**Criminal Law**

I. Establishing Guilt
   A. Criminal Justice System
      1. Police
      2. Prosecutor
         o Discretion to decide what charges to bring (offense to charge on with) and what disposition to recommend
         o Right to plea bargain
      3. Courts
         o Lower courts
            ▪ Dispense with misdemeanors or petty offenses
            ▪ First stage of felony cases
            ▪ Process the majority of offenders
            ▪ jury is a check on the judicial system and police and prosecutors
            ▪ Most criminal cases tried by jury
            ▪ Jury chosen by process of “voir dire” – juror can be excused for cause, or by exercise of peremptory challenges
            ▪ Generally unanimous verdicts are required
            ▪ If jury can’t decide – hung jury – prosecutor can decide whether to re-try the defendant
      o Until the 1970s, punishment was entrusted almost entirely to the discretion of the trial judge (and judgments varied widely based on the judge)
         ▪ Now there are moves to limit
            • Mandating specific punishments
            • Providing appellate review of trial court sentencing
            • Legislature providing a minimum sentence
   4. Corrections
      o Major purpose is rehabilitation of criminals
      o Major task is custody of criminals
   B. Purposes of criminal sanctions
   C. Steps of a Criminal Case
      1. Investigation
      2. Diversion of cases before charge - 50% are released early in the process
      3. Pretrial release - Possibly pending trial…depends on magistrate
      4. Guilty pleas - 90% of criminals aren’t tried
      5. Trial (Most civil cases are tried without a jury)
      6. Sentencing
   D. Process of Proof
      1. Overview:
         ▪ Eyewitness testimony isn’t very credible
         ▪ gender, race, and socio-economic makes some witness less credible
         ▪ one can’t just read police report because it’s hearsay
         ▪ 5th and 6th….right to not incriminate oneself….thus use witnesses
         ▪ Plea negotiation can lead to better results. A jury isn’t left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any immediate judgment
      2. Trial Procedure:
         o Selection of jury
         o Presentation of case
E. **Proof Beyond a Reasonable Doubt – standard of proof in criminal cases**

1. Beyond a Reasonable Doubt: standard of proof applies to every element necessary to constitute the crime charged. Guaranteed by Due Process Clause 5th and 14th amendment. Elements are:
   a. Conduct
   b. Attendant Circumstances and/or
   c. Result of conduct

2. burden of persuasion/proof…
   a. allocating the burden of convincing the trier of fact
   b. prove to a jury beyond a reasonable doubt – moral certainty
   c. presumption of innocence

3. Burden of Production
   a. = to come forward with enough evidence to put a certain fact at issue
   b. if def. bears, usually an affirmative defense
   c. MPC – def. must meet burden of production for affirmative defenses, then the prosecution must meet the burden of persuasion to disprove the affirmative defense

4. Allocating Burden of Proof and Production
   a. *Patterson v. New York* – Δ saw his wife in a state of undress with a neighbor, so he shot the neighbor in the head
   
     o **Patterson Holding**: Not unconstitutional for the burden of proving an affirmative defense to be placed on Δ - does not violate due process to have him prove extreme emotional disturbance defense.
       ▪ This would change it from murder to manslaughter
   
     o Elements state must prove for 2nd degree murder
       ▪ Intent to cause the death of another (*mens rea*...guilty mind)
       ▪ Causing the death of the person or a third person (*actus rea*...guilty act)
   
     o **RULE**: State may require Δ to bear burden of proving an affirmative defense to jury, rather than requiring prosecution to disprove the defense

b. **MPC § 1.12(1)** presumption of innocence unless proof beyond a reasonable doubt; (2) state does not have to disprove an affirmative defense unless Δ has proved it by a preponderance of the evidence; state must disprove it beyond reasonable doubt.

II. **Justification of Punishment**

A. **MPC §1.02**: Principles of Construction

1. Purpose of Defining Offenses:
   - Forbid conduct that threatens individual or public interests
   - Safeguard conduct that’s w/p fault from condemnation as criminal
   - Give fair warning
   - Differentiate between serious and minor offenses (**proportionality**)

2. Purpose of provisions governing sentencing and treatment of offenders:
   - Deterrence
   - Incapacitation
   - Rehabilitation / correction
   - Give fair warning of nature of sentences for conviction
• Harmonize powers and duties of courts and agencies responsible for dealing w/offenders
• Advance generally accepted scientific methods/knowledge

B. Principle forms of punishment:
• Fines, probation, imprisonment, death
• Intermediate sanctions: home detention, community service, counseling

C. Justifications of Punishment
1. Retribution (backward looking)
   a. punishment deserved on basis of public morals / redress
2. Utilitarian (forward looking)
   a. prevention, rehabilitation and incapacitation – using punishment to serve a social purpose
   b. cost-benefit analysis: (Ex. one life to save three - for capital punishment)
   c. general deterrence – person’s punishment used to deter general community
   d. specific deterrence – person’s punishment used to deter that person in future
3. Rehabilitation
4. Regina v. Dudley and Stephens: Ex: punishment for crime greatly reduced b/c of circumstances surrounding crime – but still administered b/c crime was wrong.
   Rule: Purpose of law is normative – to instill morality upon society. Take care of weak, in face of nature where strongest win.
   Rule: necessity not excuse for committing crime. No standard for judging necessity.
5. United States v. Bergman (1976) (punishment for retribution and deterrence purposes…not correction/rehabilitation)
   Rule: The court held that imprisonment was appropriate in order to convey the seriousness of the crime, and to deter others from similar acts in the future
   (Jewish benefactor – nursing home fraud)
6. State v. Chaney (1970) Alaska (Ex. of judge modifying sentence very low…ex. where stricter sentencing guidelines would be good?)
   Sentence doesn’t communicate community condemnation
   Didn’t serve to reform either
   Appellate court won’t change sentence b/c of double jeopardy; and not having facts of case in front of them
   Rule: legislatures and judges might increase sentences for career criminals w/ no hope of reform; reflect societal attitudes; cheaper in terms of court room costs.
   o Specific deterrence failed, but court is permitted to consider general deterrence and incapacitation (protect society from him)
8. United States v. Johnson (1992) ex of court lowering sentence far below guidelines b/c actual sentence would do more harm to society
   • the court held that the sentencing guidelines permit the lessening of a sentence under extraordinary familial obligations, not to lessen the punishment on the individual, but to save the dependents.

III. Defining Criminal Conduct – (&) Elements of Just Punishment
A. 3 Principles limit distribution of punishment:
1. Culpability
2. Proportionality
3. Legality
4. (All correspond w/ purposes of MPC §1.02
B. Culpability

1. Actus Reus (culpable Conduct)

*Martin v. State* (1944) Alabama Ct. of Appeals *(reqmt of overt and voluntary conduct)*

Police took drunk out to highway, then convicted him of public drunkenness.

**Rule:** the court held that convicting a person of an offense when it was involuntarily carried out was contrary to principle of law.

- Model Penal Code Section 2.01(1): A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable

- *People v Newton* (1970) CA District Ct. of Appeal: ∆ was in altercation w/ police officers – shot in abdomen. Apparently shot back after he himself was hit, but claimed he was in shock and didn’t remember perpetrating act

  **Rule:** the court held that “unconsciousness” can apply to a the state of a person when they act physically, but are not, at the time of action, conscious of acting. *If evidence exists to this effect, jury should be instructed about it.*

2. Lord Denning on Culpability:

   “involuntary”: act which is done by the muscles w/o any control by the mind; or an act done by a person who is not conscious of what he is doing

   **Involuntary is not:** (acc. To Lord Denning) – act is not involuntary simply b/c the doer does not remember it; nor is an act regarded as involuntary b/c the doer could not control his impulse. (I just couldn’t help it).

3. Problems encountered:

   a. habit
   b. possession (drugs tucked into an unsuspecting lady’s purse) court’s generally require possession w/ knowledge
   c. hypnosis: MPC says acts of hypnotized subject are not voluntary
   d. Somnambulism: Cogdon bludgeoned daughter to death in sleep – acquitted b/c she did not consciously do the act ∆

4. Legal Insanity:

   - prosecution bears burden of proof that act was voluntary – it’s a necessary element of a crime
   - burden of proving legal insanity often put on defendant
   - difference between insanity and unconsciousness – insane people can be committed. Unconscious people just acquitted (or in an appeal – get a new trial).

5. When people held accountable for involuntary acts:

   *People v. Decina* - epileptic had seizure while driving, and was held responsible for accident causing bystander deaths. Awareness of a condition which he knew may produce such consequences, and disregard of the consequences, rendered him liable for culpable negligence

B. Culpable Thoughts: why not punish for intent to commit crime, if not carried out?

- difficult to distinguish between wishing and intending
- criminal could change his mind and not intend later on?
- undue stress/ guilt

C. Omissions

1. Criminal law reluctant to impose liability for omissions, even immoral ones

*Pope v. State* (1979) Maryland Court of Appeals
Δ did nothing while crazy mother ripped and savagely beat her infant child. Charged and found guilty of felony child abuse and misprision of felony

RULE: the court held that under the current Maryland law (which only referred to parent, g-parent, etc), a bystander would not be guilty of child abuse for failing to help the victim, or stopping the abuse.

RULE: Argument is that while she may have had a moral duty, she had no legal duty.

- Biggest obstruction to Good Samaritan legislation is fear that it will substantially diminish freedom

- People v. Heitzman, 1994, CA acquitted daughter who did not reside with father, of abuse/neglect causing death. “to save constitutionality of statute it should be interpreted as imposing liability only on those who, under existing tort principles, have a duty to control the conduct of the individual who is directly responsible for the abuse”

- Jones v. United States (1962) US Court of Appeals
  10 mo old infant was staying with defendant. His mother stayed with them for some of the time, but it was not known how long. Suggestion that she was paying Δ for care of baby, but disputed. Δ had ample means to provide food and medical care – but baby died of neglect.
  RULE: duty to care for the child had to be proven beyond a reasonable doubt before appellant could be found guilty of involuntary manslaughter through failure to provide for child.
  RULE: 4 situations in which failure to act may constitute breach of legal duty:
    1. where statute imposes a duty to care for another
    2. Where one stands in a certain status relationship to another
    3. where one has assumed a contractual duty to care for another
    4. where one has voluntarily assumed the care of another and prevented others from rendering aid

2. Omission Culpability Requires DUTY
- criminal liability in America, for omission, arises only when the law of torts or some other law concerning civil liability imposes a duty to act
- could be murder if omission was done with intent to kill (Commonwealth v. Pestinikas – man let 92 year old starve to death)
  - Relationship creates duty: Commonwealth v. Cardwell: woman held to be guilty for not preventing husband’s abuse of daughter, even though she feared her safety with him.
- Not marriage – no legal duty: People v. Beardsley – man let woman who wasn’t his wife, who OD’d on morphine, die (Beardsley has largely been reversed – b/c courts have now started to look at affair type relationships or cohabitational relationships as “status relationship” under which impose duty)
  - Voluntary assumption of duty: Regina v. Stone and Dobinson: people who assumed care of Fanny by trying to find doctor, and helping her at first, had duty to continue to care for her.
  - Prevented others for caring from someone – duty: People v. Oliver: woman took man to her house from bar, left him there. He OD’d and died – she was found guilty of involuntary manslaughter b/c she had removed him from the possibility of public aid.

Comment [L.R.2]: Misprision charge dismissed. Came from old common law – not defined by statute; not prosecuted anymore. Criminal law mostly codified. If legislature was to codify this responsibility – court concern over whether it’d preserve due process rights

Comment [L.R.3]: Other situations not mentioned in case: when you create the peril; where you have a duty to control the conduct of others; duty based on being a landowner…
• **Duty of one who creates another’s peril**: one who culpably places another in peril has duty to assist the imperiled person. Prof. Smith: “whenever A’s act, though w/o his knowledge, imperils the person, liberty or property of another…A becomes aware of the events creating the peril, he has duty to take reasonable steps to prevent the peril from resulting in the harm in question.”
  - **Kuntz v. Montana**: she killed abusive boyfriend, even though in self-defense – she was found guilty under omission theory…she was liable for failing to summon help to him. You can’t have an omission without a duty. The argument is that they had a status relationship.

3. Removing Life Support: omission or murder?

  **Barber v. Superior Court (1983) CA Dist. Court of Appeals**

  **Story**: Deceased underwent surgery, and suffered a heart attack. Placed on life support. Family wrote written request to have hospital remove life support. He eventually died – hospital cared for him until death to preserve dignity

  **RULE**: the court held that the doctors’ omission to continue treatment, though intentional and w/ knowledge that patient would die, was not unlawful failure to perform duty (doctors have no duty to continue a treatment that will not revive a person – assuming authorization from relative or living will is present

  **Rationale**: cessation of life support measures is not affirmative act, but withdrawal or omission of further treatment…not criminal liability for failure to act unless there is a duty (no duty – see above)

  - Difference between euthanasia and omission of treatment:
    - one of the differences in the eyes of the law is “who’s causing the death” law says if the patient’s will says “no treatment” the patient has caused the death.
    - In euthanasia – even if patient wants to die, no one can do it for them.

  - If doctor gives injection – affirmative act.

4. MPC § 2.01: liability can’t be based on omission unless (1) omission is made sufficient by law defining offense & (2)duty to perform omitted act imposed by law

B. Mens Rea – Culpable Mental States

  - **Definition- mens rea**: mental state required by the definition of the offense to accompany the act that produces or threatens the harm. (vicious will behind a criminal act)- requires subjective assessment

  - **Defenses**: resting on the absence of mens rea: (IDLAM)
    - involuntary act
    - duress
    - legal insanity
    - accident
    - mistake

  **Regina v. Cunningham**: p204

  **Facts**: guy stole gas meter, and allowed gas to seep into neighbor’s house

  **Rule**: Court found jury instruction that equivocated maliciousness and wickness to be incorrect. Jury to be told that Malice to be seen as measure of intent, not measure of character.
even if the appellant did not intend the injury to Mrs. Wade, he foresaw that the removal of the gas meter might cause injury, but nevertheless removed it…

1. **Model Penal Code §2.02: General Rqmts of Culpability**

   unless some element of mental culpability is proved w/ respect to EACH material element of the offense, no conviction

4 Levels of Culpability

   **Purpose** (similar to knowingly… conscious object to perform that act – think Specific Intent – hopes for circumstance)

   **Knowledge** (aware that conduct is of rqd nature or that prohibited result is almost certain to follow)

   **Recklessness** (consciously disregards a substantial and unjustifiable risk)

   **Negligence** (Criminal standard requires a “gross deviation” from reasonable person standard)

        (One must be proved for EACH material element of offense)

Material Elements of Offense:

   Nature of the forbidden conduct
   Attendant circumstances
   Result of the conduct

Note from MPC 2.02:

   Rqmt of purpose is satisfied if purpose is conditional
   Rqmt of knowledge is satisfied by knowledge of high probability
   Rqmt of willfulness satisfied by acting knowingly

(see problems on p 212)

2. Two kinds of culpable UNINTENTIONAL actions under Model Penal Code:

   1. **Recklessness**: more culpable, b/c actor was aware of danger, but acted anyway…chose to run the risk. Model Penal code: “consciously disregard a substantial and unjustifiable risk”

   2. **Negligence**: actor acts inadvertently; should have been aware of the danger, but was not.

