

Criminal Law (Gershowitz)

I. **Elements of a Crime** - All 4 must be present to have a crime:

1. **Actus Reus** - An Act - Statutorily defined (you need to have done something - pulled the trigger, pushed someone into the river, taken the pack of gum from the convenience store, etc.) { There are sometimes crimes of omission where the omittor has a duty to the other person - this is rare}
 2. **Mens Rea** - Guilty mind or bad intent; intent is not always required (a crime may be strict liability or actor may be extremely negligent)
 3. **Causation** - The act or failure to act brought about the result
 4. **Harm** - The act must cause some sort of harm (i.e., social harm seeking to be prohibited)
- Omissions are more difficult to prove and usually require a duty

II. **Purposes of Criminal Punishment**

1. **Retribution** - the deserved punishment ("eye for an eye")
 2. **Rehabilitation** - this punishment is necessary for society's benefit
 3. **General Deterrence** - we need to punish him (perhaps harshly) to prevent *others* from committing similar crimes
 4. **Specific Deterrence** - we need to punish him to prevent *him* from committing similar crimes
- Public policy creates an overarching tension w/ respect to crimes and punishment.
 - **Tie in policy arguments whenever possible and defend each view**
 - **Retributivist** - believes that punishment is justified because criminal *deserves* it
 - **Utilitarian** - believes that justification lies in the useful purpose that punishment serves (i.e. deterrence)

III. **Presumption of Innocence**

- The burden of proof is on the prosecution to prove Δ guilty of something (his guilt cannot merely be assumed)

Blackstone - "Better to allow some guilty persons go free than falsely convict an innocent person"

IV. **Standard of Proof**

- a. **Beyond a Reasonable Doubt** - Standard required in **criminal** cases (maybe 90-95%)
 - b. **Preponderance of the Evidence** - Standard required in **civil** cases (51%)
 - c. **Probably Cause** - Standard required to search, arrest, hold for trial, etc. (maybe 25%)
 - d. **Reasonable Suspicion** - Standard required to pull someone over on the street (maybe 10%)
- A. Guilt Beyond a Reasonable Doubt** - in '70, SC said all criminal cases require this standard of proof
- Prosecutor must eliminate all *plausible* alternatives
 - Legislatures have the power to define an offense. Statute tells us the elements of the offense. Prosecution must prove all elements beyond a reasonable doubt
 - **If not an element of the offense, Δ must prove affirmative defense (e.g. self defense), not Π**

Jury Nullification - Δ meets all elements of the statute, but ct. disregards the law and finds him not guilty

V. **Criminal Punishment**

- A. Alternative Sanctions** - Punishment \neq Jail Time
- 2-Part Test for determining if an alternative punishment is appropriate:

1. Is there a reasonable purpose for the punishment?
 - If "putting a face to the crime" serves as a deterrent, retributive, or rehabilitative purpose, it seems okay
 - Humiliation is not a reasonable purpose
 - **Argue that there is a fine line b/t 'reasonable' and 'humiliating' punishment**
2. Is the punishment reasonably related to the crime?
 - These are rarely codified in a statute; they are created by judges
 - In many instances, the sanctions are forbidden on appeal b/c
 - i. Alternative sanction does not serve a legitimate purpose (i.e. the statute's goal of rehabilitation or giving retributive justice)
 - ii. Alternative sanction is not rationally enough related to reasoning for punishment

B. Proportionality of Punishment

1. 8th Amendment - "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
 - Cruel and Unusual - **Argue that if 1,000 people are punished a certain way, is it still unusual? What about 100 people? What about 10 people?** Since 8th Am. prohibits only cruel and unusual punishment, the most cruel punishment may arguably be permissible if it is prescribed often.
2. Proportionality - Courts, not the Constitution, mandate a proportionality requirement for punishment (ex. 50 years in jail is a *disproportionate* punishment for stealing a pack of gum)

In **Coker** (GA death penalty for rape of an adult woman), SC said a punishment is "excessive" and unconstitutional if it (may fail on either):

1. Makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering
2. Is grossly out of proportion to the severity of the crime

In **Ewing** (CA three strikes rule), the takeaway is:

1. Legislatures pretty much have free reign to criminalize whatever they want
2. Legislatures pretty much have free reign to punish however they want (even if crime seems minor and punishment seems harsh)
3. SC will step in to ensure proportional punishment in death penalty cases, but not in most typical non-death penalty cases

The Legislature gets to make decisions re: criminalization and punishment

VI. Principle of Legality

- Common law crimes are disfavored (not often found today in states)
- Legislatures, not courts, should be defining what crimes are b/c they can act *ex ante* (define crime, set forth elements, etc. *in advance*). Court must do it only when a case is before them.
- Congress has almost infinite power to act *proactively*, they have virtually no power to act *retroactively*

A. Reasoning

1. Notice - Judicially created crimes do not provide notice (if there is no statute indicating criminality, it is very difficult for the actor to know the elements of the crime - i.e. he is not on *notice*)
2. Arbitrariness - Legislative laws are more bright-line; judicially created laws may result in arbitrary convictions

In **Keeler** (CA case where Δ stomped on pregnant woman's stomach). Follow these steps to determine if the death of the unborn child constitutes murder under a statute which requires death of a "human being":

1. Look at the murder statute to see if "human being" is defined
2. Look at the general criminal code to see what a "human being" is

3. Maybe look at a dictionary prevalent *at the time the statute was last amended* to try to determine what "human being" means.
 4. Look at the common law to see what the prevailing notions of the day were and what people were thinking at the time
- At common law, you cannot be convicted of murder unless the baby was born alive and subsequently died
 - **Ct. does not assume that the statute is always changing (re-defining laws based on technological advances) b/c this would not allow Δ to inform himself of the law and to conform his actions**

Rule of Lenity - If a statute is unclear or ambiguous, Δ cannot be expected to conform his conduct to it. Therefore, unless the statute is specific and we know actions are illegal, we **do not** hold anyone responsible

B. Statutory Construction

Problems with Vague Statutes

1. They do not provide enough notice to Δ so he can take steps to comply with the law
 2. They can be applied arbitrarily
- **If a statute is vague or overbroad, Ct will find it unconstitutional b/c it does not provide enough notice to an individual to allow him to conform his actions to avoid violating the statute**
 - Ambiguous Statutes may be:
 - Under Inclusive - the target offenders may be able to get around the statute if it is not sufficiently clear
 - Over Inclusive - individuals not intended to be affected by the statute may be found to have violated it

VII. Actus Reas

"Result Crime" - Actus Reas *does* include the result (harm) - (e.g. murder requires a result, a dead body)

"Conduct Crime" - Actus Reas *does not* include the result (harm) - (e.g. DUI does not require an accident, only the conduct of driving drunk)

"Attendant Circumstance" - A condition which must be present, in conjunction with the prohibited conduct or result, in order to constitute a crime.

Ex. "It is an offense to drive an automobile in an intoxicated condition." The words "in an intoxicated condition" represent an attendant circumstance: the *actus reus* of the offense does not occur unless the actor drives her car (the conduct) while intoxicated (the circumstance that must be present at the time of her conduct).

Actus Reas Analysis

- 1) Has there been an act?
- 2) Was it voluntary?

A. Voluntary Act

An Act Must Be:

1. Voluntary (MPC indicates what are *involuntary*)
2. We know it is voluntary b/c it is a "willed movement"
3. Must not only be willed through your body, but processed in your brain to take this step

Mental state is completely separate from the act. However, certain mental processing must go on in order to establish a voluntary act. There must be volition.

Ex. If A holds a gun to B's head and tells him to rob a bank and B does so, B has committed an act b/c B acted with volition and his acts do not fall into any of the MPC's exceptions. B likely has an affirmative defense, but that is B's burden to prove, not A's.

MPC - The following acts are *involuntary*

- A reflex of convulsion
- A bodily movement during unconsciousness or sleep
- Conduct during hypnosis or resulting from hypnotic suggestions
- A bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual

i. Framing

"Time Framing Problem" - When the act occurred might help determine if an act is voluntary or involuntary. You have to look at the statute. If the statute suggests you can dial back hours or days, you're okay.

