OUTLINE

• Purpose of law
• Who deserves to be punished under a law?

PRINCIPLES OF CRIMINAL PUNISHMENT

• Punishment → D suffers punishment when an agent of the government, pursuant to
  authority granted to the agent by virtue of D’s criminal conviction, intentionally
  inflicts pain on D or otherwise causes D to suffer some consequence that is ordinarily
  considered to be unpleasant.

• Objectives of sentencing:
  1. Protect society
  2. Punish the defendant for committing a crime
  3. Encourage the defendant to lead a law abiding life
  4. Deter others
  5. Isolate the defendant so she can’t commit other crimes
  6. Secure restitution for the victim
  7. Seek uniformity in sentencing

A. Utilitarianism → conduct driven
• Since punishment involves pain, it can be justified only if it accomplishes enough
  good consequences to outweigh this harm

• D will avoid criminal activity if the perceived potential punishment outweighs the
  expected potential pleasure.

• TYPES
  o Act → Calculates whether a particular act, on this immediate occasion, is
    justified on utilitarian grounds.

  o Rule → Calculates whether a particular act, publicly announced as a rule of
    law applies to an entire community, would be justified.

• GOALS
  o General Deterrence → D is punished in order to convince the general
    community to forego criminal conduct in the future

  o Specific Deterrence → D’s punishment is meant to deter future
    misconduct by D. Works in 2 ways:
      ▪ Incapacitation while in prison
      ▪ Intimidation once released

  o Rehabilitation/Reform → Use the correctional system to reform D rather
    than to secure compliance through the fear of punishment
B. Retributivism

- Punishment is justified when it is deserved. It is deserved when a wrongdoer freely chooses to violate society’s rules.

- Offender should suffer in proportion to his wrongdoing

FORMS

- Positive/Assaultive Retributivism: Because the criminal has harmed society, it is right for society to hurt him back

- Negative Retributivism: Person should be punished if she is morally blameworthy but only when it will serve social purposes

- Protective Retribution: Punishment is a means of securing moral balance in the society. Society is composed of rules, compliance with these rules burden each member of society that exercises self restraint. When a person chooses to break a rule, he has the benefits of the system of rules without accepting the same burdens. Thus, a criminal owes a debt to society. Punishment permits the offender to pay his debt to society, and to return to it free of moral guilt and stigma.

- Victim Vindication: When an offender commits a crime he implicitly sends a message to the victim and society that his rights and desires are more valuable than those of the victim. Retributive punishment masters the criminal in much the way that he mastered the victim. Once the criminal receives punishment proportional to the offense, the score is made even.

C. CRITICISMS

UTILITARIANISM

- Uses person as a means to an end. Punished individual is an instrument for the improvement of society

- Can justify the punishment of innocent persons (if it would result in the reduction of crime)

- Assumes criminals engage in a cost benefit analysis before committing a crime

RETRIBUTIVISM

- Favor the infliction of pain/punishment, even if it does no good.

- Positive retributivism glorifies anger and legitimizes hatred.

- Irrational because it is founded on emotions, rather than reason.
TYPES OF PUNISHMENT
- Death
- Prison
- Monetary Sanctions
- Probation
- Community Service
- Restorative Justice
- Shaming

LEGALITY
3 MAIN PRINCIPLES
1. Retroactive law making is prohibited
   - Citizens need fair notice in order to conform their conduct to the law
     - Retributivist ➔ If act was legal at time it was committed, actor is not morally wrong and therefore, should not be punished
     - Utilitarian ➔ Person cannot be deterred unless she knows what acts are crimes
   - Constitutional Foundations:
     - Ex Post Facto Clauses [Applies to legislatures]
     - Due Process Clause [Applies to judiciary]
   - PROBLEM 1 ➔ assumes individuals always consult criminal codes before acting and thus, can legitimately claim surprise if the legislature acts retroactively to criminalize their conduct
   - PROBLEM 2 ➔ begs the question: when is the court making law vs. interpreting law?

2. Void for Vagueness ➔ Criminal Statutes should be understandable to reasonable law-abiding persons
   - A vague statute does not provide a person with fair notice
   - Vague statutes allow police and prosecutors to act in an arbitrary and discriminatory manner
     - According to the Supreme Court, statutes must establish minimal guidelines to govern law enforcement.
     - See City of Chicago v. Morales
   - Vague statutes may be overbroad to the point where they have the potential to sweep in innocent activity
   - Statutes that make the appearance of certain conduct criminal are problematic because D cannot control whether D’s conduct will appear a certain way to someone else
STEPS FOR INTERPRETING STATUTES
1. Common Law Meaning
2. Statutory History
3. Prior Judicial Interpretation
4. Purpose of Statute

PROBLEM
Criminal statutes need to be both general enough to take into account a variety of human conduct but definite enough so they cannot be applied subjectively (institutional problem) and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited (substantive problem) because our society believes that it is unfair to punish a person who did not have notice.