3. **Specific Intent & General Intent**:

   Difference between motive and intent:

   for legal purposes, motive is irrelevant. Why? Motive is what’s behind their intent to do something. Only considered in sentencing. It’s irrelevant w/respect to establishing a prima facie case

   exception: hate crime → motive is important, element of defense. Assisted suicide

   1. **Specific Intent**:

      (a) actions done w/ some specified further purpose in mind. Ex. burglary is specific intent crime, b/c it requires proof of that further specific purpose to commit a felony inside the building. Assault w/ intent to kill – must prove the further purpose of killing.

      (b) crime that requires the defendant to have actual knowledge of some particular fact or circumstance (bigamy…if Δ has to know other spouse is still alive, it’s specific intent)

   2. **General Intent**: in above examples, burglar could be convicted of general intent crime of trespass as long as he acted intentionally; and other guy could be convicted of assault.

   *Halloway v. United States (1999) Supreme Ct of the U.S. p218*

   **Facts**: question centered around carjacker’s intent to kill
Issue: whether the phrase “intent to cause death or serious bodily harm” in the definition of the crime of carjacking, requires the prosecution to prove that the ∆ had an unconditional intent to kill

Holding: the definition of carjacking interpreted to mean that congress intended to criminalize the more typical event of carjacking carried out by means of a deliberate threat of violence, rather than a case where ∆ has an unconditional intent to use violence, regardless of how driver responds to his threat

MPC Rule: if the intent is conditional, it’s still an intent to kill under certain situations. MPC 2.02(6) provides that person is still liable even if the purpose is conditional – unless the condition negates the evil

United States v. Jewell (1976) U.S. Court of Appeals, 9th Circuit
Facts: appellant entered into U.S. from Mexico with 110 lbs of marijuana concealed between the trunk and rear seat, and was caught and convicted of transporting marijuana to the U.S.
Holding: prosecution may prove that ∆’s deliberate ignorance (or lack of Positive Knowledge) is a result of his conscious purpose to avoid learning the truth, in proving necessary knowledge or awareness for drug conviction
MPC 2.07: knowledge is est. if person is aware of high probability of existence. It’s not a presumption flat out. Gov’t has to prove or present some evidence which would lead to that presumption
Dissent: it’s not a presumption that the model penal code is presenting, but a definition. Jury needed to know that ∆ had to be aware of high probability, and couldn’t be convicted otherwise

HYPO: if person in airport gives you package, is your decision not to unwrap it deliberate ignorance, which would equate to positive knowledge? No. they would not be aware of the high probability. They’d be truly ignorant.

A. Willful Blindness: some courts hold that wilfull blindness instruction should not be given to jury unless evidence est. that ∆ was aware of high probability of illegal conduct, and ∆ purposefully tried to avoid learning of it

B. Mistake of Fact:
   • MPC - ignorance or mistake is a defense when it negatives the existence of a state of mind that is essential to the commission of an offense or if it establishes a defense under a rule of law
   • PA- mistake negatives, ‘intent, knowledge, belief, etc” rqd, only if there is ‘reasonable explanation or excuse’ for mistake (some states require mistake to be reasonable)

Mistake of Fact Defense

<table>
<thead>
<tr>
<th>Mental state of crime charged</th>
<th>Application of the defense</th>
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<tbody>
<tr>
<td>Specific intent</td>
<td>Any mistake</td>
</tr>
<tr>
<td>Malice and General Intent</td>
<td>Reasonable mistakes only</td>
</tr>
<tr>
<td>Strict Liability</td>
<td>Never</td>
</tr>
</tbody>
</table>

C. Examples where Mistake of Fact was NOT a defense:

Regina v. Prince (1875) p226
Facts: $\Delta$ took an unmarried girl out of the possession and against the will of her father. Claimed that she said she was 18 and that he honestly believed her

Rule: Since the statute did not require mens rea to find someone guilty, if someone is found to have actually done the act so prescribed, he she is guilty, regardless of his/her mental beliefs.

White v. State (1933) p227
Facts: $\Delta$ convicted of violating a statute that provided that no husband may abandon a pregnant woman. Trial court gave instruction to effect that the $\Delta$ was no less guilty b/c he did not know his wife was pregnant.
Rule: court held that he could not plead ignorance as a defense; that he committed the immoral act at his own peril, and it was up to him to know this before committing the wrong.

People v. Olson (1984) p230
Rule: mistake as to a victim’s age could not be a defense to a charge of lewd or lascivious conduct with a child under age of 14.

Notes: What is Model Penal Code’s stance on this: §213. 6(1): defendant has burden by preponderance of the evidence to prove that he reasonably believed the child to be above the critical age
- Most jurisdictions do not allow ‘mistake’ as a defense to statutory rape
- Strict liability approach
  - brightline rule does help efficiency
  - protect children who do not understand consequences of acts to which they consent
  - if it’s difficult for jury to believe someone like girl, make the burden of proof in her favor,

HYPO: if someone intended to poison someone else with arsenic, but instead used salt, would that person be guilty of attempted murder? Yes. Why? b/c under MPC 2.04 – you still have an intent to kill – an element of the defense
HYPO: if someone was cleaning gun he thought was empty, and it went off and killed someone, would mistake be a defense? Yes. b/c it DOES negate the element of intent.

D. Strict Liability
1. Strict liability: where liability is imposed w/o any demonstrated culpability, not even negligence.
2. Justification for no mens rea, knowledge
   - argument that greater public good outweighs possibility of convicting innocent person; deterrence
   - minor punishments (MPC = no strict liability if possibility of imprisonment)
   -- efficiency argument (quicker if prosecution does not have to prove intent) – but that’s always true. Why would you say that in Dotterweich, for example, it’s appropriate to impose liability on president of the company?
     Problem of proof
     Victim/public
     Some are victimless crimes.
     It is thought that these are defendants who are better able to defend themselves

U.S. v. Balint (1922) p 236
**Facts:** A indicted for violation of Narcotic Act. Argued they didn’t know drugs they were selling were illegal.

**Court held:** no mens rea required to find guilty for selling prohibited drugs.

**Rationale:** Preferred poss. injustice to innocent seller vs. evil of exposing innocent purchases to danger from drug. (society > individual)

**U. S. v. Dotterweich (1943) p 236**
Pharmaceutical company sold mislabeled drugs. Company acquitted, and president held liable. No showing of knowledge or intent necessary to find conviction if person should have or could have known.

**Morissette v. United States: (classic case) p237 (prosecution must prove actor had proper mens rea under common law, even if it was omitted from statute)**
Facts: A took spent bomb casings that had been lying about for years (rustied); flattened them and sold them for $84

**Issue:** whether A could be convicted for taking gov’t property, if he didn’t know it was wrong to do so.

**Holding:** Court held that A must be proven to have had knowledge of the facts that made the conversion WRONGFUL (that is- that property had not been abandoned, as he believed)

**Staples v. United States: p241**
Facts: Defendant caught with gun that has been altered to violate the Natl Firearms Act: “it shall be unlawful for any person to receive unregistered firearm. (firearm = fires automatically). Said didn’t know nature of gun.

**Holding:** Infer that Statute required mens rea on part of A, (so as to avoid criminalizing innocent conduct). Unless there is some indication that legislature intended to omit mens rea rqmt, Statute construed in light of common law to require mens rea.

**State v. Guminga:** S. Ct. of MN  p244  Vicarious Criminal Liability
Facts: 2 police officers and 17 year old girl ordered alcoholic drinks at restaurant; minor paid, and then they arrested waitress for serving alcoholic drinks to minor.

**Holding / Rule:** held that criminal penalties based on vicarious liability were violation of substantive due process and that only civil penalties would be constitutional. (minority rule, unless jail is in sentence)

**State v. Akers:** imposition of liability on parents b/c they occupy the status of parents offends due process
-- Why difference? Employer can fire high-risk employee; parent can’t fire kids.

**State v. Baker:** p247  (involuntary act not defense to strict liability)
Facts: A appealed conviction of speeding. said his cruise control was stuck in accelerate position.

**Issue:** whether A can be found guilty of violating strict liability statute, against claim that he did not voluntarily offend the statute
Holding: court says as a matter of law, insufficient to raise the involuntary act defense b/c he voluntarily drove vehicle and used cruse; he was supposed to be in control of vehicle.

Note: MPC 2.01 – ‘not voluntary acts’ = reflex or convulsion, movement during sleep, conduct during hypnosis, movement not product of conscious

Regina v. City of Sault Ste. Marie: Canada p249

Holding: Absolute liability is appropriate in some cases without opportunity for defense, but in others accused should have opportunity for asserting the affirmative defense that he was not negligent.

Rationale: offenses 3 categories total: require mens rea; don’t require it but allow defense; don’t require it but also don’t allow defense

Note: Eventually, Canadian Supreme Court said that category of strict liability cases is unconstitutional - too violative of personal liberty

(insert any notes on 251-255)

E. Mistake of Law

- Common law rule was that ignorance was no excuse
- Modern courts do allow exception for mistake of law. In some jurisdictions, burden transfers to accused to prove defense

1. People v. Marerro (1987) p255 (mistake of law no defense)

Facts: ∆ arrested for unlawful possession of pistol under Penal Law § 265.02. but at time he was arrested, he thought he was exempted from the statute b/c it provided that correctional officers COULD lawfully carry the pistol

Holding: The NY Court of Appeals held that his mistake of law could not act as a defense to the conduct made illegal by the law.

Rationale: MPC 2.04 (3)(b) defense is okay when he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous… court says this means that the STATUTE that was relied upon must in itself have been declared erroneous, after the person relied upon it. Otherwise, people could interpret statutes in bad faith.

Argument against Mistake defense – law loses effectiveness if this defense could be made so readily. People are likely to interpret law differently…

Argument for mistake: if you don’t have mistake, and just use a strict liability approach, this is possibly a deterrent to people who try to be law abiding

2. State v. Woods

∆’s argument: she believed that the divorce in NV and subsequent marriage was valid

Issue: should her mistaken belief re: NV divorce defend her from prosecution

Possible Defense: Under MPC 2.04(1) – ignorance as to a mistake of law is a defense if the ignorance negates the purpose, belief, recklessness (intent) required to establish a material element of the offense

Prosecution rebuttal: MPC 2.02(9) – if accused wants to use 2.04(1) – the accused has to do so in a way that’s reasonable. If the person was careless or negligent re: lawfulness of your act, courts cite 2.02(9) as a way to avoid application of 2.04(1). ∆ lack of knowledge of the law is not something the prosecutor needs to prove.
3. **Cheek v. United States** (1991) (mistaken belief about validity of law not a defense) p 263

**Facts:** Cheek stopped paying taxes for a few years. Believed that tax laws were unconstitutional

**Rule:** Court says, ‘as a matter of law’ you cannot even make the claim that you felt law was unconstitutional and therefore decided not to pay. Why?

**Policy argument– opens door to false defenses, etc.**

- **Notes:** govt needs to show a duty, that \( \Delta \) knew of duty, and that he knowingly and willfully violated that duty. Here, knew of statutory duty – needed to file suit against it, not ignore it.

   - casino money laundering case

**Holding:** that to show that he was guilty, prosecution had to prove that he willfully avoided the law.

**Rationale:** don’t want to criminalize innocent conduct (people trying to structure transactions according to law)

Bryan Case – court upholds conviction in absence of proof that \( \Delta \) knew selling weapons was unlawful (contrast this with Staples case)

**United States v. Albertini** (1987) p268 mistake of law valid defense if \( \Delta \) reasonably relied upon official (but later overruled) statement of the law

**Facts:** demonstrated on naval base after receiving a bar letter prohibiting him from entering the base

**Holding:** 1) due process, procedural fairness, dictate that you should be able to rely on courts interpretation of law 2) 2.04(3) in MPC – reliance upon official interpretation of law as defense

**Advice of Lawyer:**

**Hopkins v. State:** advice of counsel, even if followed in good faith, furnishes no excuse to a person for violating the law and cannot be relied upon as a defense in a criminal action.

**MPC:** lawyer doesn’t fall within 2.04(3)

5. **Lambert v. California** (1957) p 271 not knowing of law as defense

**Facts:** Lambert was prosecuted for not complying with L.A. ordinance that required felons to register

**Issue:** whether a person can claim that they did not know of a law in “mistake of law” as a defense to prosecution for violating that statute

**Holding:** the court held that there has to be proof of the fact that the person had knowledge of the law in order to be convicted of it.

**Rationale:**

1) Due Process: requires notice that such a statute exists (violates due process to require someone to register w/o having proof that they know of it)

2) that it was passive: action vs. inaction. Omission v. action. Common law is very reluctant to impose liability for omission unless legal duty says otherwise. Here there is a duty – the statute creates one. Passivity (failure to act) is really different
C. LEGALITY


Facts:
• Chicago city council enacted gang congregation ordinance which prohibited criminal street gang members from loitering in public place:
  o Police officer reasonably believed person was a gang member
  o Loitering w/ no apparent purpose
  o Order people to leave
  o If they don’t leave, they violate ordinance

Holding: court held that the act violated the due process clause by being too vague, and by not providing specific limits on enforcement discretion of police

Rationale:
• Too vague:
  o Fails to provide notice that will allow ordinary people to understand what conduct is prohibited
  o May authorize and encourage arbitrary and discriminatory enforcement
• Why does the statute violate the notice prong and the arbitrary enforcement prong?
  o Vagueness of “loitering w/ no apparent purpose
  o Also so vague/overbroad as to cover activities that are lawful. (substantive due process issue)
  o Order to disperse is also vague

Dictum: If loitering is harmless, dispersal order is unjustified impairment of liberty, is also a retroactive warning of impermissible behavior under the law

O’Conner’s Concurrence: this ordinance could work if it was more limited….make “loiter” point directly to activities like intimidation, illegal activities.

Notes:
- loitering statutes are attacking behavior that proceeds the crime. Question is, what is the conduct that is criminal here. Court struck simply “standing around” down as not being an actus reus
- dissent said law criminalized not obeying police, and that police always have to use judgment…need to trust them

Papchristou v. City of Jacksonville p307
- ordinance held unconstitutional for vagueness
  o fails to give a person of ordinary intelligence fair notice and
  o encourages arbitrary and erratic arrest
  o no standards governing police discretion
  o generally implicates nonconformists, poor, etc – who live different life style than the police and courts.