Ex. Man has a seizure while driving and kills four kids. If we frame the action as Δ turning the wheel towards the kids, it is certainly involuntary. If we frame the action as Δ getting behind the wheel and driving, knowing he has seizures, the act may have been volitional.

ii. Defining the Act for a Particular Crime

Man is charged with DWI, but car wasn't moving. Statute says "operating a motor vehicle."

Argument for Conviction: The car was on, so it was "operating."

Argument Against Conviction: He was only sleeping in the case with the motor running, so he was not "operating" it.

Argue both sides

A. Omission - We only hold someone culpable for an omission if there was a duty

- We only want to hold people culpable for an *overt* act (unless there is a duty)
- We do not want to hold people responsible for omissions b/c we do not want to *impose* obligations on people where they otherwise do not exist.
- It is difficult to prove an omission
- It is tough to draw a line b/t a culpable and an acceptable omission

i. How is a Duty Created

- 1) Relationship - husband/wife, parent/child, etc.
- 2) Statute - a statute which criminalizes omission (i.e. omitting payment of taxes)
- 3) Contract - a contractual obligation to act (i.e. landlord to provide heat)
- 4) Risk Creation - If you place the other person in risk (I hit you w/ my car), I cannot omit to help you. I have to do something (e.g. call the police)
- 5) Rescue - If you start a rescue and do so in a way which prevents others from helping, if you *stop* helping (i.e. 'omit' help), you may be liable. There is no duty to rescue, but if you *begin* rescue, then stop, you may be culpable.

In **Barber** (CA case where doctor stops treating patient when he decides it is not helping), ct. said that physicians have no duty to continue treatment once it becomes of no benefit to the patient. Because there is no duty, there is no culpability for 'omitting' continued treatment.

Prosecutors want to frame as an act b/c there is no duty requirement for an act.

Δ s want to frame as an omission b/c if Δ has no duty, Δ can't be culpable for an omission.

VIII. Mens Rea

"Culpability Approach" - bad state of mind generally; generally wicked (**not helpful for this class**)

"Elemental Approach" - Is there an element of mens rea must be specified in the crime? If so, how does that relate back to the act of the crime?

- You cannot *presume* a mental state, but you can *infer* from the facts.

MPC - There are 4 states of mind (*going down* in hierarchy):

1. Purposely (Intentionally) - with desire; with the conscious objective to do something
 - It is Δ 's conscious desire to engage in conduct or cause a certain result
2. Knowingly - awareness of a practical certainty
 - Δ is practically certain that her conduct will cause the result
 - **Compare to Purpose:** Purpose requires a desire to cause a result. Knowing only requires awareness of a practical certainty a certain result will occur.
3. Recklessly - awareness of a high risk
 - Δ is aware of a substantial & unjustifiable risk that a certain result will occur b/c of her conduct or that a certain circumstance exists
 - **Compare to Knowledge:** Knowledge requires awareness of a practical certainty that a result will occur. Reckless only requires awareness of a risk, not a high likelihood it will occur.
4. Negligently - existence of high risk (constructive v. actual knowledge); you *should* be aware of a substantial and unjustifiable risk (though you are not personally aware of it)
 - If Δ *should* have been aware of a substantial & unjustifiable risk that a certain result will occur or that certain circumstances would exist.
 - The type of risk is the same as with recklessness
 - **Compare to Reckless:** Reckless requires a *conscious/actual* awareness of the risk involved. Negligent only requires a constructive awareness.

- **Unless specifically mentioned in a statute, negligence is not enough to establish Mens Rea.**
- **Δ wants to prove he acted negligently. Π wants to prove Δ acted recklessly or worse.**

Under the MPC - If a statute does not specify a mental state element, assume recklessness or higher.

At Common Law - If a statute does not specify a mental state element, it would usually result in strict liability.

"Transferred Intent" - If A swings at B and hits C, we will still hold A responsible b/c he still had intent. (This is not really necessary b/c the statute doesn't say he must have intent to cause bodily harm to A, just that he have intent to cause bodily harm in general. **TI is okay as long as the social harm is the same.**

Ex. P throws a rock at X and misses and breaks a car window. Here, intent may not be transferred b/c it is not the same social harm being prevented.

A. Specific/General Intent Crimes

- i. General Intent - The intent to commit the Actus Rea of the crime.
 - When reading the statute, is all that is required that the act itself be done with a particular mental state.
 - No requirement that Δ *intend* to violate the law, just intent to do the act.
 - No requirement that Δ be *aware* that the law made his act criminal, just that he intended to do the act.
 - **Δ 's intent can be inferred from the fact that he engaged in the conduct**
 - Ex.** Battery may be defined as an intentional application of force on another person. Gov't must only prove Δ intended to apply force (the Actus Rea of the crime).
- ii. Specific Intent - There must be intent to do something *more* than the Actus Rea of the crime.
 - Gov't must prove one:
 1. Intent to commit a future crime
 2. Special motive
 3. Awareness of some other circumstances
 - Proof of specific intent may not be inferred. It requires proof (but may be circumstantial)

- **If in the middle of the statute it says "with the intent to do X," or "with knowledge of Y," or "with the purpose to do Z," it is a specific intent crime.**

Ex. A person is guilty of burglary if he enters a building . . . with purpose to commit a crime therein. (If Δ entered the building and was just looking around, no intention of committing a crime inside, he cannot be convicted of burglary).

MPC - The MPC eliminates the distinction b/t general and specific intent. If Δ has the requisite mental state, that is enough. Under the MPC, unless specifically stated otherwise, the mental state element found in the crime modifies every element of that crime.

Ex. False Imprisonment - "Knowingly restraining another person unlawfully." MR element is "knowingly." Therefore, you must *knowingly* restrain another and *know* that it is unlawful. (MR element applies to all elements of the crime).

"**Ostrich Instruction**" - willful blindness or deliberate ignorance - we will hold someone responsible if they are aware of a high probability (though actual knowledge is not necessary).

- Knowledge of a high probability that something exists and you don't try to find out
- When something raises a red flag and you take no steps to find out about it, we will hold you responsible
- **The out w/ willful blindness is that you actually, truly believed you did not have to look any further b/c you didn't think anything bad was going on.**

IX. Strict Liability - An offense which does not carry a Mens Rea requirement; the performance of an act is enough

General Intent - One element of the crime is proving intent

Strict Liability - You do not have to prove intent

Basic Premise - There is a strong presumption *against* strict liability offenses.

MPC - Strongly disfavors strict liability

Reasoning: Some of the purposes of criminal law (deterrence, rehabilitation) are not accomplished through strict liability

Categories

1. Regulatory - speeding, etc. - crimes w/ little or not jail time
2. Public Welfare - statutory rape, grenades, etc.

If a statute does not contain a mens rea element, we sometimes read one into it:

- Prison term, harsh punishment? If the punishment is harsh or the prison term long, cts are more inclined to read in a mens rea element.
- Did the legislature include a mens rea element in certain parts, but not others? If the legislature uses a mens rea requirement for some elements of the crime and not for others, cts usually believe the legislature *intended* the crime to be one of strict liability. (**exception: see note below**)
- Does it promote or oppose public policy to make an offense one of strict liability?

Note - **The MPC applies the mens rea element to all elements of the crime unless the statute specifically indicates otherwise.**

Statutory Rape - This is a permissible strict liability offense b/c it attempts to prohibit potentially significant harm to an individual

- **An offense can be strict liability if it carries an incarceration term. That is only one of several factors in determining if something should be a strict liability offense.**
- **There is a strong presumption *against* strict liability offenses b/c we want an offender to be blameworthy/culpable.**

When MPC Would Apply Strict Liability (though generally disfavored):

1. Little or no jail time
2. Public Welfare offenses (e.g. statutory rape)

Reasons for Opposing Strict Liability:

1. Does not serve retributive purpose
2. Strict liability does not deter b/c the actor doesn't know he has done something wrong

Note - Sometimes statutes are written so broadly that prosecutors become enforcers and interpret the law by prosecuting some and not others.