3. Lenity Doctrine
Judicial interpretation of ambiguous statutes should be biased in favor of the accused
- Serves as a tie breaker
- NO Rule of Lenity in MPC [See 1.02(3)]

PROPORTIONALITY
- 8TH Amendment prohibits the infliction of “cruel and unusual” punishment.
- Death Penalty
  - Grossly disproportional punishment for any offense other than murder
    - See Coker v. Georgia
- Supreme Court is deeply divided on Eighth Amendment non-death penalty proportionality analysis.
  - Some believe in using this test:
    1. Gravity of offense compared to the severity of the penalty
    2. Penalties imposed within the State for similar offenses
    3. Penalties imposed in other jurisdictions for the same offense
  - Others want to use a more narrow test:
    Court should apply the first prong of the above test and if the crime is deemed serious, any penalty short of death is proportional. The other prongs should only be considered if the court determines that the crime was petty and the punishment severe.
  - Some justices do not believe the Eighth Amendment includes a proportionality element

ACTUS REUS
- Actus Reus
  - Voluntary (willed) act that causes social harm
  - With a voluntary act, a person—not simply the organ of the person—causes the bodily action.
• Requiring an act means that there was a point where D had to make a choice and D chose to do wrong

• Voluntary act requirement falls into line better with retributivist theories because in the absence of a voluntary act, there is no basis for punishment.
  o Utilitarian principles suggest that involuntary acts should be punished because it will motivate a person to adjust her behavior to avoid punishment. Also, punishing involuntary actors renders them less dangerous to the rest of society.

• The prosecution does not have to show that every act, or even D’s last act was voluntary in order to establish criminal liability. It is sufficient that D’s conduct included a voluntary act. Whether D’s conduct included a voluntary act depends on how expansive a time frame the court allows.
  o However, the court must focus on the relevant conduct, i.e., the conduct that actually and proximately caused the social harm of the offense charged.

• **Automatism** = unconsciousness (not voluntary act)

**OMISSIONS**
• Subject to a few limited exceptions, a person has no criminal law duty to act to prevent harm to another.

• Why not?
  o Line drawing problems
  o Mens rea problems
  o Causation problems
  o Action and non-action are morally distinguishable
  o Interveners may cause more harm by giving inadequate assistance for fear of criminal liability
  o Consistent with principle of autonomy

• Exceptions:
  o Duty to Act
    ▪ Status relationship
    ▪ Contractual Obligation
    ▪ Omissions following an Act
      • Creation of a Risk
      • Voluntary Assistance
    ▪ Statutory Duty to Act

• **Conduct Crimes** ➔ Defined in terms of harmful conduct. Harmful results are NOT required.
  e.g. drunk driving

• **Result Crimes** ➔ Defined in terms of a prohibited result
• **Attendant Circumstances**→ In order for an offense to occur, certain facts or conditions must be present when the actor performs the prohibited conduct and/or causes the prohibited result that constitutes the social harm of the offense.
  
  e.g. breaking and entering of the dwelling house of another at nighttime
  
  AC= dwelling house
  
  of another
  
  at nighttime

**MENS REA**

MODEL PENAL CODE [2.02]

• Requires the requisite mens rea for each material element of an offense
  
  o **Material Element** [1.13(10)]→ includes all elements except those that relate exclusively to statutes of limitation, jurisdiction, venue, and the like. The “material elements” of offenses are thus those characteristics (conduct, circumstances, result) of the actor’s behavior that, when combined with the appropriate level of culpability, will constitute the offense.

• If no mens rea is specified, person must act at least **RECKLESSLY**

• **Purposefully**→ Conscious object to perform an action of that nature or to cause such a result
  
  o That D intended the natural and probable consequence of his act is an *inference*. A fact finder may (but need not) conclude that D intended the natural and probable consequences of his act. The inference DOES NOT impose any duty on D to produce evidence that he did not intend the natural and probable consequences of his act.

• **Knowingly**→ D is aware that his conduct is of the required nature or that the prohibited result is practically certain to follow from his conduct

• **Recklessly**→ Involves conscious risk creation. However, the awareness of risk is less than substantial certainty.
  
  o The matter is dependent on the actor’s point of view

  o If a D put his own life or the lives of his loved ones at risk with his conduct, this may indicate that D was not consciously aware of the risk of his conduct

  o Two functions jury must perform:
    1. Examine to what extent D was aware of the risk, of factors relating to its substantiality and of factors relating to its unjustifiability
2. Examine whether D’s disregard of the risk involved a gross deviation from the standards of conduct that a law abiding person would have observed in the actor’s situation.

- **Negligence**→Does not involve a state of awareness. A person acts negligently when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware which constitutes a gross deviation from the care that would be exercised by a reasonable person in his situation
  - Two functions jury must perform:
    1. Examine the risk and the factors that are relevant to it substantiality and justifiability in terms of an objective view of the situation as it actually existed
    2. Make the culpability judgment in terms of whether the failure of the D to perceive the risk justifies condemnation

MISSOURI [562.016-562.021 pg. 151-152]
- If prescribed mens rea does not specify to what it applies, it applies to each material element. If a mens rea is prescribed to a particular element, it only applies to that element
- If no mens rea is specified, person must act at least KNOWINGLY

- **General Meaning**→general notion of moral blameworthiness, culpability
- **Narrow/Elemental Meaning**→the particular mental state provided for in the definition of an offense

Statutory interpretation will generally tilt in favor of finding a mens rea requirement because mens rea element is probably required under Due Process Clause.

- 2 Inquiries:
  1. Object (what does mens rea apply to?)
    - If it’s unclear what elements the mens rea applies to, the court will seek to interpret the statute in the manner that best gives effect to legislative intent.
      - Legislative histories
      - Earlier statutes on same subject
      - Common law as it was understood at time of statute’s enactment
      - Previous interpretations of the same or similar statutes
      - Structure of statute
  2. Level (how much mens rea is required?)