Model Penal Code Section 250.6, Loitering or prowling:
5 responses to make to gray area loitering cases:
1. loitering at “unusual hours” “w/o lawful business” may be punished as complete offense  - Problem – no proof of anti-social behavior or inclination
2. situation giving rise to alarm for persons or property may be occasion for police inquiry; failure to explain oneself would be an offense – still no proof of anti-social purpose
3. situation might be proper for interrogation and detention, but not criminal prosecution
4. police orders to move-on only - doesn’t solve problem if guy IS bad

Comment [L.R.8]: Before court even makes this argument back to the city’s 3 prong argument that officers do have guidance – supreme court says “we have no authority to construe the language of a state statute more narrowly than the construction give by the state’s highest court”...though he does anyway. Why does he? b/c he’s giving guidance (dictum) on how to rewrite statute
5. no legal consequence. Officer could inquire, person may or may not respond. Officer would note ID for later purposes if necessary. 

- courts divided on whether MPC loitering would be constitutional formulation 
- CA reqn that people who loiter provide ID and account for presence when asked, held void for vagueness. No standard, too much police discretion.

Athens, GA ordinance “loitering as being in a place at a time or manner not usual for law-abiding individuals:” too vague – no overt acts to trigger criminal liability.

IV. RAPE

A. Statutory Framework/History (skipped perspectives)
   1. Early definition – “unlawful carnal knowledge of a woman”
      a. Required: female only, forcibly, against her will and w/o consent
      b. At common law, no rape within marriage
      c. At common law, resistance and consent were 2 sides of the same coin, if she did not “resist to the utmost” she consented
   2. CA 1950 – against will and she must forcibly resist
   3. CA 1999 - gender neutral, lack of consent, uses reasonable person standard, only need duress, menace or fear. Force > lack of consent
   4. MPC § 213.1: RAPE and related offenses
      a. male who has sex w/ female not his wife
      b. compels her by force or threat of imminent death, bodily injury, etc or
      c. he has impaired her w/drugs, alcohol
      d. she is unconscious or
      e. less than 10 years old
      (felony of 2nd degree unless serious bodily harm, or victim was not voluntary social companion who had previously permitted sex)

   *Gross Sexual Imposition*
      a. man sex w/ woman not wife;
      b. compels her to submit by threat that would prevent resistance by ordinary woman
      c. he knows she suffers from mental disease or defect which renders her incapable of appraising nature of her conduct.
      d. knows she is unaware of act or thinks he’s her husband (by mistake)

   5. Class notes:
      cases are fact driven
      social issues/arguments

      Sadat: biggest issue regarding crime of rape: is it an infrequent crime, abhorrent; or this conduct actually much more prevalent, and therefore we might accidentally criminalize otherwise legal activity.

      state statutes are very different b/c jurisdictions struggle with the issues differently: gravity of facts to be proved, gradation of offenses

B. Actus Reus

Facts: conflicting stories over whether he coerced her or she voluntarily had sex. She had met him at bar and given him ride home.
Issue: whether victim’s allegation of fear, and/or failure to resist out of fear is sufficient to meet the necessary element of force in a rape case
Holding: the court held that those allegations were enough (were sufficient evidence) to be submitted to jury to allow jury to decide, and for court to decide that it didn’t believe her was improper.
Notes: What do you have to show as a legal matter, to show resistance, in Maryland? – Fear; resistance.
Had there not been that light choking, but just her fear, would that have been enough? that’s the question.
The last reference to choking seems to give rise to necessity of proving force as a separate element from force
Comparing CA code of 1950 to Maryland law – Maryland doesn’t say anything specifically about resistance. Maryland speaks of force or threat of force…CA law seems to put more emphasis on resistance…might be more difficult under that old statute.
2. Further Actus Reus Notes:
   i. Determined by victim’s conduct
      a) B/c if victim consents, no crime
      b) Thus, seems to require some objective manifestation of no consent
      c) People v. Warren – IL reversed rape charge b/c woman didn’t fight or scream – needed to communicate in objective manner her lack of consent
   ii. Victim’s fear must be reasonably grounded (State v Rusk)
   iii. General intent (not specific intent crime – don’t have to intend to rape)
   iv. Resistance – some state require reasonable resistance, some do not. Often read into statutes as implicit in elements of force or nonconsent
   v. Requires force and lack of consent

C. MENS REA

1. Majority rule = mistake of fact as to consent IS a defense
   a. Def. Bears the burden of showing reasonable mistake as to consent (Commonwealth v. Sherry)
   b. Minority rule = mistake of fact as to consent is NO defense (Commonwealth v Fisher)
      “no means no,” once said, no mistake of fact unavailable (Fisher)

2. Commonwealth v. Sherry p351
Facts:
   • Victim, nurse, claimed that she was kidnapped by 3 doctors, taken to a house and later raped.
   • She claimed that she verbally protested to the sex, and had also asked to be taken home when she got to their house
   • Doctors claimed that she volunteered to go to the house, engaged in smoking marijuana, and then willfully had sex with the 3 of them successively.
Δ argued: claims that the defense of mistake of fact should negate the criminal intent necessary to be convicted of the crime. (tried to put burden of proof on her that she expressed lack of consent beyond reasonable doubt.)

Holding: Burden of proof is on Δ to prove that it could have reasonably had mistake as to her consent
- MA seems to say that either lack of consent must be proved or that she was incapable of consent because of fear/force

MPC: §2.02(3) If statute is silent as to required culpability, then state must prove **recklessness** with respect to any specified circumstances or results.

3. **Commonwealth v. Fischer** p354

Facts: college couple that had previous sexual relations. He forced her into oral sex against her wishes, wouldn’t let her leave.

Rule: Williams case, where court held that defense of ‘mistake’ could not be used to establish Δ’s state of mind (lack of culpability) b/c it was not included in the written laws. – was applied here.

Notes:
- in MA, honest and reasonable mistake as to consent is not a defense to rape
- most recent American cases permit mistake defense, but only when Δ’s error is honest and reasonable.
- Alaska court requires proof of recklessness – sees lack of consent as a ‘surrounding circumstance’ – element which requires complementary mental state
- harder to be successful with defense of mistake of fact for lower degrees of mens rea (recklessness) (= only that they disregarded a risk that no meant “no.”)
- if prosecution had to show actual knowledge –

V. Homicide

A. Definitions:
- Homicide: common law – killing of a human being by another human being
- Illegal homicide: murder, manslaughter, suicide or infanticide
- Murder, as distinguished from manslaughter, requires: unlawful killing w/ **malice aforethought**.
- Murder is felony; manslaughter, not.

B. Intentional Killing:
1. “Malice aforethought”
   - = highly technical terms of art describing any type of killing that is murder as opposed to homicide
   - Purpose of malice requirement is to aggravate the degree of the offense and thus increase the punishment
     - Reflection of the greater moral culpability
   - = slightly above recklessness and up; i.e.:
     - intent to cause death or serious bodily harm is sufficient
     - knowledge that act which causes death will probably cause death is sufficient
   - Malice could come from Felony-murder rule

Comment [L.R.11]: In this case, it would be recklessness w/ respect to lack of consent. (if someone says no and you proceed – violating the statute w/ element of consent, either strict liability or recklessness)

Comment [L.R.12]: Desire has to come before action – but can come instant before
2. **Premeditation**
   - Used to distinguish between 1st degree murder and 2nd degree murder
   
a. **Allowing instantaneous time** between formation of intent and actual killing (*Carroll*)
   
   *Commonwealth v. Carroll* p 396
   
   **Facts:**
   - Husband shot wife in back of head while she was sleeping, after a very long argument.
   - They had argued for several hours.
   - She had a history of violence, mental illness, degrading him/threatened to leave if he took a job where he’d be around 4 days.
   
   **Rule/Holding:** Some premeditation is required, but it can be instantaneous. Willful/deliberate killing is enough (realized what he was doing).
   
   **Rationale:** Society would be almost completely unprotected from criminals if law permitted irresistible impulse or inability to control oneself to justify murder.
   
   **Notes:** Many courts follow this—instantaneous amount of time okay. Later PA cases: ‘Requirement of premeditation and deliberation is met whenever there is a conscious purpose to bring about death.’

b. Some jurisdictions require some period of time (however short) between formation of intent and the actual killing (*Guthrie*)
   
   *State v. Guthrie* p 400
   
   **Facts:**
   - Delta stabbed coworker after coworker had teased him, and snapped him in the nose with a towel.
   - Delta had a history of chronic depression and obsession with his nose.
   
   **Holding/Rule:** The court held that there must be some period between the formation of the intent to kill and the actual killing—indicating that killing is by prior calculation and design.
   
   **Notes:** To be premeditated, there has to be an opportunity for reflection. To speak of premeditation and deliberation which are instantaneous or which take no appreciable time is a contradiction in terms.
   
   Policy argument: Can’t actually deter the hot-blooded killer; cold-blooded calculating is worse.
   
   **Carroll response:** Even though he was enraged, doesn’t lessen the moral depravity of the act.

b. **MPC. Section 210.2:**
   - Murder: purposely or knowingly, or... “recklessness manifesting extreme indifference to human life” 1st degree
   
   - Manslaughter: “recklessly or homicide that would otherwise be murder committed under extreme emotional disturbance” for which there is reasonable explanation or excuse. 2nd degree
   
   - Negligent homicide — 3rd degree
   
   **Notes:** Lots of states reject premeditation. Those that retain it split between the above cases. MPC rejects premeditation as basis for greater punishment.

3. Problem = period to time requirement can produce some absurd results
   - Where a person did not “premeditate” but stabbed daughter 60 times (Anderson) (no evidence to show he had planned it)
4. Rationale = premeditated crimes are deterrible and therefore should be subject to harsher penalties to maximize deterrent effect 

(contradiction to this is State v. Forrest – where son shot terminally ill father in head while sobbing with emotion.)

3. Provocation 
- at common law, mere words not adequate provocation to reduce murder to manslaughter. Needed extreme assault, battery, mutual combat, discovery of affair

a. Girouard v. State p 405 – ME words not sufficient provocation 
   Facts: After horrible argument/taunting, man stabbed wife 19 times. Tried to commit suicide, then called 911. 
   Issue: whether words alone can be sufficient provocation to justify a conviction of manslaughter rather than second degree murder 
   Holding: The court held that verbal assaults would not be sufficient provocation to mitigate a 2nd degree murder to voluntary manslaughter.
   - For provocation to be “adequate” must be calculated to inflame passion of reasonable man and cause him to act for the moment, rather than reason 
   - Court is very clear that there are categorical standards to qualify as mitigating circumstance
   - hearsay is a problem...b/c person who reacts to words doesn’t have a “solid basis” for acting; you could actually respond to a falsehood

b. Maher v. People (1862) - Allowing rumor of adultery for consideration as mitigating provocation.  
   Holding: the court held that the circumstances of adultery should be left to the jury to determine whether a reasonable man would be so provoked as to, with mitigation of the sentence dependent on that determination. 
   Rationale: 
   - Whether provocation proved in a particular case is sufficient or reasonable is a question of fact – for jury, using ordinary human nature as standard. 
   - Jury also needs to decide whether there was adequate cooling time
   Notes: - Here, in comparison to Girouard, they’re “taking into consideration whether the ordinary man of rationale disposition might be liable to act rashly.” 
   - fact that you were so excited as to shoot someone does not necessarily mean you were provoked...such a rationale would allow a “bad” person to escape culpability for his crime.

c. Book Notes on Provocation 
- sexual infidelity as provocation: male-centered perspective... suggest there’s something inevitable / forgivable about men’s violence against women 
- homosexual advances: why should proposals to engage in consensual sexual activity, whether from a member of same or opposite sex, ever be sufficient provocation to reduce an intentional killing? 
- Cooling time: common law- too long a lapse of time between provocation and act of killing will render the provocation inadequate
   - United States v. Bordeaux: 1992, Δ found out mother had been raped 20 years earlier, and severely beat her attacker. Later returned and killed him. Court found that there would be no “rational basis for the jury to find that Bordeaux killed White Bear in the heat of passion...” evidence of prior argument insufficient.
- Commonwealth v. LeClair: 1999, man strangled wife in rage after several weeks of suspecting her of infidelity. Court held that prior suspicions were adequate cooling time.
- BUT – People v Berry: court let jury decide if 20 hours was too much cooling time vs. smoldering time.

- Victims other than provoker: State v. Mauricio: NJ supreme court reversed a murder conviction, holding trial judge had erred in refusing to give voluntary manslaughter instructions when ∆ mistook patron for a bouncer he had wanted to kill after physical abuse and provocation
- Innocent bystanders: courts have held that no provocation defense was available with respect to charges of murdering nonprovoking relatives or bystanders (when someone has gone bonkers – father of kid in accident; man killed wife and kid)
  - But is it reasonable to ask someone who has lost all self-control to direct his retaliatory acts only against his provoker – to guide his anger w/ judgment

- Model Penal Code §210.3: standard flexible… “reasonableness of such explanation or excuse shall be determined from viewpoint of a person in the actor’s situation under the circumstances as he believes them to be”

d. People v. Casassa (1980) – court’s consideration / application of MPC

  Facts: crazy dude stabbed and drowned woman who rejected him.

  Holding: the court held that the ∆ could not use the defense of extreme emotional disturbance in this instance, b/c his emotional disturbance (reacting to breakup) was not based upon a reasonable explanation or excuse

  Test = two separate inquiries:
  1) did the ∆ act under the influence of extreme emotional disturbance and 2) was there a reasonable explanation or excuse for such extreme emotional disturbance ‘ the reasonableness of which is to be determined from the viewpoint of a person in the ∆’s situation under the circumstances as the ∆ believed them to be”

C. Unintended Killing

1. Involuntary Manslaughter
   a. Commonwealth v. Welansky (1944)

      Facts: nightclub owner charged with involuntary manslaughter b/c of blocked/locked exits in fire

      Notes: why involuntary manslaughter? b/c there was a duty of care for the safety of visitors on the premises – wanton or reckless conduct including failure to take care in face of probably harmful consequences.

      Holding: The court held that wanton or reckless conduct comprising manslaughter could be an omission, as well as an act.

      - If this was a MPC jurisdiction, would he have been convicted? Probably of criminal negligence

   b. Model Penal Code §210.3(1)(a): homicide is manslaughter when it is committed “recklessly.”

      - §2.02(2)(c) person acts recklessly w/ respect to death of another when he consciously disregards a substantial and unjustifiable risk that his conduct will cause death
- §210.4 – lesser offense of ‘negligent homicide’ when Δ acts w/o awareness of such risk

c. Civil liability might consider decedent’s contributory negligence. Crim doesn’t when determining liability, but it might consider it when determining proximate cause

d. *State v. Williams* WA Ct of app. p431

**Facts:** child died of infection from abscessed tooth. Parents afraid to take kid to doctor. Convicted but sentence was suspended

**Rule:** standard in WA is that you only have to show ordinary negligence- failure to act in reasonable care for the child – to have statutory manslaughter.