X. Mistake of Fact/Mistake of Law

A. Mistake of Fact - attempts to negate the mens rea element required by the crime

- This is a defense to a crime. The burden of proof is on the Δ.
- Mistake of Fact prevents liability if it shows that the Δ lacked a mental state element essential to the crime
- i. Specific Intent** - The mistake of fact negates mens rea if Δ has a genuine belief (subjectively), as determined by the jury. His belief does not have to be reasonable.
- ii. General Intent** - The mistake of fact negates mens rea if Δ's belief is genuine (subjectively) and reasonably (objectively), as determined by the jury.
- **Mistake of Fact is never a defense for a strict liability crime**

Under a Common Law Analysis:

1. Ask yourself: Is this a general or specific intent crime?
2. If it is specific intent, does the mistake relate to the general intent element or the specific intent element?
3. Assuming the mistake relates to the specific intent element, was it an honest/genuine mistake? (reasonableness does not matter)
4. If it is general intent crime, or the general intent element of a specific intent crime, is the mistake honest/genuine and objectively reasonable?
5. "**Moral Wrong Doctrine**" - If the mistake of fact negates the requisite intent, there is an exception if your conduct is an immoral act. (this typically is not applied anymore)
6. "**Legal Wrong Doctrine**" - If the mistake of fact negates the mens rea element for the more serious crime, but the mistake proves he *did* commit a lesser crime, we toss out the mistake entirely and hold him to the higher standard. (**Ex.** Child porn - If Δ believes person is 18, when in fact they are 17, Δ gets the more serious punishment b/c distributing child porn to an 18 yr old is still illegal)

Ex. A convinces B to rob a store as part of a CIA mission. A statute provides that robbery is "the forcible taking of the personal property of another with the intent to permanently deprive such person of the property." If the jury decides that B had a honest/genuine belief that he was helping the CIA, his mistake of fact will negate the mens rea element of the crime. It does not matter whether his belief is reasonable.

Note - **On exam, mention "Moral Wrong Doctrine," but don't go into too much detail. Very few good examples exist.**

- Older **Common Law** rule is that you consider the reasonable person w/ no particular characteristics. Increasingly, we look at a reasonable person in Δ's position. (**In both modern Common Law and MPC**)

B. Mistake of Law - ignorance of the law is no excuse

General Rule - Mistake of law is not a defense and does not negate any type of mens rea

Exception - Mistake of law is a defense if there is reasonable reliance based on an official interpretation of the law by someone who has the job of interpreting it (usually not a cop or a lawyer, but like an attorney general)

Exception - If a statute includes language that requires knowledge that something is illegal, then it is conceivable we will give a mistake of law instruction (if you honestly believed it).

- If ignorance of the law were an excuse, you would in essence encourage people to remain ignorant of the law
- While a mistake of *criminal* law is usually not a defense, courts are usually more willing to accept mistake of a *non-criminal* law as grounds for negating mens rea.

Malum in se - crimes which just by looking, everyone knows are illegal (murder, rape, arson, etc.)

Malum prohibitum - crimes which are not inherently terrible, but society has decided to prohibit them for the benefit of society

C. MPC

i. Mistake of Fact (§ 2.04) - MPC does not differentiate b/t general and specific intent crimes.

Therefore, the mens rea applies to all elements of the crime.

- Mistake of Fact is a defense when it negates the mens rea element of the statute
- MPC gets rid of the "Moral Wrong Doctrine" and the "Legal Wrong Doctrine"

ii. Mistake of Law - Ignorance of the law is not an excuse

- Mistake of Law can acquit the Δ if the mistake negates the mens rea element of an offense (however, these are *very rare*)

Exception - If a statute includes language that requires knowledge that something is illegal, then it is conceivable we will give a mistake of law instruction (if you honestly believed it).

XI. Causation

Two Concepts of Causation

1. Actual Cause (Cause in Fact)

- Acceleration - if a 2nd act speeds up a death, we can hold that actor responsible for speeding up the death/shortening the life of the individual (even if he accelerates it only by a moment).
- But For - (**most common**) - would the individual have died *but for* this conduct
- Substantial Factor - (Sopranos Test) - when more than one actor engages in an act that on its own would have caused the death, then both actors satisfy the causation element (if you were to use the But For test, you could not settle an issue where 2 people pull the trigger at the same time)

2. Legal Cause (Proximate Cause)

Basically, the chain of events must be close enough to link the cause to the ultimate result.

Foreseeability is the key issue

- Look for a superseding intervening force or event that occurs after Δ's initial act/omission but before the resulting harm
- Analysis -
 - Does something happen b/t the act and the harm?
 - If so, does it break the causal link?

iii. If so, the original actor is not responsible if the superseding intervening cause was not foreseeable.

"Apparent Safety Doctrine" - This can break the chain of causation.

Ex. Man hits his wife. Wife leaves and goes to her parents' house. When they don't answer the door, she sleeps outside and dies of exposure. Δ is not liable b/c the "Apparent Safety Doctrine" breaks the chain of causation.

Note: There cannot be legal causation w/o actual causation. Actual causation is not enough. Prove actual causation and then prove legal causation.

Note: **With foreseeability, always argue both sides (that a superseding intervening cause was/was not foreseeable).**

Concurrence of the Elements

1. Identify the act you are interested in
2. Look at mens rea
3. Look at harm

In **Rose** (RI case where man was hit by bus and dragged when vehicle drove away), the problem is that we don't know when the harm actually occurred (if the victim died on impact or if he died as a result of being dragged by the fleeing vehicle).

Causation must still link the act to the resulting harm. If the man did not die at impact, but rather as a result of being dragged by another car, the bus driver's act is not linked to the resulting harm (he didn't kill the victim). The prosecution must show that the initial hit did not kill him in order to prove that the recklessness of driving away *did* kill him.

MPC - Under the MPC, actual causation is almost exactly the same. However, the MPC dispenses w/ proximate cause. Instead, they ask if Δ has the requisite culpability for the crime (basically they ask the jury to make a discretionary decision of whether or not the actor caused the act).

XII. Homicide

A. Common Law -

Murder - the unlawful killing of another human being with malice aforethought

- At common law, "malice aforethought" served to say what amounted to murder and what didn't.
- In American law today, "aforethought" really doesn't mean anything.

Four Types of Malice - All amount to *murder* and are all treated the same and all punishable by death. Murder does not exist in degrees at common law.

Express Malice

- i) Intent to kill
- ii) Intent to engage in grievous bodily harm

Implied Malice

- i) "Depraved Heart Murder" - no intent to kill, but Δ acted in such a way which evinces a depraved mind, wanton disregard for an unreasonable human risk, extreme recklessness, etc. (**Ex.** riling up a pit bull and releasing him in a park full of children)
- ii) Felony Murder - no intent to kill, but death occurs during the intentional commission of a predicate felony

Manslaughter - lack of intent

1. Voluntary Manslaughter - someone who intended to kill, but did so in the heat of passion (**Ex.** come home to find wife cheating)
2. Involuntary Manslaughter - death results during reckless behavior - though not reckless enough to reach the level of depraved heart murder (sometimes tough to separate the two)

"1 year, 1 day" - At common law, death resulting from the actus reas must occur w/in 1 year and 1 day. If not, there can be no charge of any homicide. Most states have gotten rid of this requirement, but some still have it.

Premeditation - should mean a *quantity* of time

- There is no bright line rule re: quantity of time. It is determined on a case -by- case basis.

Deliberate - should mean the *quality* of time (i.e. you took the time to weigh the factors, free from passion, reasonably, etc.)

You can premeditate w/o deliberating (if you took time to think, but you were still hot and bothered, not cool and rational). You cannot deliberate w/o premeditating b/c logically, you could never coolly and rationally think about something w/o a quantity of time to do so.

Note: Since there is no bright line rule for premeditation, always argue that Δ did/did not spend *enough* time. First, assess the quantity of time (argue both sides); then, assess the quality (argue cool vs. angry). If there was not *enough* time, there couldn't have been the necessary *quality* of time, but always argue both.

- When there is a willful and deliberate intent to kill, we agree that those murders are worse than ones done quickly and we grade them higher.