- **Transferred Intent**→Attributing liability to a defendant who, intending to kill (or injure) one person, accidentally kills (or injures) another person instead.
  - Mens rea in result crimes is not directed at a specific person, mens rea is satisfied regardless of who is killed.
STRICT LIABILITY

- Do not contain a mens rea requirement regarding one or more elements of the actus reus.

- Strict liability offenses still have the voluntary act requirement incorporated by the actus reus. Therefore, a person cannot be convicted for an involuntary act.

- 5 Factors that may Overcome the Presumption against Strict Liability:
  1. Statutory crime is not derived from common law
  2. There is an evident legislative policy that would be undermined by a mens rea requirement
  3. The standard imposed by the statute is reasonable and adherence thereto properly expected of a person
  4. Penalty is small
  5. Conviction does not gravely damage reputation of violator

- Public welfare offenses are the most common type of strict liability offenses

- Statutory rape is the most common non-public welfare offense

- The Model Penal Code only allows strict liability for violations.

- Negligence and recklessness are the middle ground between strict liability and knowledge

- Arguments that strict liability is unjust
  - Utilitarian ➔ Conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future
  - Retributivist ➔ Actor is not morally blameworthy

MISTAKE OF FACT

MPC ➔ 2.04
Missouri ➔ 562.031 pg. 152

- Is a defense when it negatives the existence of a mental state essential to the crime charged

- Actor is mistaken about or unaware of a fact pertaining to an element of the offense for which he might be prosecuted.

- Mistake of fact is not really a defense. Once the defendant produces some evidence he was mistaken, the prosecutor must prove that the defendant was not mistaken, or that the defendant’s mistake did not negate the mens rea.
• For specific intent crimes (all Model Penal Code offenses), if the actor does not have 
the culpable state of mind required in the definition of the offense, he cannot be 
convicted of the offense. The actor does not have the requisite mens rea in these 
circumstances.

• Unreasonable mistake won’t usually get a defendant convicted because mens rea for 
most crimes is more than negligence. However, if negligence is mens rea then D 
would be guilty if he makes an unreasonable mistake.

• MPC EXCEPTION→defense of mistake of fact is not available if the actor would be 
guilty of another offense, had the circumstances been as he supposed. However, the 
MPC only permits punishment at the level of the lesser offense (unlike the Common 
Law where he would be convicted of the greater offense).

MISTAKE OF LAW
• Mens rea as to whether conduct constitutes a criminal offense is usually not an 
element of an offense. Therefore, there typically is no mens rea capable of being 
negated by the actor’s ignorance or mistake of law.
  o One is never excused for relying on a personal, even reasonable, 
    misreading of a statute
    See People v. Marrero

• Why?
  o Don’t want law to be subjective
  o Deters fraud
  o Encourages legal knowledge

• EXCEPTIONS (MPC):
  o Reasonable reliance doctrine
    ▪ Official interpretation of the law
      • Statute
      • Judicial decision
      • Administrative order or grant of permission
      • Prosecutor
    o Fair Notice→Statute has not been published or has not been 
      reasonably made available prior to the conduct
    o Ignorance or mistake that negates mens rea
      ▪ Generally speaking involves different law mistakes (see below)

• Lambert Principle (Fair Notice Excuse)
  Supreme Court held mistake of law was valid defense because ordinance:
  1. Punished an omission (failure to register)
  2. Duty to act was imposed on basis of status (presence in LA), rather than activity
  3. Offense was malum prohibitum
**Key is that prohibited conduct would not alert actor to the need to investigate whether there is a relevant published statute**

- **Different Law Mistake** Claimed mistake relates to a law other than the criminal offense for which the defendant has been charged.
  - Defendant is aware of and understood the meaning of the criminal statute that was the basis of his or her prosecution. However, at the same time, the defendant was unaware of, or misunderstood the import of another law under circumstances in which this mistake of law arguably is relevant to defendant’s criminal liability because it **may negate his mens rea.**
    - e.g. D knows about kidnapping statute but mistakenly believes that another statute has given him authority under the law to detain and transport his V.

    D knows about larceny statute but mistakenly believes that another statute gives him the right to the property he has taken

  - The relevant inquiry becomes: was the offense one of specific intent, general intent or strict liability?
    - Specific Intent ➔ mistake of law is a defense if the mistake negates the mens rea in the prosecuted offense
      - See Cheek
    - General Intent ➔ mistake of law is NOT a defense
    - Strict Liability ➔ mistake of law is NOT a defense, no mens rea to negate

**Larceny**

Model Penal Code [223.2]

Theft =

1. Unlawfully takes, or exercises unlawful control over
2. Movable property of another
3. With purpose to deprive him thereof

MISSOURI [570.030 pg. 214]

Stealing =

1. Appropriates
2. Property or services
3. Of another
4. With the purpose to deprive him or her thereof
5. a. Without consent OR
5. b. By means of deceit or coercion
HOMICIDE
MODEL PENAL CODE
Homicide [210.1] =
1. Purposely, knowingly, recklessly or negligently
2. Causes the death
3. Human being

Murder [210.2] =
1. Purposely or knowingly
2. Recklessly under circumstances manifesting extreme indifference to human life
3. Felony Murder (enumerated felonies that when D commits, he is presumed to be recklessness with extreme indifference, however prosecution still has burden of persuasion that D acted recklessly and with extreme indifference)