**MPC** – probably would have been negligent homicide

2. **Murder**


   Lack of motive did not reduce sentence of homicide.

   **Facts:** kid pulled trigger three times on friend in ‘russian roulette’’ third time killed friend.

   **Holding:** act was done intentionally, in reckless and wanton disregard of consequences which were at least 60% certain from his 3 attempts…therefore killing was murder. (malice was found in intentional doing of act in callous disregard of its likely harmful effects)

   b. Text Notes:

      - Common law formulations of circumstances under which unintentional killing is murder, rather than manslaughter, have been incorporated into American statutes under terms like “malice”

      - MPC treats unintended killing as murder when it is committed recklessly and “under circumstances manifesting extreme indifference to the value of human life.” – gross deviation from standard of conduct that a law abiding person would observe…(1st step) 2nd step is the extreme indifference

   c. *United States v. Fleming* p443

   **Facts:** drunk driver sped into oncoming traffic at 70mph in 30mph zone, killed woman in collision. Convicted of 2nd degree murder

   **Rules:**

      - malice may be established by evidence of conduct which is ‘reckless and wanton and a gross deviation from a reasonable std of care, such that jury is warranted in inferring that Δ was aware of serious risk of death or harm to support conviction for murder.

      - Most courts have also held that in drunk driving cases, egregiously dangerous driving supports conviction of murder.

   **MPC stance:** § 210.2(1)(b)

      - murder requires proof that Δ acted ‘recklessly under circumstances manifesting extreme indifference to the value of human life.’

      - MPC makes clear that inadvertent risk creation, however, unjustified, cannot be punished as murder.

3. **Felony-Murder Rule**

   a. Introduction

      1. *Regina v. Serne*’ (1887) p448

      **Procedural:** Serne’ and Golfinch were indicted for murder of Serne’s son, under allegation that they willfully set fire to a house/shop, in which the boy

      **Comment [L.R.18]:** Note that to prove murder, you have to prove malice aforethought.
died.- court instructs jury that if there is proof of the arson, the murder charge should stand

**Facts:**
- Fire erupted a number of places in house at once (suggests intentional aspect of fire)
- Previous to fire, Serne’ insured boy’s life for far more value than he had in actual belongings

Notes: in this case, rather than prove the intent, they use the other felony as evidence of malice.
- what felony murder rule does, is remove the burden of proving intent to kill. Substitutes other felony

2. *People v. Stamp*, p450 (CA 1969) **Common Law Felony Murder**

**Facts:**
- Honeyman was robbed, made to lay on floor while he was being robbed. Had chest pains, and then died of heart attack (doctors testified that fright was too much of a shock).
- Court held robber strictly liable for the felony murder of Honeyman b/c the death was the direct causal result of the robbery

**Rule:** (Common Law – CA)
- Felony-murder rule isn’t limited to foreseeable deaths…rather one is strictly liable for all killings committed by him and his accomplices in the course of the felony
- The robber must take his victim as he finds him…doesn’t matter that man was obese and had a history of heart problems. (thin skull rule)

3. MPC §210.2
- ALI recommended eliminating felony-murder rule. But provided that could establish murder by act committed recklessly under circumstances manifesting extreme indifference to human life
- lists felonies like robbery, rape, arson, burglary, felonious escape as examples where rebuttable presumption exists that required indifference and recklessness existed.
- under MPC, if you can show that you thought you were not acting recklessly – even while committing felony – you can avoid felony murder charge. Difficult to overcome b/c presumption is the recklessness. Burden shifts to the accused.

4. Why use Felony-murder rule?
- deterrence is one reason
- critique: if all robbers take the same risks, one that is unfortunate enough to have someone die on them unfairly gets higher punishment (retribution)
- if the felony is wrong, defendant has no grounds for complaining I facts turn out to be worse than she expects…

Recall punishment: according to MPC 1067:
- 1st degree murder – up to life in prison
- 2nd degree murder – 1-10 years
- 3rd degree murder – 1-5 years

B. **Limitations to Felony Murder Rule**

1. *People v. Phillips* (CA) **Inherently Dangerous Felony Limitation**
**Facts:** chiropractic doctor tried to treat girl for cancer of the eye, but she ended up dying

**Procedural History:** he was charged with felony murder, and the predicate felony was grand theft.

**Holding:** felony predicate can only be used as a substitute for malice in cases where felony, as viewed in the abstract, is dangerous to life.

**Rationale:**
- only such felonies as are in themselves ‘inherently dangerous to human life’ can support the application of the felony murder rule
  - looked at felony in the abstract, not in relation to the specific case (in general – grand theft is not dangerous to human life)

**Notes:** court limits the use of the felony murder rule. Why limit it?
- policy reason – that some of the felonies may not involve risk
- historical genesis of the rule. As kinds of felonies expand include many felonies that are not necessarily dangerous, court doesn’t want rule to expand beyond its intended purpose
- prosecutor came up with creative argue that this was “grand theft medical fraud” which was inherently dangerous. Court’s response – rejected. Legislature generally defines crimes. Why? b/c courts would be able to continually evolve the law.

2. **People v. Satchell – 2nd ex. of felony inherently dangerous to life**

**Story:** felon convicted of 2nd degree felony murder b/c it was a felony for ex-felon to possess a shot-gun. Supreme court held the instruction erroneous and reversed the conviction, concluding that the felony of possession of a concealable weapon by an ex felon was not a felony inherently dangerous to human life.

**Notes:**
- why did prosecution use felony-murder rule here? - b/c sometimes it makes it easier to get a conviction. Don’t have to prove intent.
- Under MPC, what does prosecution need to show? purpose, knowledge or recklessness manifesting extreme indifference to human life. What relevance is the weapon felony? It is not relevant.

3. Escape as dangerous felony:
- CA says since some are dangerous and some are not, the crime of escape is not inherently dangerous to human life
- RI says felonious escape is dangerous
- MPC – takes position that felonious escape is dangerous

4. **People v. Stewart (RI 1995) Declined to use ‘inherently dangerous felony’ in abstract, as guide**

**Facts:** mother went on crack binge for a few days and neglected her infant who then died from dehydration

**Procedural History:**
- she was charged w second degree felony-murder
- felony was “wrongfully permitting a child to be a habitual sufferer”
- ∆ was found guilty of both second degree murder and wrongfully permitting child to be a habitual sufferer

**Holding:** trier of fact should consider the facts and circumstances of particular case to determine if such felony was inherently dangerous
Notes: Pros of RI approach: more flexible; if favored, this approach allows it to be applied more often. Cons: could be arbitrary Cons w/ CA rule: eliminates application of rule until it’s unlikely that a murder conviction will occur w/out malice

C. The Merger Doctrine
The court is prevented from imputing malice under the felony-murder rule where the felony is an integral part of the homicide (People v. Smith) AND the evidence is shown to be an offense included in fact within the offense charged (People v. Ireland)

1. People v. Smith (Felony murder rule not applied b/c of merger)
Facts: parents beat daughter and she died from her injuries
Issue: whether felony child abuse may serve as the underlying felony to support conviction of second degree murder on felony-murder theory, when the elements of the felony are an integral part of the homicide
Holding: can’t merge the elements (same conduct) of the predicate felony with the elements of the homicide
Notes: limited by Burton: you can use the felony murder theory if the other felony has an independent felonious purpose. (armed robbery is separate from homicide)

*Know that there are 3 approaches to felony murder doctrine, and that states mix them or choose among them. *
- RI looks at detail surrounding crime for felony murder rule
- MI has banned use of felony murder rule
- MPC limits it to certain types of felonies
*So where would CA allow the felony murder rule?*
- Arson (traditional felony w/ independent purpose);
- Burglary – courts are split. CA says no. NY says yes – b/c burglary indoors increases chance of an assault, and chance that someone will die from it.

D. Killings not “in Furtherance” of the Felony
1. Felon not liable for co-felon killed during felony, if he did not commit the killing:
   State v. Canola (1977) p471
Facts: ∆ and three confederates attempted to rob a store when one co-felon was fatally shopped by the shop-owner/employee
Holding: ∆ is excepted from liability of the killing of a co-felon during the commission of a felony if he, or confederate, did not commit the actual killing
Notes:
- didn’t want to further expand the use of the felony murder rule
- gradation of criminal liability should accord w/ degree of moral culpability, and have less to do with tort concepts of foreseeability and proximate cause
- Excuse – act is still unlawful. Felon is just excused from liability
- under agency theory, the principal – the felon- would not be liable for the murder committed by someone else not working for the felon or with them
2. To limit felony murder, distinctions drawn between who does killing and whether felon’s act caused the death
   - agency theory: only if the act of killing is done by a co-felon or someone acting in concert with a co-felon will the felony-murder rule be applicable

Comment [L.R.19]: They’re using the agency theory
proximate-cause theory: central issue is whether the killing, no matter by whose hand, is within the foreseeable risk of the commission of the felony. (NJ legislature after Canola) & NY

3. **U. States v. Martinez** (1994) **death of co-felon not an exception**
   - 3 men planned to bomb several Chicago adult bookstores; one bomb went off and killed one of the men.
   - **Holding:** Court held that the other two accomplices should be sentenced for felony murder on basis of death of their co-felon
   - **Rationale:** deterrence from using lethal weaponry; life of felon not worthless (proximate cause theory)

4. **Taylor v. Sup. Ct** (p477) **Vicarious Liability not felony murder**
   **Procedural History:** ∆ Taylor, getaway car driver, was charged for murder of a co-felon, which occurred as a result of victim shooting the co-felon during the armed robbery.
   **Holding:** The court held that a felon could not be convicted under the felony murder doctrine if he or an accomplice did not personally kill the person, but he could be held liable under theory of vicarious liability
   **Rationale:** Felony murder rule doesn’t apply b/c you can’t attribute malice aforethought to robber if killer is innocent. (using agency theory)
   To determine criminal liability for a killing committed by a resisting victim, look at conduct of ∆ or accomplices to see if it was sufficiently provocative of lethal resistance to support finding implied malice (malice in recklessness toward human life)
   Note pros and cons for convicting in this instance: disparity v deterrence

5. **Misdemeanor – Manslaughter Rules**
   - In many states a misdemeanor resulting in death can provide basis for involuntary manslaughter conviction w/o proof of negligence or recklessness

VI. The **SIGNIFICANCE OF HARM**

A. **CAUSATION**
   Causation = material element of all (completed) substantive crimes; except attempt, conspiracy, burglary.
   1. **2 Prongs:** Must have [1] AND [2] for criminal liability
      vi. **[1] Actual cause = “but for”**
         a) Threshold test, not required to be the only cause
         b) Accused setting chain of action in motion = sufficient
         c) Accused contributing to chain already in motion ~ sufficient
      vii. **[2] Proximate cause = legal cause**
         a) Foreseeability
            i. Sufficient direct cause (People v. Warner-Lambert) AND
               Def.’s conduct need not be sole and exclusive factor, just sufficiently direct cause
            b. Ultimate harm is something that should have been reasonably foreseen
            b) Natural and Probable Consequences ~ substitute for foreseeability
            c) Where the def. does something “wicked” the courts are more likely to find proximate cause

2. MPC Section 2.03:
1. Conduct is cause of a result when:
   a. meets but for test
   b. causal relationship meets any rqmts of code
2. if purpose or knowingly causing specific result is element of offense in statute, that element is not established if the actual result wasn’t what the offender planned, unless:
   a. the only difference is that a different person or property was affected; or person/property less seriously injured than planned
   b. actual result was foreseeable
3. if recklessly or negligently causing a result is an element of an offense, that element is not est. unless actual result is not a risk the actor was or should have been aware of, unless:
   a. actual result differs from probably only in respect to different person/property
   b. actual result involves same kind of injury /harm as probable and is not too remote or accidental
4. If causing a particular result is element of an offense for which absolute liability is imposed, element is not est. unless actual result was probable result of actor’s conduct

3. People v. Acosta  
   **Facts:** Acosta stole a Nissan Pulsar, and a 48 mile high speed chase ensued. Police helicopters in the chase collided, and 3 people died.  
   **Holding:** The court held that while it might be foreseeable for a crash to occur, Δ would not be held liable for highly extraordinary result for which he could not have consciously disregarded the risk.  
   **Rationale:**
   - It was the actual cause…but for
   - Proximate cause was found since it is a possible consequence which might have been contemplated
   - However, there was no mens rea: issue is whether its foreseeable enough that Δ could consciously disregarded the risk to them

4. **Transferred intent:** if you try to shoot A, but miss and shoot B, killing B, is it murder? Yes. – confirmed by MPC 2.03(2)(a)

5. **Δ’s ACTIONS must be a sufficiently direct cause of ensuing death before criminal liability:**
   People v. Warner-Lambert: explosion at chewing gum factory. Explosive substances at plant. **Holding:** that the evidence was not legally sufficient to establish the foreseeability of the immediate triggering cause of the explosion and therefore dismissed.
   **Rationale:** different doctrinal approach than Acosta. Rejecting tort liability for criminal acts

   a. wound that causes death indirectly through a chain of natural effects and causes unchanged by human action, person who inflicted wound is responsible for death. Hall v State - Δ not allowed to introduce testimony about poor medical treatment of his victim. State v. Shabazz: stab wounds
would have been fatal in absence of medical treatment, so if hospital contributed, not admissible.

6. Omission only a legal cause where there is a duty to act.

7. **SUBSEQUENT human Actions:**
   a. **Subsequent actions intended to produce result: SUICIDE**

   **People v. Campbell**  p530  (MI) 1984
   
   **Issue:** whether one could be guilty of homicide for simply providing a depressed person with a gun in hopes that the person would kill himself.
   
   **Holding:** Person cannot be charged for providing only a weapon, and hoping
   
   **Rationale:**
   - Homicide is “killing of one human being by another” by definition, suicide excludes homicide
   - Hope alone is not the degree of intention required to fit a charge of murder.
   
   **Notes:** idea is that suicide is an intervening act; breaks the chain of causation

   **MPC: 210.5:** person can be convicted of criminal homicide by forcing another to commit suicide by force, duress or deception. But can be found guilty of felony in 2nd degree if his conduct causes suicide and he purposely aided or solicited another to commit suicide.

2. **People v. Kevorkian** (1994) S. Ct. of MI
   
   **Facts:**
   - Kevorkian agreed to help two women, Miller and Wantz, who were terminally ill and in great pain, commit suicide. Occurred one year before MI enacted statute prohibiting assisted suicide
   - Both women performed final act, activating the devices, and died.
   
   **Holding:** To be convicted of criminal homicide, must be proven that death occurred as a direct and natural result of the Δ's act. Simply providing them w/ the means is not enough.
   
   **Notes:**
   - so what is the central inquiry? If it’s actual participation – Kevorkian is going down. If it’s committing the final act, he did not commit the FINAL distinct act.