In **Forrest** (NC case where man killed his father to put him out of his misery, though he was getting better), the court looked at factors to determine whether or not there was premeditation. Factors included, but were not limited to:

1. Provocation by the deceased
2. Conduct before the killing
3. Threats before the killing
4. Ill will
5. Dealing of lethal blows after the victim was deemed dead or helpless
6. Killing in a brutal manner

B. MPC

- **Generally interested in culpability in Mens Rea**
- MPC generally does not favor the degree approach

Murder

1. Δ acts purposefully to kill
2. Δ acts knowingly to kill
3. Δ acts recklessly with extreme indifference to the value of human life (similar to common law depraved heart murder)
 - **No felony murder under the MPC - however, there are instances where the commission of a felony would make your actions extremely reckless**

Manslaughter

1. Voluntary Manslaughter - extreme emotional distress or disturbance

Note - this is broader than the **common law** voluntary manslaughter (more than just finding wife in bed w/ someone else)

2. Involuntary Manslaughter - killing that results from reckless conduct
3. Negligent Homicide - this does not exist at common law

C. Heat of Passion

i. Common Law

1. Words alone are not enough to constitute provocation
 - Society believes that in response to words, a person should respond rationally and reasonably (and not kill anyone)
2. Minor physical activity is not enough

At **common law**, there are a series of "pigeon holes" which amount to heat of passion. If you do not fit into one of these, you cannot use the heat of passion defense:

- a. Catching a cheating spouse
- b. Serious assault
- c. Involvement in mutual combat
- d. Seeing a relative killed and going after the killer

Test for Heat of Passion

1. Is there adequate provocation? (words alone are not adequate)
2. Is the response reasonable?
3. Is there a cooling off period?
4. Is there a causal connection b/t the passionate event and the harm that occurs?

ii. MPC - does not like the common law rules

1. Under the MPC, words alone can be enough (a person can be subjectively provoked by words alone).
2. Must determine if that subjective provocation is reasonable
3. MPC is less concerned w/ linking the passionate event w/ particular harm (causation and cooling off period are more lenient in MPC)

- In the **MPC**, there are no "pigeon holes." All we ask is if Δ was reasonably provoked. He will argue that to the jury and they will decide if they believe him or not. (At common law, we do not give such a jury instruction b/c Δ either fits on of the pigeon holes or does not).
- **Under the MPC, if there is *any* subjective provocation, it can get to the jury for a decision on reasonableness.**

In the MPC, it is not the "heat of passion" rule. Δ "acts under an extreme emotional disturbance.

Good News for Δ : Almost always will get issue to the jury (seems easy to point to *some* evidence of provocation)

Bad News for Δ : Jury likely will not believe it (practically)

Note - Because jury has broad discretion to consider "emotional disturbances," if they reject the argument, the appellate board gives great deference to the jury's decision.

"Heat of Passion" Defense allows you to 'ratchet down' charges. To get to voluntary manslaughter, you must start with murder. However, b/c there is a heat of passion defense, we 'ratchet down' the charge to manslaughter.

D. Unintentional Killings - Involuntary Manslaughter

- These are based on recklessness and we must determine if it is run of the mill recklessness (manslaughter) or *extreme* recklessness (depraved heart murder).
- **To be extremely reckless, the risk must be unjustifiable.**

Depraved Heart Murder

1. Is there a high probability of death?
 2. Is there a base, anti-social motive to the conduct?
- i. **Common Law** - start w/ manslaughter (recklessness), and 'ratchet up' if you can demonstrate wanton disregard for human life by:
1. Is the behavior extremely risky?
 2. Is there an anti-social reason for doing it?
If so, there is extreme recklessness and you may 'ratchet up' to depraved heart murder.
- In typical recklessness case, there will be extremely reckless behavior that shows a high probability of death with no good reason for what they're doing. There will be some where the probability is lower but the behavior is *really* anti-social. Others will have only slightly anti-social behavior, but a very high probability of risk.

If you decide that something is either *involuntary manslaughter* or *depraved heart murder*, say why. Argue both ways.

Note: Gershowitz thinks it is harder to 'ratchet up' *depraved heart murder* than to 'ratchet down' to *involuntary manslaughter*.

E. **Felony Murder** - Felony + Death = Murder

- At **common law**, all felonies were dangerous and there were fewer in number than today. All were *malum in se*. If you committed a *malum in se* offense and someone died (either accidentally or intentionally), you would be held criminally responsible for the death b/c what you did was bad.

Note: In many jurisdiction, we're interested in a specific list of enumerated felonies ("underlying felonies" or "predicate felonies"). In jurisdictions who do not enumerate which felonies qualify, judges try to determine if the felony is inherently dangerous. Some states, like CA, apply *both* sets of standards.

- In **Fuller** (CA case where Δ stole tires, got into a police chase, and someone died), the court said that although *burglary* is not inherently dangerous at common law, the legislature has the power to write whatever laws they want. Therefore, because burglary was specifically enumerated as an offense which would qualify for felony murder, the ct deferred to the legislature. **Even though an offense would not be inherently dangerous at common law, if enumerated as a qualifying offense, the cts will defer to the legislature.**

To Determine if an Felony is Inherently Dangerous: (Cts may use one of these analyses)

1. **Abstract** - more sound, but sometimes overlooks the real world elements
 2. **Contextual** - almost always leads to concluding inherently dangerous b/c there is a dead body
- Felony murder is very easy to prove. If there is a felony and there is a death, you win. That is why many cases which may also amount to other crimes (extreme recklessness or depraved heart murder) are instead brought as felony murder.

Note: If the felony is not enumerated and you're not sure if the ct will find it

inherently dangerous, you should bring additional charges (such as extreme recklessness or depraved heart murder).

i. "Independent Felony" vs. "Merger Doctrine"

- In order to have felony murder, there must be death and an "independent felony"

"Merger Doctrine" - If you made an assault a predicate offense to felony murder then you'd never have to prove intentional killings (assault + death would always = felony murder). The legislature could not have intended that. Therefore, the assault *merges* with the homicide making it *part of* the homicide.

Voluntary manslaughter typically merges and almost all assault charges merge. When it merges, we do not have a collateral felony and felony murder cannot be charged.

"Res Jeste" - We do not cut off Δ's liability the second he leaves the dwelling (part of the ongoing crime). *When res jeste* ends is to be determined by the jury. **If a death occurs in the immediate flight from a felony, Δ is guilty of felony murder.**

- a. **Agency Approach** - Felony murder does not apply if the person directly causing the death is a non-felon. **(Majority Rule)**

Ex. A = felon	B = felon	C = victim	D = police
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1. A shoots C accidentally in the course of a robbery. A is guilty of felony murder. B is guilty of felony murder under the agency approach b/c A is the agent of B b/c they're on the same team.
2. D shoots and kills A. A is not liable b/c he's dead. Under an agency approach, B is not guilty of felony murder b/c D is a non-felon (not on the same team) and is not an agent of B.

Note - Under an agency approach, if an innocent party (non-felon) is the shooter, you can never hold the felon responsible for felony murder b/c the person who fires the shot is not their agent.

- b. **Proximate Causation** - Felony murder can apply if the person directly causing the death is a non-felon if the felon set in motion the acts which resulted in the victim's death. **(Minority Rule)**

Note - Under a proximate causation approach, if the shooter is a non-felon, the felons can be held responsible if there is a proximate cause scenario (i.e. it is foreseeable that when they began this endeavor, that someone could end up dead).

- The felon can be convicted a non-felon kills another non-felon (i.e. clerk tries to shoot felon and kills a hostage).
- If, however, the clerk kills felon A, in a small minority, felon B cannot be responsible b/c it is a justifiable killing and *nobody* should be held responsible for it (i.e. if victim is a felon)

XIII. Capital Murder

- In '71, a CA Δ argued that he couldn't be executed b/c procedures were so unfair and death

penalty was applied so arbitrarily that it violated Due Process. SC disagreed

- In **Furman v. Georgia**, Δ argued that the death penalty violated the 8th Am., not Due Process. SC agreed and struck down all 35 state death penalty statutes. In 10 separate opinions, some justices said the procedure was too arbitrary (like getting struck by lightning), some said death penalty was *always* unconstitutional, and some said that it was for the legislatures, not the court, to decide. After *Furman*, states wrote statutes which SC would find constitutional.
 - **Furman** said that capital trials need to be bifurcated. (**TX bifurcates all criminal cases**)
- In **Gregg v. Georgia**, SC said:
 1. States can write a death penalty statutes (i.e. death penalty is not *per se* unconstitutional).
 2. The GA death penalty statute is constitutional b/c it clearly lists aggravating factors.
 3. Δ has the option to show mitigating factors he would like.
- In **Tyson v. Arizona** (AZ case where escaped convict and family steal a car and shoot the passengers), SC says death penalty is okay for non-shooters who were down the road when the convict shot the passenger's b/c they were major participants in the underlying felony (the escape from jail and continued flee).
- In **McCleskey v. Kemp**, Δ cites the 'Baldus Study' to demonstrate statistics of racial discrimination in death penalty cases. SC said that you must show discrimination in his particular case.