Manslaughter [210.3] =
1. Reckless
2. Purposely/Knowingly with extreme emotional disturbance for which there is a reasonable explanation/excuse.
   o Determined from the viewpoint of a reasonable person in the actor’s situation under the circumstances as he believes them to be.
   o Manslaughter provision has two components, one objective: reasonable explanation or excuse and the other subjective: extreme mental or emotional distress.
   o Almost always get to a jury under MPC manslaughter instruction (objective component is for jury to decide)
   o Provocation by the victim is NOT necessary
   o Under Common law, words alone are not adequate provocation but under the MPC, words alone are sufficient (even though provocation is not required).
   o When determining how subjective the standard should be, we get to a point where we say that while a defendant may have lived in a certain society, we don’t live in that type of society and one way we show that is by not recognizing certain excuses.
     ▪ Usually only excuses that are consistent with society’s norms will be recognized
MISSOURI
First Degree Murder [565.020 pg. 165]
1. Knowingly
2. Cause death
3. with Cool deliberation
   Deliberation→cool reflection for any length of time, no matter how brief

Second Degree Murder [565.021 pg. 165]
1. Knowingly Cause Death
2. Purpose of causing serious bodily injury cause death
3. Felony Murder (ALL felonies)

Voluntary Manslaughter [565.023 pg. 165]
1. Second Degree murder with sudden passion arising from adequate cause
   a. Adequate Cause→cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair and ordinary person’s capacity for self control [pg. 163]

Involuntary Manslaughter [565.024 pg. 166]
First Degree
1. Recklessly

Second Degree
1. Criminal Negligence

• Felony Murder Rule→D is guilty of murder if death results from conduct during the commission or attempted commission of a felony.
   Why?
   o Deterrence
   o Reaffirms the sanctity of life
   o Transferred Intent (although this is a misuse of the Transferred Intent doctrine because intent to commit one offense DOES NOT transfer to a different offense, only to a different victim).
   o Felonies that result in death should be punished more severely than those that do not

   Why Not?
   o How can one deter an unintended act?
   o Many people don’t know about the felony murder rule
   o Unfair (mens rea requirements for felony and killing are separate and distinct)
   o Unnecessary (mens rea can be proved without felony murder rule)

• LIMITATIONS:
  o Enumerated felonies
• MPC approach

  o Inherently Dangerous Felonies
    ▪ Felony is inherently dangerous in the abstract (cannot be committed without creating a substantial risk that someone will be killed)
    ▪ Felony as it was committed in a particular case was inherently dangerous

  o Merger: felony must be independent of the homicide, otherwise the felony merges with the homicide and cannot serve as the basis for a felony murder conviction
    ▪ A felony does not merge with a homicide where the act causing death was committed with a collateral and independent felonious design separate from the intent to inflict the injury that caused death.

  o Res Gestae: must be a relatively close proximity in terms of time and distance between the felony and the homicide.
    ▪ Typically includes fleeing the scene of the felony
    ▪ Must be a causal connection between the felony and the homicide.
    ▪ Often extends, not limits, felony murder rule

• The difference between depraved heart malice and felony murder is that, under the former theory, when the defendant kills a person while committing an act which, by its nature, poses a high probability that the act will result in death, the trier of fact may infer the defendant killed with malice aforethought; whereas under felony-murder theory, if the inherently dangerous act is a felony, the defendant is deemed to have killed with malice aforethought as a matter of law.

• Killing by a Non-Felon
  o Agency Approach: Felony Murder Rule only applies if a co-felon (agent) commits the homicidal act.

  o Proximate Causation Approach: Felon may be held responsible under the felony-murder rule for a killing committed by a non-felon if the felon set in motion the acts which resulted in the victim’s death.

  o Justified vs. Excusable Approach: Felony Murder rule does NOT apply when homicide is justifiable (e.g. in self defense) but DOES apply when the homicide is merely excusable (third party is killed when person acts in self defense)
o Provocative Act Doctrine: Even in a jurisdiction that uses the agency approach, a felon can be held responsible for the provocative acts of his co-felon.

  e.g. A and B try and rob X. A threatens X’s life and shoots a bullet over X’s head. X pulls out a gun, shoots at A but misses and hits V. B can be held responsible for V’s death (along with A).

However, if X shot A under the same circumstances, B would not be responsible for A’s death because A’s reckless actions resulted in his own death, not that of another person.

- Should murders that are premeditated more severely than those that are not?
  o Retributivist:
    ▪ Yes. Something more blameworthy in the case where a person makes the decision to kill ahead of time.
    ▪ No. Isn’t it better to have a person reflect on his actions rather than simply act on his emotions?

  o Deterrence
    ▪ Do impulsive people fail to deliberate or do deliberators make the wrong decision? This is an empirical question that we cannot know the answer to. Therefore, the rationale for punishing deliberators more severely is weak.

**RAPE**

SCHULHOFER

Sexual Assault [201]

1. Physical Force to Compel
   Statute does not indicate how much force is required
2. Another Person to submit to an act of
3. Sexual Penetration

Sexual Abuse [202]

1. Sexual Penetration
2. With Another Person
3. When Actor knows he does not have consent

Mens Rea: Knowingly, Recklessly, Negligently

**MISSOURI**

Rape [566.030 pg. 186]

1. Sexual Intercourse
   Any penetration, however slight, of the female sex organ by the male sex organ
2. With another person
3. By use of forcible compulsion [definition on pg. 118]
a. D drugs V  
b. Physical force that overcomes reasonable resistance  
c. Threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of such person or another person

Sexual Assault [566.040 pg. 186]  
1. Sexual Intercourse  
2. With another Person  
3. Knowing he does so without consent  

- **Traditional Law** → required lack of consent + force (threat of force)  
  - Force = likely to cause serious bodily harm or overcomes female’s physical resistance  
  - Force and non-consent are not synonymous  
  - In order to prove force, woman had to physically (not merely verbally) resist  
  - For fear of force to be legitimate, woman was required to show some conduct of the male placed her in reasonable apprehension for her safety

- Force as an element is tricky because too high a force threshold turns the victim’s resistance into an issue, turning the focus onto the victim’s actions rather than the defendant’s. Too low a threshold makes it hard to distinguish criminal force from the force required to have sex at all.