3. **Prevailing American Law:** one who successfully urges or assists another to commit suicide is not guilty of murder, as long as deceased was mentally responsible and was not forced, deceived, pressured… most also reject manslaughter or negligent homicide if deceased actions were voluntary.
   - most states also have something similar to MPC 210.5(2) – felony to aid or assist suicide.
   - Kevorkian court could convict one who recklessly or negligently makes means to commit suicide available to person who is ‘intoxicated, despondent, agitated,’ of lesser degree of homicide like involuntary manslaughter

b. **Intervening Human Action**
   - physical events that follow from a person’s actions are treated as caused by him or her
but Human Action that follows from an initial actor’s conduct is treated as caused by THAT actor, even if the subsequent human action is entirely foreseeable (like Kevorkian’s suicides)

Exceptions/Qualifications to those rules:
- not all subsequent human actions are treated as outside of causal law – only those that are chosen freely
- things like actions in self-defense, firefighter going in to fire to rescue – not seen that way

c. Stephenson v. State (1932) S. Ct of Indiana p537
  - DD subjected woman to sexually perverse acts for days on end. She took poison to commit suicide without his knowledge or presence
    - Found guilty of second degree murder
    - When suicide follows a wound inflicted by the Δ his act is homicidal, if deceased was rendered irresponsible by the wound and as a natural result of it
      - Basically, she was irresponsible due to shame and humiliation and it’s his fault
    - He set the casual chain in motion and she was in his custody and control
    - Her death was part of “one transaction” – takes it out of human actor category, and looks at proximate cause instead

Commonwealth v. Root (1961) (death has to be the direct cause of the Δ’s action – rejects proximate cause theory) – look back to Warner-Lambert → similar approach

Procedural History: Appellant was found guilty of involuntary manslaughter for death of competitor in a drag race on a highway

Holding: Court held that while defendant was reckless, (in his participation in the drag race) his unlawful conduct was not the direct cause of death, and therefore, he was not criminally liable for the death

People v. Kern: Δs who were chasing men and threatening to kill them were convicted of second-degree manslaughter when one man ran across highway and was killed by oncoming car. Court upheld conviction b/c they created the danger and the man running had no other option. How do you reconcile this w/ Root? Here there is no culpability of the victim. (in torts, an intentional act can cut off the causation) (p547)

State v. McFadden (1982) (accepts proximate cause theory)
2 drag racers – one crashed into another car, killed himself and child.
  - Trail court found that Δ was guilty under 3 separate theories:
    1. That Δ aided and abetted Sulgrove in commission of involuntary manslaughter
    2. That Δ was vicariously responsible for S’s commission of involuntary manslaughter
    3. That Δ himself committed the crime of involuntary manslaughter to by recklessly engaging in the drag race as a proximate cause of the collision
  - Supreme court of Iowa declined to adopt the direct causal connection of Root, and instead applied proximate cause principles to determine whether the Δ was criminally liable for the death.

Comment [L.R.26]: Root case is really more of an exception. Courts more likely to find liability

Comment [L.R.27]: This is an agency theory. You can use this only for the little girl – b/c the two drivers were acting in concert

Comment [L.R.28]: If you use vicarious liability theory – causation is not nearly as important. If you’re saying his actions were proximate cause of both deaths – need to establish causation.
causation element of a crime had been met. (looked to foerseeability) S’s voluntary participation did not bar Δ from being convicted of involuntary manslaughter for S’s death.


**Holding:** the court held that the defendants could be convicted of manslaughter for making the decisions to engage in Russian roulette – putting deceased in position to kill himself.

**Rationale:**
- court distinguishes that this is not a civil action – in a tort case, the court would maybe consider his voluntary / contributory negligence
- Court also distinguished it from drag racing – higher probability of death here; no chance to use skill to avoid death
- duty to avoid game; wanton and reckless w/ result to probable outcome.

B. ATTEMPT

1. Definitions vague and vary:
   - w/intent; an act that constitutes a substantial step toward commission of offense (IL)
   - w/intent, engages in conduct which tends to effect the commission of such crime (NY)
   - CA just says you’ll be punished if you attempt and fail or are prevented.

2. Punishment:
   - common law: misdemeanor
   - today, usually a reduced factor of the punishment for the completed crime
   - substantial minority of states make punishment same for attempt as completed crime, except for sentences of life in prison or death (MPC)
   - question justification of giving an unsuccessful attempt at a severe crime a lesser sentence. Treating same act differently b/c of the difference in outcome – possibly guided by circumstance

   **MPC 5.05(1):** attempt is to be treated as the same grade of the most serious offense which is attempted (or which is the object of the conspiracy) EXCEPT when the attempt was of a capital crime or felony in first degree, in which case the attempt will be a felony of second degree.

3. Mens Rea for Attempt

   **Smallwood v. State (1996) p556**
   **Facts:** Smallwood raped 3 women, not using condom though he knew he had AIDS. Convicted of assault w/ intent to murder
   **Holding:** “attempt” requires a purpose or “specific intent” to produce the proscribed result, even when recklessness or some lesser mens rea would suffice for conviction of the completed offense. (Majority rule!)
   **Rules:**
   - Δ can only be found guilty of attempted murder and assault w/intent to murder if there was sufficient evidence from which jury could reasonably conclude he possessed a SPECIFIC intent to Kill at the time he assaulted each woman.
- intent to kill may be proved by circumstantial evidence
- death has to be sufficiently probable result of Δ’s acts in order to infer intent – prosecution must provide evidence

*Thacker v. Commonwealth: p560* Just shooting into tent not specific intent.
- if man fired gun at tent and hit and killed someone, would be murder. (recklessness, purposeful, intent ?)
- If he misses, it would not be attempted murder. (fact centered argument about tent) attempted murder needs to have specific intent to murder, not just recklessness about the results of your actions.
  o Mens rea for Attempt: “specific” intent. Mens rea for intent is higher than minimum mens rea for the crime.
  o Mens rea required for murder: purpose, knowledge, or recklessness

**How would this case come out under MPC?**
- Even though the beginning of 5.01 suggests lower mens rea might be okay, once you start looking at sections a, b, and c, it’s apparent that MPC even requires higher mens rea for attempt. – seems to require “knowledge” with use of word “belief”
- THOUGH if you look at subsection 7, “rqmt of knowledge satisfied by knowledge of high probability” – could say that he could have known that it was probable a shot into a tent would produce that result.
- Though can this definition meet rqmt of “belief” ?
  o MPC definition of Attempt:
    ▪ Act w/ rqd culpability of crime
    ▪ Purposely engage in conduct that would make the crime if circumstances were as he thought, or
    ▪ When causing particular result is element of crime, does or omits to do anything w/ purpose of causing or belief that it will cause result w/o further conduct on his part
    ▪ Purposely does or omits to do something, under the circumstances as he believes them to be, constituting a substantial step in courts of conduct planned to culminate in commission of crime
- SUMMARY: MPC still raises rqmt of mens rea – at least for crimes where result is relevant.

*People v. Thomas* (Colo. 1986) p560 (different from MPC)
  - man who fired shots at fleeing rapist convicted of attempted reckless manslaughter
  - statute said guilty of attempt if engaged in conduct constituting a substantial step toward commission of the offense
  - court found that the necessary potential for future harm is present when the Δ knows that the prohibited result is practically certain to occur or when he recklessly disregards a substantial risk

a. *Attempted Felony Murder?*
   - **most states reject concept of attempted felony murder.** Why? Situation like a bank robbery where someone had a heart attack from fright, but didn’t die, would allow robber to be convicted for attempted felony murder. Problem is that in felony murder cases, person doesn’t even have intent to murder.
   - Burden of proof is removed – but at least there is a **death to prove** certain degree. In the hypo: not only no intent, but no result
b. there CAN be attempted voluntary manslaughter (reacts to provocation but fails to kill); but not attempted involuntary manslaughter

c. Attempted Statutory Rape – Attendant circumstances (knowledge or attendant circumstances under MPC) further if person acts in situation where attendant circumstances will confirm crime (statutory rape) – even if he did not know of circumstances, he can still be convicted of crime (if he attempted sex w/ woman and did not know she was minor, still statutory rape) (see Regina v. Khan – p 562)

  o MPC: introduces defense of mistake. (p 564 comments: since mistake is irrelevant w/ respect to substantive offense, irrelevant in attempt) Only strict liability for children under 10.
  o MPC takes position that knowledge or recklessness to woman’s age would be sufficient for attempt, even though it’s not normally accepted.
  o MA case that knowledge of intended victim’s age irrelevant – can’t have different standard for completed crime than attempt

4. Preparation vs. Attempt

  o *Eagleton* said person had to perform last act possible to achieve result. (Have to distinguish criminal intent from mere preparation.) This has since been rejected, but no new rule. All that is known is person doesn’t have to get to the last possible act for it to be an attempt.
  o *Eagleton* also cited White, where it was held that if the first of a series of acts intended to result in a killing would be attempt.

*People v. Rizzo* (1926) (Dangerous Proximity Test)

**Facts:** four guys rode about NY looking for a payroll dude so they could rob him. Never found him. Question is whether they can be convicted for attempted robbery.

**Rule:** law only considers those acts tending to the commission of the crime which are so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference.

**Ask:** did the acts come so near the commission of the robbery that there was reasonable likelihood of its accomplishment but for the interference?

- Under MPC – the “substantial Step” test: actions need to strongly corroborates the actor’s criminal purpose. Looks more at whether activities of the accused tend to support police allegation that individual was about to commit a crime
- Under part (e) of substantial step test: had materials. Also were seeking the victim for the crime. So probably would be attempt under MPC test.

**Renunciation for Rizzo:**

  o would not have been able to use renunciation defense (multiple attempts) if they were just intercepted.
  o if Rizzo wanted to leave car and go call cops, could he use it as renunciation? b) he wasn’t triggered by cops/ voluntary b) not using it opportunistically – so it’d be okay. Rizzo’s defense would be personal only under MPC – would not affect his accomplices.

*Comment [L.R.29]:* Equivocality test – look at whether actions speak of criminal intent, rather than how far along the chain of events the thing has proceeded. McQuirter case cited. Used race as equivalence to evil.

*Comment [L.R.30]:* Narrow holding: They were not guilty of attempted robbery b/c they had not found or were not in the presence of the person they wished to rob.
a) Dangerous Proximity Test:
   - NY requires conduct “which tends to effect the commission of the crime”
   - Shows firm intent, but requires police to wait until almost committed
   - Judiciary wants to preserve opportunity for to repent

b) p572: Substantive Crimes of Preparation:
   - Burglary: some statutes entry is all that is required for burglary. Entered w/ intent.
   - Assault: unlawful attempt to commit violent injury against other
   - Stalking
   - Punish crime for evil purpose, w/o regard to whether act would constitute attempt

**United States v. Jackson (1977)** (moving away from proximity test)

**Facts:** Δ and 2 accomplices planned to rob bank – obtained shotgun, masks and handcuffs, and generated plan. First visit- aborted plan. Second visit to bank – intercepted by FBI before entering building to perform robber.

**Issue:** whether they could be convicted of attempted robbery for two visits to the bank, even if they did not actively hold gun up and seek to get cash.

**Holding:** the court upheld convictions for attempted robbery b/c the men took substantial steps towards committing the act.

**Test:** 2 Step inquiry-
1. Δ must be acting w/ kind of culpability otherwise required for the commission of the crime he is attempted of attempting
2. Δ must have engaged in conduct which constitutes a substantial step toward commission of the crime. Strongly corroborates his criminal intent.

c) where jurisdictions fall on Attempt:
   - MPC uses both proximity elements and equivocality test for attempt
   - ½ states and 2/3 federal circuits now use “substantial step” test comparable to MPC

**United States v. Harper:** CA court held that just setting trap for appearance of potential victims was not attempt – no substantial step. Moving towards them w/ gun and mask would be attempt. MPC might have held differently…lying in wait can be substantial step.

5. Impossibility
   - WE WILL NOT GET HUNG UP ON THE DIFFERENCE BETWEEN LEGAL AND FACTUAL IMPOSSIBILITY ? MPC COMPLETELY REJECTS BOTH AS A DEFENSE) (some JDs still make a distinction * so we need to know a bit about it)

Two Types of Impossibility:
   - Factual Impossibility:
     - = even if the person where to do what he plans to do, he is unable to commit the crime
     - REJECTED by nearly ALL jurisdictions
   - Legal Impossibility:
= even if the person were to do what he plans to do, he does not commit a crime (b/c one of the elements of the crime cannot exist)

**People v. Jaffe (ex. of legal impossibility) p585**

**Facts:** ∆ bought cloth he thought stolen, but it had been restored to the owners and thus bought lawfully

- Purchase can’t constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the DD of a nonexistent fact, although there might be a belief on his part that the fact existed
- His crime consisted of three elements: the act, the intent, and knowledge of existing condition (attendant circumstances not fulfilled)
  - No proof to establish the third
  - Under circumstances, one of the elements of the crime is missing
- Pickpocket cases
  - Don’t have to prove anything in pocket to be convicted
  - Act completed would be illegal
  - Though factually impossible, not legally impossible (especially for attempted theft)

**People v. Dlugash - NY p587**

**Facts:** Bush shot at decedent…2-5 minutes later, ∆, Dlugash, fired 5 more shots at decedent’s head and face

- To sustain a homicide conviction, it must be established beyond a reasonable doubt, that the DD caused the death of another person
  - Can’t be established here
  - Legal impossibility to murder a dead man
  - Unlawful killing with malice aforethought
- But, can modify the judgment to reflect the offense of attempted murder
  - Result must be intended and desired…no defense for impossibility
  - MPC position * if you intend the harm, you can still be prosecuted for attempt (THIS HAS BEEN VERY INFLUENTIAL – 2/3 state revised codes in accordance; almost all reject impossibility defense entirely) - depends on what ∆ intended had circumstances been what he believed them to be.