XIV. Rape

A. Common Law - At Common Law you need force and lack of consent.

Traditional Rules of Common Law Rape: (Still the rules in many places, though they sort of offend our modern sensibilities)

Rape: Carnal knowledge of a woman forcibly against her will.

- a) Carnal knowledge means 'ordinary' vaginal intercourse (this does not mean non-vaginal intercourse)
 - b) The victim could *only* be a woman (though in some jurisdictions this is no longer true)
 - c) Only the male can be the perpetrator
 - d) It must be forcible and against her will (these are *2 different* things)
- Force can be application of physical force or the threat of force ("constructive force")

How much force is necessary?

- 1) Enough to cause serious bodily injury or death
 - 2) Enough to overcome's the victim's resistance
- If Δ causes serious bodily harm or death, we're not really going to look for the victim's resistance. **When there is less force, you do not convict unless the victim has 'resisted to the utmost.'**
 - In acquaintance rape, it is difficult to quantify the amount of force required to demonstrate force.

Note - At common law, you always need more force than is needed for penetration. **Demonstration of penetration is not enough to show force, you need something more (i.e. 'extrinsic force').**

- In the case of stranger rape, typically the lack of consent and the use of force are bound together and there is little difficulty showing that it happened. At trial, these are easier to prove.

- In couples cases, it is usually easier to demonstrate lack of consent, but difficult to demonstrate force. **It is entirely possible to demonstrate lack of consent, but not force.**

Note - At common law, if the victim is alleging threat of force, the threat must be **reasonable**. It is not enough that the victim demonstrate a subjective *fear* of force. Otherwise, we'd end up convicting people who looked scary, but who might not have been warned that what they were doing was unwanted or wrong.

Note - At common law, we spend a lot of time looking at whether victim's resisted and how much. The reason for this is b/c this is the best evidence of Δ's mens rea.

Note - First, assess consent. Second, demonstrate force (actual or constructive). Even if both exist, you still must look to see if there was a mistake in fact.

B. Rape Reform

Note - Reform has come to the point in many states that we can establish sexual assault or rape simply by showing lack of consent and penetration (no extrinsic force required). If we do not require extrinsic force, we do not require resistance from the victim.

- i. **Lack of Consent** - Consent may be explicit (w/ words) or implicit (read b/t the line)

Three possible standards would make the consent issue more clear:

1. No means no
2. She doesn't say 'yes' - until she says 'yes', there is no consent
3. Until there is something in writing, there is no consent

- A key difference of rape reform is that now, the burden of proof is really being placed on the Δ to show that his belief that the victim consented was reasonable. (though courts claim that ∏ must still prove the unreasonableness of Δ's belief)

Note - Even though consensual intercourse is commenced, either party is entitled to withdraw consent at any time. At that point, if the person continues after consent has been withdrawn, that person is just as guilty as if there were no consent in the first place.

Note - There has been discussion as to what constitutes a reasonable period of time to stop. At common law, withdrawing consent is not enough, she must also provide some sort of resistance.

C. Mistake of Fact

- Because rape is a general intent crime, the mistake of fact going against mens rea must be genuine/honest and objectively reasonable. Simply lacking *actual* knowledge alone is not enough, b/c the lack of knowledge may be unreasonable.
- The reasonable person is a reasonable person in the Δ's circumstances.

Note - We only give a mistake of fact instruction if there is evidence in the record to support the claim. If the ct looks at the evidence and sees simply 2 different stories (his and hers), there is not mistake of fact. The court will either believe him or her.

Burden of Production - the only way we get some evidence is from the Δ, he has the burden of production

Burden of Persuasion - this still rests w/ the gov't to prove beyond a reasonable doubt

For mistake of fact, Π still has burden to prove Δ had the requisite mens rea. Gov't has the burden of proving all elements of the crime, including mens rea. If Δ says there is a mistake of fact, he has the "burden of production" to introduce *some* evidence to support his claim. In the end, Π still has the burden of persuasion to prove there was no mistake.

D. Fraud

Fraud in Factum - The consent fails b/c what happens is not what the victim consented to.

Ex. OB/GYN says I am going to put an instrument in and patient consents. Instead, Dr. puts in his penis. This is fraud in factum b/c she consented to a medical procedure, not to sexual intercourse.

Fraud in the Inducement - You trick a person into having sexual relations. They still know they're having sexual relations w/ you.

Ex. Sleep with me and I'll make you famous.

Fraud in factum invalidates consent and the actor can be held guilty of rape. Fraud in the inducement never invalidates consent. Therefore, if I trick you into having sex, I cannot be guilty of rape.

E. Rape Shield Statutes

- Δ does not get to introduce evidence of the victim's prior sexual history (Δ cannot introduce no question victim about it).

Reasoning: First, it is irrelevant. Second, it is harassing and humiliating to the victim. Therefore, it is argued, it would deter people who have been victimized from coming forward.

Exceptions: We *would* allow evidence of motive to fabricate (i.e. prior allegations of rape which turn out to be untrue).

- Typically, judges have a lot of discretion re: what evidence to allow. Rape shield statutes take this away. They presume it is irrelevant and inadmissible.
- Π works hard to keep it out and Δ works hard to get it in. Therefore, while it may not be relevant, it may cause jurors to draw inferences and conclusions about the victim in *this* case based on *previous* evidence.

XV. Inchoate Offenses

- The typical criminal code has a series of target offenses and only 1 section saying that it is a crime to *attempt* any of the target offenses

Attempt - Focuses much more heavily on the Actus Rea of the crime (was it committed or not - this is difficult to determine)

Conspiracy - Almost entirely about Mens Rea (little needs to be determined w/ regard to Actus Rea)

Solicitation - If you ask someone to do something illegal (even if they don't do it), you're guilty.

"Merger Doctrine" - You cannot be convicted of the inchoate offense and the underlying crime. The inchoate offense 'merges' and becomes part of the target offense. It *is* possible to be *charged* w/ the target offense and to be *convicted* of attempt alone (b/c attempt typically is considered to be a lesser, included offense).

Think About Attempt as a Series of Steps:

1. Idea - you come up w/ the idea for a crime

2. Think - you think about the crime
3. Intent - form the intent to actually commit the act
4. Prepare - what will I need to carry out the act
5. Begin - you begin to commit the crime
6. Complete - you complete the steps necessary to commit the crime
7. Accomplish - we figure out if you actually completed the crime (i.e. caused intended harm)

In almost all jurisdictions, attempt is punished *less severely* than the target offense.

1. The social harm is not accomplished. Less social harm begets less punishment.
2. If you punish attempt as much as the target offense, there is no incentive to stop at the last minute.
3. It is often difficult to know if the actor is as culpable (we don't know if he had the same intent as a person who *did* complete the target offense).

Reasons to punish *as severely* as the target offense:

1. Δ has the same culpable mens rea
2. Δ is just as dangerous as the target offense Δ

Complete but Imperfect - I pulled the trigger, but the gun jammed, so the result was not accomplished.

Incomplete Attempt - Δ does some of the act necessary, but either quits or is stopped before taking the very last step.

When punishing attempt, we know for sure that in the completed attempt, Δ is *totally culpable*. In the incomplete attempt, Δ may decide to stop before going through with it. Therefore, it is much more difficult to assess the incomplete Δ's culpability.

Note - We don't need an overt attempt, we can infer attempt from Δ's actions b/c there is no other valid explanation for his actions.

A. Specific Intent Crime

- Attempt is *always* a specific intent crime. It does not matter what type of crime the target offense is general or specific intent.
 - a. Attempt to commit the actus reus of the target offense (**Ex.** Burglary - the breaking and entering of a dwelling house)
 - b. Specific intent to commit the target offense
 - Because you must *intend* to attempt, you cannot attempt a reckless or negligent offense. Therefore, for example, you cannot be convicted of an attempted depraved heart murder.

Note - Because attempt is always a specific intent crime, attempt must be done *purposefully or knowingly*. As such, it is harder to convict for attempt than for a target offense (when the target offense is established by negligent or reckless behavior)

Note - Because felony murder is an accidental crime, you can *never* be convicted of attempted felony murder.