- Why resistance requirement has subsided:  
  - Many women do not react to sexual assault with active resistance, they become numb from fear and panic  
  - Resisting rape can be dangerous

- Resistance retains evidentiary significance, however. Proof of a woman’s resistance may be critical to the prosecutor in proving beyond a reasonable doubt that a rape has occurred.  
  - Since not all sex is criminal, resistance helps distinguish criminal sex-acts from non-criminal sex acts

- **Fraud in the Inducement** → victim’s consent is valid if she knows she is consenting to intercourse UNLESS there is a special rule in the statute

- **Fraud in the Factum** → victim’s consent is invalid if, as a result of fraud, she is unaware that she has consented to the act of sexual intercourse

- There is arguably a difference between a traditional rape case and a withdrawn consent case because with withdrawn consent, there is no bright line as to when the crime begins, i.e. the crime does not begin at the instant of the woman’s non-consent. The defendant must have time to stop.

INCOHATE OFFENSES
Why have them?
• There is a need to permit law enforcement intervention before the defendant’s activities come dangerously close to bringing about the criminal result; and
• There is a need to subject to corrective treatment those who have clearly indicated their criminal disposition

**ATTEMPT**

**MODEL PENAL CODE** → [5.01]

_completed Attempts:_

a. Conduct Crime [1(a)]
   i. Purposely
   ii. Engages in conduct that would constitute the crime
   iii. If the attendant circumstances were as he believes them to be
   iv. Mens Rea = (1) Purposefully with respect to his conduct
       (2) Culpability required by underlying crime

b. Result Crime [1(b)]
   i. Does or Omits to do anything
   ii. With purpose or belief
   iii. Actions will cause result
   iv. Mens Rea = (1) Belief act/omission will cause result (2)
       Culpability required by underlying crime

2. Incomplete Attempts [1(c)]
   a. Purpose or omits to do anything
   b. Under circumstances as he believes them to be
   c. Constitutes a substantial step
      i. Substantial step = strongly corroborative of criminal purpose
      ii. Strongly corroborative = actor’s conduct considered in light of all the circumstances, must add significantly to other proof of her criminal intent, such as a confession or other incriminating evidence.
      iii. Mens Rea = (1) Purposefully takes substantial step (2) Culpability required by underlying crime

MPC—Two levels of inquiry:
(1) all actors must at least have the culpability otherwise required for the underlying crime (e.g., if the underlying offense is negligent driving, did the actor’s mental state satisfy the test for negligence?)—start there, and if you can't get past this, you're probably done;
(2) if the answer to (1) is yes, then we still need some more mens rea for attempt and we get to the requirement of purpose (this is why it is said that "attempt is a specific intent crime"); the way we think about the purpose requirement under the MPC depends on the scenario we're dealing with (remember the MPC breaks out attempt into 3 categories); if it's a "completed attempt" not involving a result crime (5.01(1)(a)), the actor must be purposeful with regard to the conduct part of the offense (e.g., can't attempt to
drive negligently because can't have as one's "conscious object" to be behave negligently); if it's a "completed attempt" involving a result crime (5.01(1)(b)), the actor must be purposeful (or have belief) with regard to the result (this is where, for example, a theory of attempt to commit depraved indifference murder would fail); if it's an "incomplete attempt" (5.01(1)(c)), the actor must be purposeful with regard to the act that qualifies as a "substantial step"—but the substantial step must also be part of a course of conduct "planned to culminate in commission of the crime" (meaning essentially that the actor must have the purpose to commit the crime).

MISSOURI→ [564.011] pg. 160

1. Purpose of committing offense
2. Substantial Step toward commission of offense
   a. Substantial step = strongly corroborative of firmness of actor’s purpose

**No mens rea requirement as to underlying offense**

Missouri:
Simpler rule. No inquiry as to whether the actor has the culpability required for the underlying crime. We just ask if the actor had the purpose to commit the underlying crime, that is, was it the actor's "conscious object" to engage in the conduct that constitutes the underlying offense? This is like the purpose requirement for conspiracy—the actor always must have the "conscious object" of accomplishing the underlying offense. This sounds like it might be more defendant-friendly than the MPC, but I don't think the difference is all that great since the MPC requires a significant form of purpose under almost any attempt scenario that is going to more or less operate the same way as the Missouri formulation. The one exception might be where MPC says "belief" is enough as to result in result crimes; the Missouri statute would seem to reject that approach and require purpose as to result for attempted result crimes.

- **Attempt is a specific intent crime**

- MPC Subsection 1(b) expressly and subsection 1(c) implicitly provide that a person is guilty of an attempt to cause a criminal result if she believes that the result will occur, even if it were not her conscious object to cause it.
  e.g. If D plants a bomb on a plane in order to kill V and the bomb fails to go off, D is guilty of attempted murder of V because it was D’s conscious object to take V’s life; but D would also be guilty of attempted murder of the other passengers in the airplane if she believed that they would die in the bombing.