**NOTES cases:**
- **United States v. Berrigan** – father smuggled letters in and out of prison…but warden actually knew about it
  - Since warden knew about it, it’s not criminal
  - It’s legally impossible (element of crime is missing) and it’s a defense in this case
  - Attempting to do that which is not a crime is not attempting to commit a crime
- United States v. Oviedo – cop bought “heroin” which passed field test, but later found to be a common drug
  - Legal and Factual Impossibility...wasn’t selling heroin...look at it ex ante
  - The objective acts without any reliance on the accompanying mens rea must mark the conduct as criminal in nature...doesn’t happen here
    - Look at conduct, not mens rea (don’t punish thoughts, motives w/o objective evidence)

VII. GROUP CRIMINALITY
A. Comparable Definitions:
   1. Common Law:
      4 Categories of Participant in Common Law
      Principal in first degree: is the actor, absolute perpetrator of the crime
      Principal in second degree: is present, aiding and abetting the fact to be done
      Accessory before the fact: facilitates but isn’t present during the crime
      Accessory after the fact:
   2. Modern: most jurisdictions treat them all the same, except accessory after the fact.
   3. Components of Modern Accessory After the Fact (CA):
      - Mens Rea: Need intent to help felon avoid punishment
      - Actus Reus: Harbor, conceal or aid principal
      - Treated differently b/c that person has a very different intent. Not an intent to commit crime – intent to treat person who committed crime certain way.
   4. modern statutes influenced by MPC, make people who are accomplices of other person accountable for that person’s conduct, and define people as accomplices if they solicit that person to commit crime or aid that person in planning OR committing it.
   4a. Conspiracy is substantive crime in itself, but is a doctrine of complicity. Makes each of coconspirators criminally responsible for criminal acts of fellow conspirators

B. MPC 2.06: Liability For Conduct of Another
   - A person is guilty of an offense if it is committed by his own conduct or the conduct of another for which he’s legally accountable
     - One is legally accountable for another’s behavior when:
       - Acting with the kind of culpability that’s sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct OR
       - He is made accountable for the conduct of such person by the Code or the law defining the offense OR
       - He is an accomplice of such other person in the commission of the offense
         - A person is an accomplice of another in the commission of an offense if
           - With the purpose of promoting or facilitating the commission of the offense, he
             - Solicits such other person to commit it OR

Comment [L.R.31]: Look to Blackstone for definition of accessory before fact: “procure, command or counsel.”
• Aids or agrees or attempts to aid such other person in planning or committing it OR
• Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so OR
• His conduct is expressly declared by law to establish his complicity

O Unless provided otherwise by code or law defining the offense, one isn’t an accomplice in an offense if:
  ▪ He’s the victim of the offense
  ▪ The offense is so defined that his conduct is inevitably incident to its commission or
    ▪ He terminates his complicity prior to the commission of the offense And
    ▪ Wholly deprives it of effectiveness in the commission of the offense OR
    ▪ Gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense

C. Mens Rea
- Specific intent generally req’d to hold person liable as accomplice – must have intended his action to further criminal action of principal

1. Actions of Principal

  Hicks v. United States (1893) p607 This is Classic accomplice liability
  Facts: Hicks (Δ) was riding w/ Colvert took of his hat and said ‘take off hat and die like man’ before Rowe shot Colvert
  Issue: whether Hicks’ comments, presence w/ Rowe was evidence of his complicity w/ Rowe to murder. (he was charged as a principal in 2nd degree)
  Holding: jury had to be instructed that this individual had to have the INTENT to further or facilitate the criminal act. The jury needs to specifically find that this was his intent.
  Variations on 609:
    (i) just watching the crime – or going along to see the spectacle. is probably insufficient
    (ii) have to show purpose to further the crime. “attaboy” probably not enough
    (iv) conditional intent treated same as regular intent. Still meets requisite mes rea.

  State v. Gladstone (1980) p 611 (aider has to work w/ principal)
  Facts: undercover cop wanted weed from Gladstone; he didn’t have enough, so referred him to Kent, drew map and address for Kent’s house. Cop got weed from Kent. Gladstone was then charged w/ aiding and abetting sale of weed.
  Rule:
    - Aider and abettor has to be in communication with principal committing the crime.
    - The nexus between the accused and the party whom he is charged w/ aiding and abetting in the commission of a crime is a vital element.
    - G couldn’t be held liable simply for furnishing information which was used to commit crime.
**Dissent:** G knew, when he drew the map, that it would instigate the crime
Note: why didn’t they charge him w/ facilitating the purchase? b/c common law took approach that accomplice liability was derivative, so if principal didn’t have requisite intent (and this detective did not) – accomplice couldn’t be charged w/ it.

*People v. Luparello* (1987) p615 (liability of accomplice for foreseeable acts of principal)

**Facts:** jilted lover’s friends killed ex-lover’s husband’s friend Martin (he had told them he wanted information from Martin at any cost) L was charged and convicted of murder

**Notes:** at common law, what would he be – accessory before the fact.

**Holding:** court upheld his conviction b/c it was reasonably foreseeable to him that act of murder would be a foreseeable consequence. (he is vicariously liable for any reasonable offense committed by the person he aids or abbetts.)

**Notes:**
- didn’t look like he had specific intent to have Martin killed. Probably wanted assault or battery
- under Hicks case, could he even be found guilty of complicity to have someone murdered? NO! Luparello is an extraordinary broadening of accomplice liability.
- Number of courts have followed this case, even though it is highly criticized.

- **Roy v. United States** – Roy referred police informant to another to buy a gun. The other guy didn’t sell him a gun, but robbed the officer
  - Common law….extension of Luparello
  - Roy’s conviction for armed robbery was overturned
  - An accessory is liable for any criminal act which in the ordinary course of things was the natural and probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him. (foreseeable not possible)

**D. ACTUS REUS**

*Wilcox v. Jeffery* (1951) p628

**Facts:** Wilcox was a writer for a jazz magazine, and was found guilty of aiding and abetting violation of a law against Alien employment, by American saxophone player. He bought ticket to show, and wrote glowing review in magazine.

**Holding:** Found guilty for unlawfully aiding and abetting
- Mere presence isn’t enough, buying ticket not enough; writing article enough - but he knew about it…it’s an attendant circumstance
- Mental intent for complicity…purpose to furthering the solicitation of the crime

**Tally:** p629

**Facts:** four men on horseback pursuing Ross to kill him for wooing judge’s sister. Judge found out, and wired operator not to let Ross know to save him.

**Holding:** for Tally to be guilty of aiding and abetting, must appear that his assistance was known to principals. (act in concert)
- causation element: for principal liability, the Δ has to cause the harm. For accomplice liability – ‘but for’ causation is not required. So here, even if guy would have been killed w/o judge’s interference, doesn’t get judge out of hot water.
MPC Differs! Can be guilty of complicity if acted w/ reqd mens rea, whether person aids or attempts to aid principal; further, solicitation is established even if actor fails to communicate w/ the person he solicits to commit the crime.

Attempted Complicity Examples:
P630:
(a) under MPC: attempting to aid can still attach accomplice liability, even if your attempt to aid is interrupted.
(b) if the crime you attempt to aid is never fulfilled:
- under common law: if the crime is not committed, you cannot convict the accomplices. Their liability is derivative of the principals.
(c) if principals can only be charged w/ attempt, you would only be able to try to pursue accomplice w/ a charge of attempt of the actual crime.
- under MPC: even in some cases where you couldn’t convict the principals of anything other than attempt; maybe you can get accessory. But the better way of doing it is just to charge the accessories directly w/ attempt of crime. – MPC does expand accomplice liability, but nowhere near as expansive as Luparelli

E. Relationship between Liability of the Parties

State v. Hayes (1891) p 633: MO - 1891
Facts: Δ told Hill he wanted to burglar store; Hill offered to help him and then actually did most of the burglary himself – but Hill’s intent was only to get Δ caught for burglary
Holding: B/C Δ did not actually participate in crime, and Hill never had intent to commit the crime, the derivative mens rea did not exist. (notion is if Δ is being made responsible for actions of Hill, they have to share the same mens rea)

(if situation was reversed – what would be outcome of case)
- if Δ entered building w/ intent to steal, he could be found guilty of attempt as a principal
- and what about Hill? He’s not an accomplice. He doesn’t have the actual intent of furthering the act.

Facts: F&W Protect. Agency had officer pose as hunter to get Vaden to take him in aircraft to hunt fox; agent shot four foxes, and Vaden was convicted of four offenses
Holding: Agency officer’s justification defense would not apply to Vaden.
Dissent: 1) argument against imputing liability for accomplice when principal is actually feigning real intent, is that you’re pulling him into doing something that he wouldn’t have done w/o the act. Encouraging/promoting crime. 2) the enforcement person can abuse the process – take advantage of accused’s aid – and then accused is liable for all of it.
Vaden under MPC: 2.06 - (3)(a)(ii) - accomplice liability and (7) says accomplice may be convicted even though the person claimed to have committed the offense has not been prosecuted, or has an immunity to prosecution...

Could he argue entrapment under the MPC?
- defense avail if law enforcement reps induce another to commit an offense using methods ‘which create a substantial risk that such an offense will be committed by
persons other than those who are ready to commit it.” §2.13 – police can’t make false statements to induce the action; but if you can show that person would do it otherwise, and if police didn’t lie or induce, okay.

Taylor v. Commonwealth (1999) (Excuse of Principal not avail. To accomplice)

Fact: ∆ went with boyfriend to visit his previous girlfriend and his child; boyfriend abducted the child, and she assisted. Court convicted her as a principal in the second degree for abduction.

- boyfriend could possibly say that he had excuse or justification – natural parent may take child w/o permission

Holding: Court said crime was not justified, but might be legally excused. Excuse would be unique to him – not transferable to her. (status of father is unique to him)

MPC 2.06 – agrees w/ court.

POLICY – many courts treat (taking child back for lawful custodian) it as justification; some treat it as excuse. It’s a policy choice.

F. CONSPIRACY

Inchoate crime: like attempt and solicitation – gets at preparatory conduct, before it matures into criminal conduct.

- unlike accomplice liability -> really focuses on group liability; groups banding together to commit much worse crime than one could do alone.

- What makes conspiracy easy way to get at organized crime?
  - Relaxed evidence rules (circumstantially proved)
    - Can use hearsay
    - Can change venue
  - Vicarious liability for substantive crimes committed by anyone involved in conspiracy in furtherance of crime.

1. MPC 5.03 Criminal Conspiracy

- Definition of Conspiracy. A person is guilty of conspiracy with another person to commit a crime if with the purpose of promoting or facilitating its commission he:
  - Agrees with such other person or person 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
  - Agrees to aid another in the planning or commission of such crime or of an attempt or solicitation to commit such crime

- Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) knows that a person with whom he conspires to commit a crime has conspired with another to commit the same crime, he’s guilty of conspiring with such other person, whether or not he knows their identity to commit such crime.

- Conspiracy with Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he’s guilty of only one conspiracy so longs as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship

- 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.

Comment [L.R.36]: Note that if crime is justified – it is essentially wiped out as a charge. (self-defense). Can spread to accomplices.
Renunciation of Criminal Purpose. It’s 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 this criminal purpose.

Duration of conspiracy

- Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the DD and by those with whom he conspired.
- Such abandonment is presumed if neither the DD nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation.
- If an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy and his participation therein.


Facts: petitioner and other woman induced and persuaded 3rd woman to go to FL to be prostitute. He transported her to FL for that purpose; charged w/ inducing and persuading; transporting; and 3) conspiracy

Notes: prosecution trying to get K by having testimony of his alleged co-conspirator, and the woman who was trafficked. The testimony saying what the two women had discussed is at issue. In their supposed discussion, they had talked about K’s involvement.
- normally this kind of testimony is not allowed, but an exception exists for conspiracy trials.
- Court says you can’t use this kind of testimony of subsidiary conspiracy to keep it quiet to prove that there was a conspiracy in the beginning
- most courts refuse to infer that implicit agreement to cover up the crime is inherent in every conspiracy. Need direct evidence of an express original agreement to continue to act in concert to cover up crime.

2. Other notes on Conspiracy:
   a. Abandonment:
      - Conspiracy is abandoned when no conspirators is engaging in any action to further the objectives (pros. Barred if continues for length of SoL)
      - A Δ must take affirmative action to announce his withdrawal to all other conspirators, and many cts require that he take action to thwart conspiracy
   b. Renunciation as defense:
      - Most courts, following MPC, allow complete defense for renunciation under some circumstances
      - MPC allows defense only if circumstances manifest renunciation of actor’s criminal purpose AND actor SUCCEEDS in preventing commission of the criminal objective
      - has to be complete and voluntary
   c. Crime vs. public morals
      - MPC says conspiracy is agreement (literally a combination) to commit a CRIME. Is it always a crime that has to be planned?
No, CA says if object of conspiracy is against public morals – can still criminally charge for conspiracy.
Most states reject this doctrine and says have to pursue criminal objective

d. Punishment:
- grading for conspiracy varies dramatically from state to state
- most fix punishment for conspiracy at some term less than that for object crime
- CA – even an act of misdemeanor can become a felony if object of conspiracy
- MPC grades it same as attempt or solicitation – 1/3 states follow MPC

e. Liability for substantive offenses: in many jurisdictions, party can sometimes be held liable for crimes committed by co-conspirators during course of conspiracy, even when he could not be held accountable for those crimes under principles of accomplice liability

3. Conspiracy as a Form of Accessorial Liability

**Pinkerton v. U. S. (1946) p684 (conspiracy liability for substantive crimes- foreseeability)**

Facts: two bros convicted of several substantive crimes (violate Internal revenue code) and of general conspiracy to commit crimes. Brother Walter commits the crimes; while Walter does so, Daniel is in jail. Daniel doesn’t actually know about Walter committing the crimes, and he’s not committing them himself

ISSUE: whether co-conspirator can be held liable for substantive crimes committed in furtherance of the general conspiracy, even if he did not specifically know of the individual crimes being committed.

Holding – yes can be held liable for acts committed in furtherance of the conspiracy. (which are reasonably foreseeable)

Theory that justifies expansion of liability – *agency theory*. Person joining conspiracy becomes an agent of the conspiracy. Partners are each liable for action of whole in general partnership. Same thing.

Dicta: it would be different if the offense committed by one conspirator was not done in furtherance of the conspiracy, or did not fall w/in scope of unlawful project

**State v. Bridges (1993) p687 (more reasonably foreseeable liability)**

Facts: Bridges got in fight at party, left and got two thugs who brought guns to supposedly keep crowd at bay while Bridges took care of business. (fought) but things got out of control, and Bing/Rolle (thugs) shot into crowd and killed someone.

Holding: Bridges could be held liable for the killing, b/c it was reasonably foreseeable that murder could happen as consequence of the conspiracy.

**RULE:** co-conspirator may be liable for commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy.

What theory of liability can be used to charge the actors?