B. Common Law

- We are interested in differentiating b/t preparation and attempt. Issue is whether to define actus reus broadly or narrowly. If narrowly, it will be very difficult to convict and guilty people will go free. If broadly, it will be easy to convict and innocent people who started down the path and at a certain point turned back will be convicted anyway.

1. Some approaches look *backwards* at what has already been done.
 2. Some approaches look *forwards* at what remains to be done. (most common law approaches go this way)
- i. **Common Law Approaches** - These tests are *difficult* to apply. If a jurisdiction uses only one test, it is fairly easy to say 'guilty' or 'not.' Many jurisdictions use more than one. In such jurisdictions, they are likely applied in a result-oriented fashion (i.e. use the test which results in conviction).
1. **Last Act Test:** Only convict Δ if he has performed all acts necessary to commit the target offense. **Note: This is the narrowest rule and used almost nowhere.**
Ex. Δ buys a gun, loads it, pulls it out, points it at the victim, *and pulls the trigger*. (Under this test, bank robbers would need to be *in* the bank, pointing a gun the teller)
 2. **Physical Proximity Test:** Only convict Δ when the target offense is within his grasp. He must be physically close to being able to complete it and he could do so almost immediately. **Note: We do not require him to commit the last act (i.e. pull the trigger).**
Ex. Δ buys a gun, loads it, pulls it out, points it at the victim, and then police tell him to freeze. Since it is within his grasp, he can be guilty of attempt. (Under this test, bank robbers may need to be inside the bank, or maybe right outside)
 3. **Dangerous Proximity Test:** We can convict Δ if he is on the verge of being able to commit the crime (this is more *flexible*) We are more willing to convict Δ if the target offense is dangerous, conceivably great social harm. **Note: This is a sort of balancing test of physical closeness to being able to complete the crime and the particular danger of the offense.**
Ex. Δ takes a bomb to school, places it in his locker, and goes to class. He is likely not guilty under the *physical proximity test* b/c he is not physically w/ the bomb while he is in class. However, under the *dangerous proximity test*, he is physical close to being able to complete the crime and the offense is particularly dangerous. (Under this test, bank robbers probably don't have to be inside the bank, so long as they are dangerously proximate to the bank)
 4. **Indispensable Element Test:** Only convict Δ if he all necessary instrumentalities to commit the crime. He must have all of the equipment and must be in a position to use it. If he is missing even 1 instrument, we cannot convict. **Note: This is criticized b/c very culpable people get away b/c they're missing one instrument, and less culpable people get convicted b/c they have all the instruments, even if they wouldn't actually go through with it.**
Ex. Δ plans to blow up a building. He buys all of the instruments to build a bomb, but forgets to buy a detonator. Because he does not have all instrumentalities to commit the crime, we cannot convict. **Note:** In this test, they bomb *does not* have to be in the building Δ wishes to blow up (similarly, under this test, bank robbers do not have to be *inside* the bank).
 5. **Probably Desistance Test:** Only convict Δ if we think he is 'past the point of no return.' **Note: Look at an ordinary person in this scenario and ask if we think he may still turn back, or if he is past the point of no return.**
Ex. Δ brings a gun to work to kill his boss. He pulls the gun out of his bag and walks towards his boss' office. If an ordinary person in this scenario may still decide not to go through with it, we do not convict. If he is past the point of no return, we do convict. **Note:** Consider aggravating circumstances (i.e. if he got to his boss' office and his boss' daughter was in there, an ordinary person might not want to kill someone in front of their child and might desist).
 6. **Unequivocality (Res ipsa) Test:** Only convict Δ if, by looking at his actions alone, it is clear that Δ was going to carry out this crime (the idea is that we punish people for their actions, not their words). **Note: Do not focus on words or language, we only**

look at Δ's actions. This is like watching TV with the sounds off.

"Concurrence" - The Actus Reas and the Mens Rea must concur. We only convict if Δ has the requisite Mens Rea at the time the Actus Reas is committed.

Ex. Δ assembles a bunch of combustible substances in his house and *does not* light them. He then goes to a local bar and solicits someone to light a candle in the house. The man says no, so Δ drives back to his house. On his way there, he decides not to go through with it, and turns back around. At the time he collected the combustibles, he did not have the requisite mens rea. At the time he was driving home to light the candle himself, he *did* have the mens rea, but did not have the actus reas b/c he was not there w/ the combustibles to carry out the crime. Because he doesn't have both at the same time, he can't be guilty. This amounts merely to collection/preparation.

C. MPC

"Substantial Step" - If Δ is in possession of materials to be used in a crime, they have them near the scene of the crime, and there is no good reason to otherwise have the materials in this situation, we can hold Δ guilty of attempt.

Note: It is easier to convict under the "substantial step" test. This step looks *backwards* at what has already been done. Many other tests (i.e. many common law tests) look *forwards*. Therefore, if Δ has taken steps in a particular direction, we can look backwards and say that it does constitute attempt.

D. Impossibility

Factual Impossibility - Impossibility due to the fact that the illegal act cannot *physically* be accomplished. The mistake is the Δ's. If the facts were as the Δ believed them to be, the crime would have been committed. **This cannot be a defense.**

Ex. Δ tries to pick someone's pocket, but it is empty. Δ cannot use impossibility as a defense.

Legal Impossibility - Impossibility due to the fact that what Δ intended to do is not illegal, even though he thought he was committing a crime or b/c one element of the crime is not present. In other words, the law does not forbid what Δ is trying to do. **This can be a defense.**

Ex. 27 yr old man decides to engage in a sexual relationship w/ a 17 yr old girl, thinking it was statutory rape. The statutory rape law is for 16 yr old or younger. Because the statute doesn't criminalize the goal he seeks to accomplish (sex w/ a 17 yr old), he cannot be charged with attempt.

Hybrid Legal Impossibility - This is really a dressed up form of Factual Impossibility. **This cannot be a defense.**

Ex. Δ shoots a corpse believing it was still alive. Because it is not a crime to shoot a corpse, you'd say it was *legal impossibility*. However, if the facts were as you believed them to be, you would have committed a crime, therefore, it is like *factual impossibility*.

MPC - MPC clearly abolishes hybrid impossibility. It does, however, recognize legal impossibility, b/c you cannot prosecute for a crime that doesn't exist.

E. Abandonment

MPC - Δ cannot just abandon, he has to *voluntarily* abandon. Seeing a police officer and deciding to quit would not be abandonment.

- **We will not convict Δ of attempt if he voluntarily and completely abandons the offense.**

To Constitute Abandonment:

1. You must abandon voluntarily (of your own free will and thoughts, not b/c you're about to get caught)
2. You must abandon completely (you give up and will not try again)

Note - You cannot abandon a completed crime. You can ask for less severe sentencing, but you're still guilty.

XVI. Conspiracy - The criminal act of agreeing to commit a criminal act.

Common Law - Not taken seriously; usually a misdemeanor

MPC - Conspiracy is as bad as the target offense; may punish as much as target offense

Note - Unlike attempt, conspiracy does not merge w/ target offense. You can be guilty of conspiracy and murder. Additionally, even if you're not convicted of the target offense, you may still be convicted of conspiracy.

Conspiracy is Easy to Prove

- 1) **The typical rules of hearsay evidence do not apply in a conspiracy conviction.**

If you have 2 Ds, D1 and D2, D1 can say that he and D2 robbed a bank. That would be hearsay under the rules of evidence. However, under a conspiracy prosecution, the statement of one conspirator is admissible against all other conspirators.

- 2) **The actus reas of conspiracy is the agreement itself.**

When multiple people agree to commit an act together, the actus reas requirement is satisfied.

"Overt Act Requirement" - Some jurisdictions require *more* than an agreement. Some require at least one step in furtherance of the agreement b/c we don't want to punish those who don't deserve to be punished. The overt act can be anything (buying matches, calling to find out bank hours, etc.). **Easy to Prove.** The overt act does not have to be illegal. Also, only one conspirator must make an overt act.

Common Law - all you need is agreement
Some Jurisdictions - overt act requirement

Mens Rea - Conspiracy is a specific intent crime.

- 1) Intent to agree
- 2) Intent to commit the target offense

A. Conspirator Liability

Note: You are liable for all of the acts of coconspirators that are in furtherance of the conspiracy.

- It does not matter if you did not commit the acts or if you were incapable of committing the acts (ex. in jail)

Proving conspiracy does not require proving accomplice liability.