- If any of the enumerated instances in subsection 2 are established, the jury as fact finder is entitled to evaluate whether the defendant has taken a substantial step.

- MPC’s focus is on what actor has already done, not what remains to be done.

- Under Section 5.01(3), a person may be convicted of a criminal attempt, although a crime was neither committed nor attempted by another, if: (1) the purpose of her
conduct is to aid another in the commission of the offense; and (2) such assistance would have made her an accomplice in the commission of the crime under MPC’s complicity statute if the offense had been committed or attempted. [applies to accomplice liability as well]

**Complete**—Actor performs all of the acts that she set out to do, but fails to attain her criminal goal.

**Incomplete**—Actor does some of the acts necessary to achieve the criminal goal, but she quits or is prevented from continuing.

- Specific intent crime
  - One can be convicted of attempted voluntary manslaughter but not attempted involuntary manslaughter.

- Under the MPC, if the offense is one of strict liability with respect to any one of the attending circumstances, the same strict liability applies to the attempt.
  - If D manifests a purpose to engage in the type of conduct or to cause the type of result that is forbidden by the criminal law, he has sufficiently exhibited his dangerousness to justify the imposition of criminal sanctions, so long as he otherwise acts with the kind of culpability that is sufficient for the completed offense.
    - *e.g.* D could be convicted of attempted statutory rape if he attempted to have sex with a girl who is underage, even if D thought she was of age.

**Subjectivism**—Attempt law should focus on actor’s intent. Any act that verifies the actor’s commitment to carry out a criminal plan, or which corroborates her confession or other incriminating evidence, is sufficient to justify punishment for an inchoate offense.

**Objectivism**—Conduct should not be punished unless its criminality is objectively discernable at the time it occurs.

**IMPOSSIBILITY**

- MPC does not recognize hybrid or factual impossibility as an excuse
  - 1(a)→D is guilty if she purposely engaged in conduct that would constitute a crime if the attendant circumstances were as she believes them to be.
  - 1(b)→D is guilty if she performs an act with the purpose of causing or with the belief that it would cause such result without further conduct on D’s part.
  - 1(c)→D is guilty if she performed acts that under the circumstances as she believed them to be constituted a substantial step in course of conduct planned to culminate in commission of the crime.

- MPC recognizes defense of **Pure Legal Impossibility** (application of principle of legality)
Person cannot be punished for performing a legal act with a guilty conscience, i.e. she believes she is committing a crime but is not.

Person cannot be guilty of attempt, if unknown to her, the legislature has repealed a statute that D believes that she is violating.

Actor’s mistaken belief that she is committing crime X does not make her guilty of attempt to commit crime X.

Attempt Theories
- Physical proximity
- Dangerous proximity
- Probable desistence
- Abnormal step (anti-social behavior)
- Indispensable aspect that remains to be done?
- Unequivocality (res ipsa loquitur)
- Substantial Step, strongly corroborative (MPC, MO)

Impossibility (Not an excuse to an attempt):

**Factual Impossibility** Exists when what D intends to accomplish is proscribed by criminal law, but he is unable to bring about that result because of some circumstances unknown to him when he engaged in the attempt. Never recognized as a defense to attempt because D has culpable mental state.

**Pure Legal Impossibility** Exists if the criminal law does not prohibit D’s conduct or the result that she sought to achieve. In other words, the concept of pure legal impossibility applies when an actor engages in conduct that he believes is criminal, but is not actually prohibited by law.

- e.g. smuggling diamonds into the U.S. [not a crime]

**Hybrid Legal Impossibility** Exists if the actor’s goal is illegal, but commission of the offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the charged offense.

- e.g. D shoots at a corpse
  - Factual → D believes corpse is alive
  - Legal → Not illegal to shoot a corpse

CONSPIRACY
MODEL PENAL CODE [Section 5.03 pg. 1019]
1. Purpose to promote or facilitate a crime
2. Agrees
3. Overt Act (not for first and second degree felonies)

- Under MPC, Person is guilty of conspiracy if she agrees to:
  - Commit an offense
  - Attempt to commit an offense
- Solicit another to commit an offense
  - e.g. D1 agrees with D2 that D2 will solicit X to steal V’s painting
- Aid another person in the planning or commission of the offense
  - e.g. D1 agrees to provide D2 with a gun to be used to kill V

- MPC → A person with multiple criminal objectives is guilty of one conspiracy if the multiple objectives are: (1) part of the same agreement; or (2) part of a continuous conspiratorial relationship

- MPC → If everything in the conspiracy has been achieved, it merges with the substantive crime. If there is anything in the conspiracy that has not been achieved, the conspiracy DOES NOT merge with ANY of the completed substantive crimes.