- 1. Under Section 2.06 (3) – could charge Bridges as an accomplice
  - His defense under accomplice charge? He didn’t intend to kill anyone. He didn’t “have the purpose of facilitating this crime”

- 2. Second theory is that he conspired w/ them to commit aggravated assault

Comment [L.R.39]: Each time you look at fact pattern, look at actors, and understand which theory of liability you can use to charge each?
• So if a murder occurs, is he responsible? There is no conspiracy to commit murder… BUT!
• Reasonably close connection between original plan and harm that ultimately prevailed.
• Foreseeable that this outcome would occur; natural and probable consequence

HYPO p 690  A= organizer and ringleader of conspiracy to rob banks. B and C don’t know each other, but know they are members of large conspiracy and know of each other’ B robs bank 1; C robs bank 2; D steals getaway car used by B

<table>
<thead>
<tr>
<th>Party</th>
<th>Pinkerton liability theory</th>
<th>Accomplice liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>B (for C’s robbery)</td>
<td>yes</td>
<td>Probably no (not furthering C’s crime; no stake in it)</td>
</tr>
<tr>
<td>D (for C’s robbery)</td>
<td>yes</td>
<td>No – no aiding, etc.</td>
</tr>
<tr>
<td>D for B’s robbery</td>
<td>yes</td>
<td>Yes – aided and abbeded.</td>
</tr>
<tr>
<td>B/C for D’s car theft</td>
<td>Yes – reasonably foreseeable; furtherance of same conspiracy</td>
<td>No – neither robbery itself, nor agreement to rob, itself aided and abbeded.</td>
</tr>
</tbody>
</table>

- United States v. Alvarez – agents killed due to unintended turn in events in a drug deal/bust in a hotel
  • 3 dealers who took no part in the shooting were liable for 2nd degree murder
  • Extension of Pinkerton
    • Say they only had minor roles in drug deal…but court disagreed
    • What limits are there?
      o Must be in furtherance of the conspiracy
      o Reasonably foreseeable, though not originally intended
      o More than a minor participant
  • MPC – conspirators are liable for the substantive crimes of their co-conspirators only when the strict conditions for accomplice liability are met

3. ACTUS REUS OF CONSPIRACY
- govt does not need to prove an express agreement between conspirators…circumstantial proof, could be inferential; knowledge by Δ of essential nature of conspiracy ok, even if he doesn’t know details.

Facts: distributors agreed to only sell first run movies to certain theatres at certain prices
Issue: whether ∆’s participation in conspiracy could be proven by evidence that actors participated individually, while knowing that many others were participating at same time.

Rule: conspiracy could be inferred through circumstantial evidence. “not all conspiracies are formed w/ simultaneous action or agreement.”

Evidence here:
- they all were aware of agreement
- agreement was carried on unanimously

p 697 Coleridge instruction: not necessary to prove that the two parties came together and actually agreed in terms to have the common design…can find that two persons pursued by their acts the same object, often by the same means, one performing one part of act and one performing other as to complete it… (this is direction w/ regard to how much evidence is necessary)

Gang Membership hypo on p698: 9th circuit didn’t find that all members carrying guns, etc was conspiracy.
- Argument for conspiracy: 1. agreement can be tacit; doesn’t need to be expressed. 2. And there is a special harm that comes from group activity.
- Argument against: 1. need coordination and planning; not enough time. 2. This could be guilt by association.

a) Overt Act Requirement
- MPC §5.03(5): cannot be convicted of conspiracy to commit a crime w/o overt act in pursuance of act, unless that act is a felony in 1st or 2nd degree
- federal conspiracy statute requests ‘an act’ by any one person
- overt act is one part of actus reus, but also is used to prove intent to conspire.
- Overt act does not require one to approach the level of proximity (or substantial step) of MPC in attempt.
- About half federal statutes don’t mention overt act rqmt. in conspiracy crimes. Supreme court just said they won’t read the requirement in if it was not specifically mentioned by Congress.
- Common law did not require overt act – just agreement

4. Mens Rea of Conspiracy

People v. Lauria – undercover cop pretended to be a prostitute and used answering service
- Common law
- Both the elements of knowledge of the illegal use of the goods or services and the element of intent to further that use must be present in order to make the supplier a participant in a criminal conspiracy
  - Intent may be inferred from knowledge, when the purveyor of legal goods for illegal use has acquired a stake in the venture
    - There was no proof that he charged inflated rates for the answering services
• Intent may be inferred from knowledge when no legitimate use for the goods or services exists
• Intent may be inferred from knowledge, when the volume of business with the buyer is grossly disproportionate to any legitimate demand, or when sales for illegal use amount to a high proportion of the sellers’ total business.
  ▪ An inference of intent drawn from knowledge of criminal use properly applies to the less serious crimes classified as misdemeanors…positive knowledge without more doesn’t establish an intent to participate in the misdemeanor
  Required Mens rea: intent of supplier to participate in the conspiracy
  (specific intent needed in misdemeanor area)

VIII. EXCULPATION
JUSTIFICATION
- Justification and excuse are distinct for our purposes
  o Justification
    ▪ You accept responsibility, but deny it was bad
    ▪ Self-defense
  o Excuse…you admit it was bad, but deny responsibility
    ▪ This is the one that’s personal to the individual
    ▪ The insanity plea

- MPC 3.01: Justification as an Affirmative Defense
  o Justification is an affirmative defense

- MPC 3.02 Justification Generally: Choice of Evils (Necessity)
  o Conduct which the actor believes necessary to avoid a harm or evil to himself or another is justifiable, if
    ▪ The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged and
  o When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable for any offense for which recklessness or negligence, suffices to establish culpability

- MPC 3.04 Use of Force in Self-Protection
  o The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion
    ▪ Limitations on Justifying Necessity for Use of Force
      ▪ The use of force isn’t justifiable
        ▪ To resist an arrest which the actor knows is being made by a peace officer.
      ▪ The use of force isn’t justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual
intercourse compelled by force or threat; nor is it justifiable if
- The actor with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter or

A. Protection of Life and Person:

_U.S. v. Peterson_ (classic definition of self defense/justification) p750 D.C.

- right of self-defense arises only when the necessity begins, and equally ends with the necessity

Elements that must be united:
1. threat, actual or apparent, of the use of deadly force against ∆
2. threat must have been unlawful and immediate
3. ∆ must have believed that he was in imminent peril of death or serious bodily harm
4. his response was necessary to save himself therefore
5. belief must have be honestly entertained and objectionably reasonable

**MPC 3.04**

1) use of force justifiable for protection of the person:
- justifiable when actor believes that force is immediately necessary
- actor believes (subjective)

_People v. Geotz_ (NY) p751

Facts: ∆ shot and wounded 4 youths on subway; said 1-2 had approached him for money – said b/c he had been robbed before, was wary/fearful

Issue: whether or not jury had to find that person could ‘reasonably believe’ that force was in necessary for self-defense, or whether person’s own belief that it was necessary would be sufficient

Holding:

NY STATUTE

- A person may use deadly physical force upon another person if he reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery AND
- Person believes the use of physical force upon another is necessary to defend himself from what one reasonably believes to be the use or imminent use of unlawful physical force by such other person

*note – reasonableness can take into account person’s circumstances and situation at hand
- MPC…pure subjective standard…though reckless belief would get you to manslaughter
- 3.09 helps mitigate. If belief is formed negligently or recklessly, (compared to other actor in situation) then person should be charged w/ negligent homicide (or crime at negligent level of culpability)
  - Example of college girl in the loop who turns around and shoots
  - Charged with a lesser offense
  - Maybe recklessness or negligence with belief formed
- Under both MPC and common law, won’t permit you to raise a self-defense standard

B. Battered Woman’s Syndrome
**State v. Kelly (1984)**

Facts: woman who had been abused for 7 years stabbed husband w/ scissors, reportedly during another attack

**Issue:** whether expert testimony concerning battered-woman’s syndrome should be admissible

**Rule:** where purported common knowledge of the jury may be mistaken, or may lead to a wholly incorrect conclusion, expert testimony as to the reasonableness of a person in defendant’s situation should be accepted.

**Rule:** expert testimony in this case could have lead the jury to determine whether a reasonable person would have believed there was imminent danger to her life

- not proper for expert to express opinion hat Δ’s belief on that day was reasonable, b/c area of expert knowledge in this case only relates to why she didn’t leave husband
- Three rqmts for admission of expert testimony under rule of evidence 56(2)
  ○ Intended testimony must concern a subject matter beyond the ken of average juror
  ○ Field testified must be at such state of the art that an expert’s testimony could be sufficiently reliable
  ○ Witness must have sufficient expertise to offer the intended testimony

Notes:
- most courts seem to agree that the syndrome evidenced is relevant to reasonableness, but only in a limited way

CA in *People v. Hymphrey*: ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm. Jury considers Δ’s situation and knowledge, but doesn’t change std. (770)

- Argument against objective std – too harsh; against too subjective – lose all normative value
- There are questions about whether syndrome is valid
- *Werner v. State*: court refused to let jury hear testimony of expert witness on “Holocaust Syndrome”

**State v. Norman** p776  S. Ct. N.C

Facts: woman was badly abused/tortured for 25 years; 3 days before killing husband abuse intensified. One night after he threatened to killer her, she shot him in his sleep

**Holding:** court did not permit instruction on self defense or imperfect self defense b/c she wasn’t in immediate danger (imminent equated w/ immediacy)

**Rules/Rationale:**
- only where it is shown that Δ killed due to a reasonable belief that death or great bodily harm was imminent can justification for homicide remain clearly and firmly rooted in necessity
- Δ’s subjective belief of what might be inevitable at some indefinite point in future does not equate to what she believes to be ‘imminent’ – devoid of time frame

MPC relaxes the imminence requirement…if it’s inevitable, in the near future, immediately necessary, that’s enough

Notes:
most courts remain unwilling to admit battered-spouse evidence where abuser is killed in sleep
- if woman has 3rd party kill him, most courts don’t allow self defense (even though this could support helplessness in syndrome)

*State v. Schroeder:* inmate killed cell-mate while cell mate was sleeping b/c cell mate had threatened to make a ‘punk’ out of him. Court held that there was no evidence to sustain finding that Δ could believe an assault was imminent.

**Rule:** *Words alone are not sufficient justification for an assault.* P782-783

**Jahnke v. State:** Wyoming
- court upheld not allowing self-defense instruction when 16 year old killed abusive father upon father’s return home
- self defense only ok for circumstances where confrontation or conflict was not of Δ’s instigation

**Ha v. State:** Alaska
**Facts:** Ha killed Buu b/c Buu had threatened to kill him and had violent past.
**Rules:**
- Self-defense withheld from jury b/c ‘inevitable harm is not the same as ‘imminent’ harm.
- Reasonable fear of future harm does not authorize person to hunt down and kill an enemy”

C. NECESSITY

**Justification v. Excuse – in theory**
**Excuse:** benefits of the defense will not be able to accrue to others; purely personal (for ex. insanity)
**Justification:** all other co-conspirators (for ex.) would benefit from that defense
- **first ex:** self defense (we only looked at use of deadly force in self defense)
  - courts require immanency
  - person had to have apprehension of imminent bodily harm/death (some states allow robbery/rape)

**Regina v. Dudley Stevens**
- why didn’t court accept necessity as justification for killing boy for food?
  - MPC 3.02 – elements reqd: (a) harm or evil sought to be avoided is greater than that sought to be prevented by the law defining the offense charged
  - There was no way to determine whether the harm avoided was greater than that inflicted. Can’t way one life over another.
  - (b) neither the code nor other law defining the offense provides exception dealing w/ specific situation involved.

A. People v. Unger p809 Choice of Lesser Evil – residual principle of justification

**Facts:** Unger escaped minimum security farm (was in prison for auto theft). Claimed that he escaped to avoid further sexual abuse and threat of death.

Comment [L.R.42]: Why the concern w/ legislative policy? Deference if legislature was explicit. What if legislature is not explicit? Legislature is looking at social policy concerns. By raising individual justice above policy – would be harmful
**Holding:** court cites *Lovercamp* and *Harmon* decisions where duress (compulsion) or necessity were allowed as defense for crime of escape. Procedurally (he committed crime of escape, and argued that he was justified – necessity)

- *Lovercamp* conditions for applying necessity as defense to prison escape:
  - A prisoner faced with specific threat of death in immediate future
  - No time for a complaint or complaints are futile
  - No opportunity to resort to courts
  - No evidence of force or violence for escape
  - Immediately report to authorities after escape into safety

- Not all criteria are necessary for the defense to go to the jury to establish credibility

**Dissent:**
- allowing this defense will cause slippery slope – encourage prison escapes
- thinks defense should be confined to *Lovercamp* criteria

**Notes:**
- court discusses compulsion v. necessity
- compulsion/duress:
  - ex: ‘escape or die’.
  - Excuse, not Justification.
  - Argument is that person is deprived of free will, not capable of making a moral choice at that point.
  - Note: murder is rarely excused
- Necessity
  - A not deprived of free will – chooses the lesser evil
  - In this case, he chose to escape, rather than going to authorities, etc.

Court did not allow “necessity” defense in needle exchange case.
Rationale:
- Danger sought to avoid was not clear and imminent – was debatable or speculative
- Defendants cannot raise issue of nullification (that juries have right to nullify law on which they are instructed to judge)

*Commonwealth v. Hutchins* – charged with growing pot and tried to claim necessity since he was a victim of progressive systemic sclerosis

- They did not allow the defense
  - The importance to the A wouldn’t clearly and significantly outweigh the potential harm to the public were we to declare that the A’s cultivation of pot and its use for his medicinal purposes may not be punishable
  - Dissent
- Supreme Court said you can’t raise the defense of necessity

**B. Model Penal Code p816 Justification Generally: choice of Evils**
- subjective.
  - Conduct which ‘the actor believes’ to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
    - The harm sought to be avoided is greater than that sought to be prevented by law
Neither the code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved and A legislative purpose to exclude the justification does not exist. If actor was reckless/negligent in bringing about the situation that required a choice of harms, justification unavailable if recklessness/negligence is necessary culpability.

**NY: – 817:**
- difference between NY and MPC
  -- conduct in NY has to be to avoid imminent injury
  -- NY requires necessity arose through no fault of the actor

*United States v. Schoon* p820
**Facts:** Δ were part of group of people who went into IRS where they chanted and spilled fake blood everywhere. Resisted police requests to leave. Δ argument: U.S. support of paramilitary activities causing deaths in El Salvador. Want to get attention to get policy changed.

**Court held that:**
- Cannot use defense of necessity for acts of Indirect civil disobedience (evil they were trying to stop not directly affected by their act – takes an intervening actor)

**Test for the Necessity Defense:**
1. Δs must show that they faced choice of evils and chose lesser
2. they acted to prevent imminent harm
3. they reasonably anticipated direct causal relationship between their conduct and harm to be averted
4. They had no legal alternatives to violating the law.