Once you're part of the conspiracy, you're guilty of:

- 1) The charge of conspiracy
- 2) Every other criminal offense committed by any other member of the conspiracy if that

offense is committed in furtherance of the conspiracy.

B. Culpability

Note: You cannot conspire to commit an impaled malice (unintentional) crime. Because conspiracy is a specific intent crime, there must be intent to agree and intent to commit the target offense.

MPC: We require at least purpose to convict of conspiracy. You must have the purpose to carry out the conspiracy.

Mere knowledge of criminal activity is not enough to involve you in the conspiracy. In 99% of cases, you must have the purpose to participate in the conspiracy. In the remaining 1%, we use knowledge +.

- If you are profiting from the conspiracy in an unlawful way, your knowledge of the conspiracy is enough to hold you liable
- Courts are more likely to hold you liable based on providing goods/services if someone is charging an inflated price (i.e., Δ makes an additional profit off it)

Courts are more likely to find knowledge of conspiracy sufficient if:

- 1) Δ charged an inflated price (\$1,000 for a hotel room which usually is \$100)
- 2) Good/services are vastly disproportionate in quantity than he'd normally be selling (doctor buys 100 times more testosterone than similar doctor)
- 3) No lawful purpose for the service

- **You can infer conspiracy based on the actions of the people around you.**
Ex. A is driving a car and B and C get out and beat up a pedestrian and then get back in the car and A drives away. We can infer that A was part of the conspiracy.
- **It is possible to be guilty of conspiracy and not accomplice liability, and vice versa. Just participating in the substantive offense does not make you guilty of conspiracy. You must have an agreement *before* the act.**

C. Bilateral vs. Unilateral Conspiracy

Bilateral Conspiracy - Common law only allows bilateral. Two people must have the necessary mens rea to agree and carry out the target offense. If one is an undercover cop w/ no intent to commit the underlying crime, there is no bilateral conspiracy. If one is retarded and cannot have the mens rea, there is no conspiracy.

Unilateral Conspiracy - It still requires two people, but only one must have the necessary intent (ex. one is a bad guy and one is an undercover cop).

- You could try charge w/ attempt, but it is easier to prove unilateral conspiracy
 - 1) Safer for the general public (we stop the bad guys before they get to the point of attempt)
 - 2) Promotes better law enforcement (allows undercover cops to stop conspiracies before they go too far)
 - 3) Allows us to convict people who are mentally culpable (before they go too far)

MPC - Primarily concerned w/ culpability.

D. Abandonment/Withdrawal

Conspiracy is complete in one of two ways:

- 1) When the agreement is formed (when the people agree)
- 2) When there is an agreement + an overt act (not tough to show *some* overt act)

Common Law

You cannot withdraw from a completed crime of conspiracy. If you conspire to burn a building, buy the matches, etc., you cannot change your mind and avoid conspiracy charges. You can abandon the ongoing conspiracy and avoid charges for the target crime (i.e., you abandon but your coconspirators burn down the building; you're not guilty of the target offense, but you are guilty of conspiracy)

MPC

The law is pretty much the same. It is difficult to abandon or withdraw. You can't just walk away, you must communicate to all coconspirators that you are withdrawing. In some jurisdictions, you have to try to stop the conspiracy from going forward. Similarly, this only applies to the future crimes of the conspiracy, not to the already completed crime of conspiracy.

"Renunciation" - Under the MPC, if Δ, a member of the conspiracy, comes forward and completely and voluntarily withdraws from the conspiracy, and helps thwart the conspiracy, we will allow that to constitute an affirmative defense for the already committed conspiracy. **The burden is greater than abandonment.**

Here, he is guilty of any completed target offenses, but he is not guilty of conspiracy or anything future conspiracies or future target offenses.

XVII. Accomplice Liability

Note - This is not the same thing as conspiracy. In reality, if you are an accomplice, you're likely a coconspirator, and vice versa, but they are not the same thing.

Conspiracy - The crime of agreeing to commit the crim. You can be guilty of conspiracy w/o ever assisting in the actual crime.

- This is a crime in and of itself.

Accomplice - This requires proof that the accomplice actually helps or assisted in the commission of the target offense (at least minimal assistance). No agreement is necessary.

- In most places, this is not a crime on the books in and of itself, **it is a derivative of a crime.**
- We derive criminal responsibility from the principle (the person being helped).
- The illegal actions of the principle become the illegal actions of the accomplice (basically the same thing as agency law)

Note - In most jurisdictions today, we call it the principle (or primary) and the other person is an accessory (or accomplice). However, in many jurisdictions, accessory after the fact is its own criminal liability.

Ex. D1 sells drugs to a purchaser. He is a principle in the 1st degree. If D2 is standing around the corner watching for the cops, D2 is a principle in the 2nd degree. If D3 is in the warehouse making sure nobody comes in and finds the drugs before they're sold, D3 is an accessory before the fact. If D4 is scouting out a safe house where they can all hideout, D4 is an accessory after the fact.

Common Law - If you were held responsible for a serious crime, you get the death penalty. So there were limitations:

- 1) The accessory could never be tried before the principle.
- 2) The accessory can never be convicted if the principle is not convicted.

MPC - The CL limitations are eliminated. Here, an accomplice can be tried first and convicted even if the principle is not.

CL & MPC - Typically, the accomplice cannot be convicted of a higher offense than the principle. The only exception is homicide. (**Ex.** If I encourage you to go kill Bob b/c he's been sleeping w/ your wife, you'll be guilty of heat of passion voluntary manslaughter, but I'll be guilty of murder). However, this is rare (understandably b/c accomplice's guilt is derivative, so it's tough for him to be *more* criminally liable).

Common Law - **There must be some actual help provided.** If A unlocks a door so B can get in and rob a house, but B breaks in through the window, A is not guilty of accomplice liability.

Note - This requires more than mere presence. Moral support/encouragement may suffice, but simply standing there would not.

MPC - Attempting to assist can make you criminally responsible (even if you do not do so successfully).

i. No but-for causation requirement

Although you must provide aid, it does not matter if your aid was not the but for cause. The fact that the principle would have successfully completed the crime w/o your help does not matter.

Ex. If A gives B and gun to shoot C, A is an accomplice. It does not matter if B could have gotten the gun from someone else.

"Natural & Probable Consequences" - If you are an accomplice and assist the principle in committing a crime, you're guilty of the crime they commit. If, however, you assist the principle to commit the robbery (that was all you were trying to do), but in the commission of the robbery the principle kills the gas station attendant, you are an accomplice to the robbery and to the murder b/c your liability is derivative and b/c the murder was a "natural and probable consequence" of the crime you assisted in.

Note - You only derive the natural and probable consequences. If the principle does commit an additional crime which is not a natural and probable consequence of the original, you're not liable for it.

Ex. If in the course of a robbery the principle shoots another person, it could be felony murder, *only if the person dies*. If he does not die, or even if he does, this rule allows accomplice liability to flow.

MPC - Rejects the idea b/c they're only interested in what your personal level of culpability is. If all you wanted to do was help out w/ the robbery, and you had no intent to help murder the clerk, you're only guilty of robbery. **There is no "Natural & Probable Consequences" rule in MPC.**

ii. Mens Rea

This is the same as for conspiracy. It is a specific intent scenario:

- 1) Intent to assist the principle
- 2) Intent that the principle commit the target offense

iii. Limits on Accomplice Liability

- 1) We tend not to hold responsible as an accomplice someone the law is trying to protect
Ex. If an 18 yr old has sex w/ a 16 yr old, we wouldn't treat the 16 yr old as an accomplice b/c the law is to protect her.
- 2) You can abandon accomplice liability just like you can abandon conspiracy

Common Law - We do not convict the accomplice if the principle is not convicted.

MPC - Abolish this rule - you can convict the accomplice regardless.

Note - If the principle is justified, we do not convict the accomplice under CL or MPC. If we justify her, no criminal liability exists. If there is no criminal liability, there can be no derivative liability.

Justification helps the principle and the accomplice.

Excuse defenses are personal to the principle. Only the principle gets the benefit of the excuse defense. Although we don't hold the principle liable for the conduct, there is still criminal conduct which we can derivatively impose on the accomplice.

Note - It is possible for an accomplice to be guilty of a greater offense than the principle.