MISSOURI [564.016 pg. 160]
1. Purpose to promote or facilitate a crime
2. Agrees
3. Overt Act

- MISSOURI → Overt Act is required for ALL conspiracies
- MISSOURI → A person with multiple criminal objectives is guilty of one conspiracy if the multiple objectives are part of the same agreement
- Under both MPC and MISSOURI, person cannot be convicted and punished for both conspiracy and commission/attempted commission of the offense, unless the prosecution proves that the conspiratorial agreement involved the commission of additional offenses not yet committed or attempted.
- All conspiracies to commit murder are necessarily first degree murders because if there is time to form an agreement, there is premeditation.
- Pinkerton Rule → So long as the partnership continues, the partners act for each other in carrying it forward. An overt act of one partner may be the act of all without any new agreement specifically directed to that act so long as the act was foreseeable.
  - Neither MPC nor MISSOURI has Pinkerton liability. However, they have other rules of accomplice liability.
- Conspiracy has two different functions:
  1. It is a means for preventative intervention against persons who manifest a disposition to criminality
  2. It is a means of striking against the special danger incident to group activity

Why Conspiracy Liability is Helpful
- Doctrine of Joinder (everyone involved in a crime can be tried together)
• Venue (Trial can be brought in jurisdiction where the agreement was formulated or any jurisdiction in which any member performed an act in its furtherance)

• Exception to Hearsay Rule

• Early Intervention

• Allows law to get “hard targets”

Consistency and Attempt
First, in this merger scenario, technically it's not a question of whether the D can be CHARGED with both, but whether D can be convicted of both. The prosecutor is allowed to charge both offenses (so the jury has alternative theories on which to convict), but if the D is found guilty of both offenses, they merge for purposes of sentencing. Second, as to the question of whether conspiracy and attempt merge at sentencing, I would certainly argue merger if I were the defense. The MPC rule says there's merger if "one offense consists only of a conspiracy ... to commit the other." On one hand, there's no such thing as a "conspiracy to attempt" (people don't make agreements to fail). On the other hand, EVERY agreement to commit a crime has subsumed within it an agreement to attempt (or, if you prefer, try) to commit the crime; therefore, the conspiracy IS a conspiracy to commit the attempt and, you would say, they should merge.

HYPO [pg. 486 Treatise]
Importer meets with Middleman and agrees that Importer will smuggle drugs into the country in violation of Statute X. They further agree that Middleman will find retailers to sell the drugs in their states, which would violate Statute Y. Middleman meets with NY retailer one day and TX retailer the next. Middleman agrees with both retailers that they will sell drugs in their respective states in violation of Statute Y. Neither retailer knows that Middleman is dealing with another retailer, nor do they know the details of the Importer-Middleman dealings.

Conspiracies:
Importer ➔ Middleman to violate Statute X
Importer ➔ Middleman ➔ NY ➔ TX to violate Statute Y

Middleman ➔ Importer to violate Statute X
Middleman ➔ Importer ➔ NY ➔ TX to violate Statute Y

NY ➔ Middleman to violate Y

TX ➔ Middleman to violate Y

ACCOMPlice LIABILITY
MODEL PENAL CODE [2.06 pg. 997]
1. With purpose of promoting or facilitating the commission of an offense
   a. Solicits such other person to commit it
b. Aids or agrees or attempts to aid in the planning or commission
c. Has a legal duty to prevent the commission of the offense but fails to do so

2. For Result Crimes, Person is accomplice when (1) he was an accomplice in the conduct that caused the result [using 2.06(3)]; and (2) he acted with the culpability, if any, regarding the result that is sufficient for commission of the offense
   a. Basically, the phrase intent to promote or facilitate the commission of the offense is that it requires proof of the accomplice’s intent to promote or facilitate another person’s conduct that constitutes the actus reus of the offense. With regard to the results of that conduct, the government must prove that the accomplice had whatever culpable mental state is required for the underlying crime

REMEMBER:
Under Section 5.01(3), a person may be convicted of a criminal attempt, although a crime was neither committed nor attempted by another, if: (1) the purpose of her conduct is to aid another in the commission of the offense; and (2) such assistance would have made her an accomplice in the commission of the crime under MPC’s complicity statute if the offense had been committed or attempted.

- No natural and probable consequences doctrine. D is only liable for offenses he purposely aided in the commission of.

Person is not an accomplice when:
- He is the victim of the offense
- His conduct is inevitably incident to the commission of the offense
- Terminates his participation and (1) neutralizes his assistance (2) gives timely warning to the police of the impending offense; or (3) in some other manner attempts to prevent the commission of the crime.

MISSOURI [562.041 pg. 152]
1. With Purpose of promoting the commission of an offense
2. Aids or agrees or attempts to aid in the planning or commission

- Unclear whether person could be prosecuted for result crime requiring reckless or negligent mens rea

- Presence can be enough if it’s helping in some way
  o Could be that presence is fortifying the other person’s resolve to commit the crime

- If a crime has already occurred, a person cannot be an accomplice to the completed crime
  e.g. If reporter listens to and publishes classified information, she is not aiding and abetting because the crime (the leak) already occurred
DEFENSES

Burdens of Proof
MPC [1.12]
• MPC allocates to the prosecution the duty to disprove defenses, assuming that the defendant has satisfied her burden of production.
  o However, this rule does not apply to defenses that the Code expressly requires the defendant to prove by a preponderance of the evidence.

MISSOURI [556.056 pg. 118]
• With some defenses, defendant has burden of injecting the issue (burden of production)
• With affirmative defenses, the defendant has the burden of persuasion that the defense is more probably true than not

Justification ➔ Conduct that under ordinary circumstances is criminal but which under the special circumstances encompassed by the justification defense is not wrongful and even, perhaps, affirmatively desirable.
  o Act focused

Justification Theories:
• Public Benefit ➔ Conduct is justified when performed in the public’s interest
• Moral Forfeiture ➔ People possess certain moral rights that society recognizes through its criminal laws, but which may be forfeited by the holder of the right if the holder voluntarily decides to violate the rights of another.
• Moral Rights ➔ Actor has a right to protect her threatened moral interest
• Superior Interest ➔ Authorizes conduct when the interests of the defendant outweigh those of the person she harms.