**EXCUSE**
What kind of excuses, under MPC, does law allow?
3 categories:
1. Involuntary actions: literally, not having control over bodily movement
2. Deficient but reasonable actions:
   a. defect of knowledge – reasonable mistake of fact
   b. defect of will (volitional will) – moral choice wasn’t possible. Person of reasonable firmness would not be able to make a moral choice under the duress.
3. Irresponsible actions: insanity/infancy – sometimes

**A. DURESS**
*State v. Toscano* p845
**Facts:** chiropractor claimed he was threatened that if he didn’t provide false medical reports, his wife could be harmed
**Procedural:** trial judge excluded testimony in connection with Δ’s claim of duress – thought he could tell police
**Holding:** Duress shall be defense to crime if Δ engaged in conduct b/c he was coerced to do so by threat of unlawful force against him or another, which person of reasonable firmness in situation would have been unable to resist. (adopted MPC)
Common law: duress only available when coercion involves use of threat which is present, imminent, and pending

MPC §2.09 Duress
a) Duress = actor was coerced by force of threats of force [against the actor or a close family member] “that a person of reasonable firmness in actor’s situation would have been unable to resist”
b) Murder is never excused under duress
   a. Some jurisdictions allow duress to mitigate murder to manslaughter
c) Not applicable when actor recklessly (or negligently) placed himself in a situation of duress
d) Must be the coercion of another person, not a physical situation (fire)

B. Insanity
- Who has burden of proof of insanity:
  - the accused - defendant
  - P 885 – all jurisdictions create a presumption of legal sanity
  - Federal courts and most states/jurisdictions require clear and convincing evidence of insanity
  - Insanity verdict can lead to great stigma, longer confinement, and more intrusive treatment

M’Naghten’s Case: p879
Facts: crazy guy tried to kill prime minister and instead killed Edward Drummond. Was acquitted b/c successful plea of insanity.
Rule: jury to be told that issue was whether at time of act, prisoner had use of his understanding to know whether it was wicked.
   o Test
      ▪ Need a mental disease or defect (but intoxication doesn’t count) that causes you to be unaware or not realize the nature or quality of the act
      ▪ Stricter test (courts went back after Hinkley)

The King v. Porter
 o It’s useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they can’t be in the least influenced by the possibility or probability of subsequent punishment

Blake v. U.S.: 5th Cir. p885 - 1969
Facts: Δ robbed bank, long history of mental illness/ treatment; drinking, violence.
Rules:
   - burden on prosecution, once hypothesis of insanity was established, to prove beyond a reasonable doubt that Blake was sane at time of commission of crime
   - court adopts MPC standard over the previous, ‘Davis’ standard
   - Follow the MPC standard
      ▪ Lacks substantial capacity to either appreciate (more than knowledge/awareness, but understanding) the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of the law

Comment [L.R.44]: Jones v. U.S. - S.Ct upheld constitutionality of mandatory commitment – can become indefinite
Comment [L.R.45]: Before Hinkley case where burden moved to Δ
Mental disease and defect
- Lacks substantial capacity to either appreciate (understand) the wrongfulness
  - DD just has to show insanity, but PP has to prove insanity

**U.S. v. Lyons** (5th Cir. changes rule from Blake) 1984; p890
**Rule:** Court rescinded MPC volitional prong of requirement. Pretty much went back to M'Naugten standard.

**Rationale:**
- no objective basis for distinguishing between offenders who were undeterred and those who were merely undeterred.
- Claimed most people who satisfied first prong – cognitive – met second prong anyway (2nd prong was volitional: lack of capacity to conform conduct to reqmts of law)
- Only time you’re not guilty at this point is if you are unable to be aware of your actions

**State v. Green (1982) p896**
**Facts:** Green shot officer. Had long history of mental illness – had received psychiatric treatment. Mumbled to no one; didn’t bathe, etc.

**Procedural:**
- in lower court, he was found guilty of first degree murder. Court said prosecution had shown that he was sane.
- On appeal, court actually looked at evidence and said jury was wrong. He was clearly insane. (no reasonable jury could have found sanity)

**Notes:**
- given extensive evidence showing he was insane, why did jury convict him?
  - State offered that he may have hidden the gun. By bringing this up, state was trying to show that he had an awareness that it was wrong.
  - Court’s response: just one piece of evidence showing sanity is not enough. Weighed evidence on both sides…
  - Further, paranoid schizophrenic can have periods of normal behavior
  - And it was only police officers alleging that he was normal

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**International Criminal Law**

**I. Generally**

**A. Two Types:**
1. International Crimes, strictly
2. Transnational Crimes

**B. Big issues are triggered in international law:**
1. Difficult issues of proof; location of def.
2. Have to deal with multiple (sometimes conflicting) legal systems

**II. The Crime of Terrorism**

**NB.** Terrorism = an act of violence committed for a political purpose

**A. Criminalizing terrorist acts**
1. There are 12 treaties on international terror; the US a party to all of them
2. The US is a major part of the effort to criminalize terrorism
3. US Territorial Long Arm Terrorist Statute:
   a. Whoever kills a national of the US, while such national is outside the US AND:
[1] If the killing is a murder, etc…

[2] The Attorney General must certify that the offense was intended to coerce, intimidate, or retaliate against a gov’t or a civilian population

b. This statute creates a conflict of jurisdiction
   i. Conflict btw jurisdiction of state (nation) where the act was committed and the US

B. Types of jurisdiction
   1. Basis for US asserting jurisdiction over terrorist accused people:
      Passive Personality
         = Nationality
         Assert US jurisdiction over acts committed outside US territory affecting US nationals
      • Territoriality
         o Used when the act is committed on US property
         o Abnormal, b/c usually a state’s law do not apply extra-territorially
      • Protective principle
         o Assert jurisdiction over acts of violence against US citizens when such an act is determined to be an attempt to undermine the US gov’t
         • Principle only extends so far; questionable whether an attack against civilians in a allied country would suffice (US v. Rahman)
      • Universality principle
         o Some crimes so shock the conscious of the human mind that any state that can apprehend the criminal can assert jurisdiction and try the person
         o Used regularly by the US to try international terrorists
      • Nationality
         o Assert US jurisdiction b/c the accused perpetrator is a US national (US v. Yunis; John Walker Lindh case)

C. Physical presence of def.
   1. US courts cannot prosecute accused persons in absentia
   2. Def. must be caught and brought under the jurisdiction of the court
   3. Exception, if the def. flees during the trial, the trial can continue

D. Nuremberg Trial
   o Criticized for being trial of victors
   o Tribunal (judges) consisted of 4 winners: U.S., France, U.K. and USSR
   o Prosecutors: one appointed by each signatory
   o Δ’s rights listed; presumption of innocence
   o Crimes Tried:
      ▪ Crimes against peace – outlaws war of aggression
      ▪ War crimes – unnecessary killing of hostages, plunder of property, wanton destruction of cities, slave labor
      ▪ Crimes against humanity – exterminating population; enslavement (aimed at concentration camps)
      o worst evil here? The planning…conspiracy to commit the atrocities.

Comment [L.R.47]: One big issue was whether this was an ex post facto prosecution (law of war on books since 1907)

Comment [L.R.48]: This was extraordinary b/c previously, there were no treaties on this. Further – it prohibited countries from doing something like this to their own citizens. Previously, would be protected by popular sovereignty.
o U.S. pushed for group-based crime. Why? Then no one can say they were just following orders, etc. Each individual can be tainted with the acts of the co-conspirators, etc.
  - what would defense argue? That the allies did it too.
  - Response: jurisdiction of tribunal only includes European Axis countries (Art 6) – victor’s judgment
  - What about retroactivity argument? The ex post facto prosecution.
  - Jackson’s response – what alternative exists for them besides trial? Churchill wanted to shoot them.

Nuremberg premises get codified in U.N. charter:
  - no head of state immunity
  - can’t use duress as defense

III. The Crime of Genocide
A. Genocide is the specific intent crime to destroy, in whole or in part, a religious or ethnic group
   1. ICTY says that a person cannot be vicariously liable for specific intent crime
   2. BUT, command responsibility is one of very few omissions that can be criminal
   3. Genocide, b/c it is a specific intent crime, focuses on the motive of crime as a material element of the crime
      Includes following acts:
      a. killing members of the group
      b. causing serious bodily or mental harm
      c. inflicting conditions of life meant for physical destruction
      d. imposing measures intended to prevent births w/in the group
      e. forcibly transferring children to another group

      what is punishable:
      - perpetrator - conspiracy
      - direct and public incitement - attempt
      - complicity

B. History
   1. International definition of genocide stemmed from WWII
   2. 1948 Genocide Convention was one of the first attempts to criminalize human rights crimes/crimes against humanity
      a. The Convention resulted in the Genocide Treaty
         i. The US did not ratify this treaty until 1988, 40 years after the original ratification in 1948
            i. The US has an exception that this crime must be consistent with First Amendment Free Speech rights
   3. The Treaty criminalized incitement/encouragement of genocide
      a. Recognition that crimes of genocide do not occur because a few people kill, but because a large group of people are encouraged and incited to kill

C. Jurisdiction
   1. Territorial basis for genocide jurisdiction; AND
   2. International jurisdiction for an international tribunal to enforce the convention under international jurisdiction

D. Extradition

Comment [L.R.49]: They mixed up aiding and abetting w/ inchoate offenses like incitement, w/ forms of participation.
1. Remedy when one state has custody of a criminal, but not jurisdiction
2. Custody state will move the criminal to the state with jurisdiction
3. Idea of no haven

E. Two international tribunals
   [1] ICTY – International Criminal Tribunal for the former Yugoslavia
e. Sits in the Hague
c. Sits in Arush
   NB ICTY and ICTR have a common appeals chamber, separate trial chambers

F. Krstic case
1. Conflict = fight for territory btw Serbs and Bosnian Muslims b/c the Serbs wanted more territory and the only way to get it was take if from Bosnian Muslims
2. Serbs attached Srebrenica, people fled, the Serbs caught about 2/3 of men who were leaving and killed them
3. Theory of criminal liability
   a. Founded on complicity inherent of command
   b. That the killings and genocide occurred while Krstic was in command and a commander is responsible for all acts he knew or should have known of OR for any actions that he did not punish
   c. Distinguishable from strict liability in that if Krstic had been elsewhere he may not have been convicted of genocide
   d. Krstic’s personal participation in this crime:
      - charged as perpetrator and under “joint criminal enterprise theory” – akin to conspiracy.
      - he’s charged w/ aiding and abetting - where would that fall in list of what is punishable above? → seems to put it into complicity theory.

   Question for court: what forms of perpetration can you be held guilty for and what’s the mens rea for each form?

   Mens rea rqd here: This court holds that its sufficient if the ∆ knew of the principal’s genocidal intent. Aider and abettor doesn’t have to have the intent himself, just needs knowledge of it.

   ∆ argues that there isn’t evidence to prove the intent. What type of evidence do you need? What is sufficient? Circumstantial evidence. As long as they could show that principal’s had intent, and then showed that by circumstances he would have or should have known – it’s okay.

   Under the MPC, would knowledge be sufficient for aiding and abetting liability for genocide? No. Under MPC, aider and abettor has to share the purpose (have specific intent) of the principal.

   - they used a lower standard of liability in this case than one would use in U.S. courts.

4. Genocide requires specific intent because it is a specific intent crime
a. Thus, the prosecution is required to show the specific intent to destroy, in whole or in part, a religious or ethnic group
b. The ICTY says a person cannot be vicariously liable for specific intent crime (such as Genocide)
c. BUT, command responsibilities is one of very few omissions that can be criminal
d. The court uses Krstic’s presence and awareness of the killing to satisfy the purpose requirement similar/contained in the MPC

Example of Genocide prosecutions focusing on the motive of crime as a material element of the crime

IV. Where to Try to the Accused?

A. Domestic Courts

United States v. Yunis
- Yunis hijacked a civilian aircraft in the middle east with the objective of disrupting a convention but they were not allowed to land where they wanted and eventually let passengers off
- hijacked the plane in Beirut and ended up landing in Beirut because they couldn’t land anywhere
- Yunis is Lebanese and the aircraft is Jordanian
- US prosecuting this case because there were US nationals on the aircraft
- Under the Hostage Taking Act we can assert jurisdiction under the passive personal principle
  - This principle is not widely accepted by the United States because they do not want US citizens being prosecuted by alien guests of the United States
  - The potential problem if widely used for extraterritorial jurisdiction is that when foreigners come here and get into an issue with an American here they don’t want the American to get arrested if they ever travel to the foreigner’s country
  - In the terrorism area this principle is fair because of international treaties which give it an optional basis for jurisdiction, its easy to know what the crime is, and Lebanon is part of the treaty
- The second argument under the Hostage Taking Act is that there is jurisdiction under the universal principle
  - underlying basis of universal principle is that some offenses are so heinous that if the U.S. get perpetrator they are allowed to prosecute them for the world
- The reason for having universal jurisdiction for terrorism is to get rid of the safe haven problem, want to create an interlocking web forcing each state to enforce its jurisdiction
- The Second Statue the court looks at is the Destruction of Aircraft Act
- Two parts of this statute are examined under this statute, the first is 32(b) that jurisdiction exits over offenders later “found” in the US and the court accepts that Yunis was found in the US (universal jurisdiction)
- 32(a) allows jurisdiction over aircraft in overseas or foreign air commerce and the court finds the government cannot successfully indict him under 32(a)
- Congress did not intend to exercise jurisdiction in this way

B. International Courts

1. ICTY
   a. Ad hoc, temporary
   b. Limited jurisdiction – certain geographic areas
   c. US dislikes but tolerates, says should disband by 2010
   d. Crimes within the jurisdiction of the ICC (Art. 5):
i. Genocide
ii. Crimes against Humanity
iii. War Crimes

2. ICC and International Law
   a. Permanent
   b. Jurisdiction (Art. 11):
      i. Crimes occurring in/on the territory of a member (consenting) state
      ii. Nationality of accused is a party to the statute
      iii. Consent
      iv. When Security Council refers the case to the ICC, the jurisdiction is unbound by geography (Art. 13(b))
      v. When a State party refers the case to the ICC AND there are one or more crimes within the jurisdiction (Art 13(a) and Art. 14)
      vi. Prosecutor can refer and investigate within the jurisdiction (Art. 13(c))
   ix. No custodial jurisdiction
     viii. No retroactive jurisdiction, only crimes after July 1, 2002 (Art. 11)
        A. Saddam Hussein cannot be tried by the ICC, even if the Security Council wanted to send him to the ICC
   ix. The ICC must, according to the complimentary, relinquish jurisdiction to a state if that state wants to try the party first
      A. The ICC is not a court of first impression
   c. US objects/wants to destroy the ICC; b/c:
      i. US does not control or veto power over the ICC
         A. Conversely, ICTY was created by Security Council
            ai. ICTY = creature of the Security Council
            aii. Security Council picks ICTY judges
            aiii. US can exercise its veto power over ICTY
      ii. The ICC is controlled by (through the election the judges) “Assembly of States Parties” (member states)
         A. 139 Signatories; 92 Parties
      iii. No American judge(s) on ICC
         A. B/c judges can only be from member states
        iv. US doesn’t want to join ICC b/c:
           A. Afraid of frivolous prosecution
           B. Afraid of US citizens being prosecuted
   d. Crimes within the jurisdiction of the ICC (Art. 5):
      i. Genocide
      ii. Crimes against Humanity
      iii. War Crimes
      iv. Aggression *(additional crime than ICTY)*
         A. e.g. Nazi Germany is the paradigm of these crimes (Nurnberg Trials)
         B. Jus in bello = methods used in war, conduct in war
         C. Jus ad bellum = are you allowed to launch the war in the first place = aggression