Excuse ➔ Although the actor has harmed society, she should not be blamed or punished for causing that harm
  o Actor focused

Excuse Theories:
• Deterrence ➔ Excuses identify the circumstances in which conduct is undeterrable. In such situations, punishment of the actor is wrong because it is inefficacious
• Causation ➔ Actor should not be blamed because her conduct was caused by forces outside her control
• Character ➔ Punishment should be proportional to a wrongdoer’s moral desert, and that desert should be measured by the actor’s character. Excuses should be
recognized in those circumstances in which bad character cannot be inferred from the offender’s wrongful conduct.

- Free Choice ➔ A person may be properly blamed for her conduct, if and only if, she had the capacity to freely choose whether to violate the moral/legal norms of society.

**Justification vs. Excuse: Why Does it Matter?**

- Accomplice Liability
  - Accomplices can be acquitted of aiding a justified act but not an excusable act
- Third Party Conduct
  - If D is justified in performing act A to protect her own rights, a third person, X is also justified in doing A to protect D. However, an excuse may only be invoked by the person who suffers from the excusing condition.
  - If an act is justified, a third person is NOT justified in trying to stop it, whereas if an act is merely excusable, a third person is justified in trying to stop it
- Self Defense
  - A person can use self defense against an excusable act but NOT a justifiable act

**Self Defense**

MPC [3.04]
The use of force upon or toward another person is justifiable when:
1. the actor
2. believes such force
3. is immediately
4. necessary
5. to protect himself against the use of force by the other person on the present occasion

- MPC does not require that D’s belief be reasonable
- MPC prohibits the use of deadly force by a person who instigates a deadly conflict. Therefore, a person who instigates a nonlethal conflict does not lose his privilege of self defense if V escalates it into a lethal assault.
- Person is required to retreat if possible EXCEPT: (1) from one’s home or (2) from one’s place of work.
  - However, a person is REQUIRED to retreat from his home or office if: (1) she is the initial aggressor and wishes to regain her right of self protection; or (2) even if she was not the aggressor, if she is attacked by a co-worker in their place of work.
Section 3.09(2)

- When a defendant is reckless or negligent in regard to the facts relating to the justifiability of his conduct, the justification defense is unavailable to him in a prosecution for an offense for which recklessness or negligence suffices to establish culpability.
  
  e.g. if D purposefully kills V because D negligently believes that V is about to kill him, the defense of self protection is available to D if he is charged with purposefully, knowingly, or recklessly killing V, but the defense is not available to him if he is prosecuted for negligent homicide.

- There is arguably a gap in the MPC because a person could be unreasonable but not negligent, so D would still get self defense instruction.

MISSOURI [563.026 pg. 156]
A person may use physical force upon another person when and to the extent he

1. reasonably believes
2. such force to be necessary
3. to defend himself or a third person from imminent force by such other person

- Expert testimony on Battered Women’s Syndrome is helpful in that it explains to jurors why the defendant subjectively believed that the decedent was about to kill her (when he may have been asleep or otherwise passive); and to demonstrate that this belief was objectively reasonable to a person suffering from the syndrome.

Necessity

MPC [3.02]

1. Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another
2. the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law
3. no legislative intent to exclude the conduct in such circumstances plainly exists

- When actor was reckless or negligent in bringing about the situation requiring a choice of harms, this defense is unavailable for any offense for which recklessness or negligence suffices to establish culpability.

MISSOURI [563.026 pg. 156]
Conduct which would otherwise constitute a crime other than murder is justifiable when it is necessary to:

1. avoid imminent injury
2. developed through no fault of the actor

- Determining what constitutes the lesser harm is done by the judge/jury not the defendant because the analysis includes a social decision about which harm is worse [for both MPC and Missouri]
**Duress**

MPC [2.09]

Affirmative defense to unlawful conduct if:
1. D was compelled to commit the offense by the use or threatened use, of unlawful force by the coercer upon her or another person; and
2. a person of reasonable firmness in her situation would have been unable to resist the coercion

- The defense is unavailable if the actor recklessly placed herself in a situation in which it was probable that she would be subjected to coercion. If D negligently placed herself in such a situation, however, the defense is available to her for all offenses except those for which negligence suffices to establish culpability.

- If one reasonably but mistakenly believed he had been threatened, he would be liable for no offense if a person of reasonable firmness would not have been able to resist such a threat.

- If one’s mistaken belief was negligently or recklessly formed, he could be liable only for a crime of negligence or recklessness, respectfully.

MISSOURI [562.071 pg. 154]

Affirmative defense to unlawful conduct if:
1. D was coerced to do so by the use of or threatened imminent use of unlawful physical force upon him or a third person
2. Which force or threatened force a person of reasonable firmness in his situation would have been unable to resist

Defense is unavailable:
- For murder
- If D recklessly places himself in a situation in which it is probable that he will be subjected to force

**Utilitarian Arguments:**
- Coerced person cannot be deterred
- Coercing person requires incapacitation and rehabilitation, not coerced person

**Retributive Arguments:**
- Coerced person does not possess a fair opportunity to exercise her will to act lawfully

**Duress vs. Necessity**
- Duress always involves human agency (a person can only be coerced by a human), whereas necessity does not require it
  - With duress, there is a culpable human being who may properly be held responsible for the social harm caused
• Special worry with duress that does not exist with necessity. It is easier to say someone threatened you than to construct a necessity scenario that doesn’t involve human agency