Ex. A tells B that his wife is committing adultery w/ C. B kills C. B would be guilty of heat of passion voluntary manslaughter. A would be guilty of murder.

Note - You cannot derive criminal liability from a crime designed to protect you.

Ex. An 18 yr old and a 16 yr old break into a house to have sex. He is the principle and can be charged with burglary and statutory rape. Statutory rape is B&E w/ the intent to commit a felony within. Because she could not have committed a felony (rape law protects her), she can't be an accomplice to burglary.

Note - **Accomplice is not a crime.** Arson, murder, etc. are crimes. Accomplice liability is the vehicle by which you are held liable of the crime.

iv. Vicarious Liability

Only permitted in these cases:

- 1) It is absolutely clear the legislature wanted there to be vicarious liability.
- 2) It is a public safety offense.
- 3) It is a fine or some other civil-type penalty (small punishment)

Note - We impute intent and actions to the corporation through its people.

A corporation is liable if:

- 1) Agent who commits actions is acting w/in the scope of his employment
- 2) Agent must be furthering the corporation's interest
- 3) Criminal actions must appear to be authorized, ratified, or tolerated by management of the corporation

Note - The fact that the actions is ratified would not matter in other crimes b/c the crime would have already been committed. However, here, ratification is required to impute intent onto the company.

XVIII. Self Defense

Self Defense is a justification defense and acts as a complete (affirmative) defense.

A. Common Law

1. **The threat to you must be imminent.** (it must be *about* to happen)
2. **Your response to the imminent threat must be proportionate.** (only min. force req'd to stop crime)
3. **You cannot be the aggressor ("unclean hands").** (if aggressor successfully retreats, and must later defend himself, he may use self defense)
4. **If you are able to retreat, you must do so.**

Exception:

"**Castle Doctrine**" - This is an exception to the retreat rule - you do not have to retreat from your own home.

"**Curtilage**" - The area surrounding your house (your yard, etc.) is covered by the

"Castle Doctrine."

Note - You may never respond to non-deadly force w/ deadly force. If A is the aggressor and uses non-deadly force, and B responds disproportionately w/ deadly force, A may not use deadly force.

B. MPC-

1. **MPC does not care if the threat is imminent, it looks at whether the force by you must be used immediately.** (focuses on actor's perspective rather than actual threat of force)
Ex. A man is in his kitchen with his wife and says "I am going to go upstairs and get my gun, come back down, and shoot you." At CL, this is not an imminent threat b/c he doesn't *actually* have the gun. MPC allows the wife to use force if it is immediately necessary for her to respond. Therefore, if he turns to go upstairs and she stabs him, she has acted in self defense.
Note - MPC might allow for expansion of "immediate" need to use force in the case of "battered spouse syndrome."
2. **Your response to the threat must be proportionate.** (Same as Common Law)
3. **If Δ started the matter using non-deadly force, and the victim responds w/ disproportional force, Δ may then respond in self defense.** (MPC is unwilling to say that simply b/c you started it, you forever forfeit your right to self defense)
4. **If you are able to retreat, you must do so.** (Same as Common Law)

Note - MPC allows use of self defense further away than common law does.

Proportionality: You may only respond with the level of force used or threatened against you. You may also only use the amount of force necessary to stop the force against you. In order to use deadly force, you must be threatened w/ deadly force. Additionally, if it is possible to use non-deadly force to repel deadly force, you should do that.

Aggressor: The aggressor *does* get to invoke self defense if he successfully retreats.

Ex. If I start a bar fight and then tell everyone I am leaving and go outside to the parking lot to leave, I have retreated and I regain the right to use self defense if they follow me out to the parking lot to fight.

Note - You must make it clear that you are retreating. Tell everyone you're retreating.

Retreat: At **Common Law** and **MPC**, you must "retreat to the wall," retreat as far as possible. However, this depends on the circumstances. It is easier to retreat from a wrench than from a gun. You must only retreat if you may do so safely. If retreating would increase your risk, you're not obligated to do so.

Note - "**Castle Doctrine**" says you don't have to retreat from your home (or curtilage)

Note - Self defense is a **complete** defense. If a person gets it, he gets it entirely.

C. Mistake of Fact

Self Defense is always justifiable if you are actually in danger. If you are actually threatened w/ deadly force, you may respond proportionally w/ deadly force. Δ may not use deadly force when he is wrong about the threatened force. We will not let Δ use deadly force unless his mistaken belief is objectively reasonable.

You may respond w/ deadly force if:

1. You face deadly force; or
2. You reasonable think you face deadly force, but you are wrong

Common Law: Δ must subjectively believe he is being threatened, and his belief must be objectively reasonable. If he belief is found *unreasonable*, Δ may is not entitled to claim self defense.

MPC: If Δ is mistaken, and his mistake is objectively reasonable, Δ is entitled to claim a complete defense. If Δ's mistake is *unreasonable*, he is entitled to an incomplete defense (i.e. murder--> manslaughter).

Note - Reasonableness is determined based on a reasonable person in Δ's position.

D. Defense of Others

You may use deadly force to protect someone else if necessary.

Modern Trend - Δ must reasonably believe that the defense of others is necessary

Exceptions (at Common Law):

1. You used to have a special relationship (i.e. relatives) - **MPC does not follow this.**
2. "**Alter Ego Rule**" - Someone who intervenes to help another only gets a defense of others instruction if the 3rd party would *actually* be justified in using self defense.

This is overruled in most jurisdictions.

Ex. A is accosting B and you go to help B. A turns out to be an undercover cop.

Note - Today, if you reasonably believe someone is in need of assistance, even if you're wrong, you may be entitled to a defense of others instruction.

MPC - If you reasonably think someone is in need of assistance, even if you're wrong, you can use defense of others.

E. Defense of Habitation (Real Property)

Common Law - Δ may use deadly force if he thinks it is reasonably necessary to prevent an imminent and unlawful entry into the habitation/real property.

MPC - Δ must reasonably believe that intruder is trying to dispossess him of the home (i.e. minor theft would not be enough here - must show intruder was trying to commit a serious crime)

Note - Both rules are broader than the traditional self defense rules b/c force does not have to be proportionate. (**Ex.** You do not have to believe your life is in danger. You can just shoot the guy coming in the window.)

i. Spring Guns

Common Law - You may claim self defense only if the resident would have had and *actual* claim of self defense had *he* shot intruder himself (instead of w/ a spring gun).

MPC - Spring guns do not allow claim of self defense.

F. Defense of Personal Property

At **common law** and under **MPC**, it is personally proportionate for the individual to use non-deadly force to protect property. If non-deadly force escalates, it may then be justifiable to use *deadly* force.

1. You may use non-deadly force to protect personal property
2. Based on the follow up actions of the aggressor, you might then get to use deadly force.

Common Law - You cannot start using deadly force to protect personal property (even if it is the only way to protect the property).

Ex. I see my car being stolen. Someone is getting in the car and going to drive away. At common law, you cannot shoot them to get them to stop.

MPC - The default rule is the same as above. However, it is permissible to utilize deadly force to protect personal property if it is not objectively possible using non-deadly force to prevent the commission of the crime.

Ex. I can shoot the car thief to stop him from fleeing if non-deadly force would not work and it's the only way I can get him to stop.

XIX. Necessity

Necessity must be:

- 1) Naturally created
- 2) Balancing of harms (see "choice of evils" below)

Necessity is a justification defense (i.e. you did something, we think it was a good idea, and you should do it again).

"Choice of Evils" - necessity requires Δ to make a choice b/t the lesser of two evils; if it is the lesser harm, we let you 'amend' the law and do what you've got to do.

Note - Necessity must come from a natural condition. (contrast w/ duress)

i. Common Law elements of necessity:

- 1) Imminent danger
- 2) Individual reasonably believed his actions would stop the danger
- 3) There is no alternative, legal method to stop the danger (If I was in Δ 's shoes, would my first and only reaction be Δ 's?)
- 4) The harm Δ will cause must be less than the harm of the impending danger (cannot be more or equal)
- 5) Δ must have "clean hands" (if they mess up or cause the problem themselves, they may not use this defense)

Note - At common law, necessity does not apply to the crime of murder (or intentional homicide).

Ex. A, B, and C are in a horse drawn carriage being pursued by a pack of wolves. The wolves catch up and eat all of the people. Can we throw one person out to save the other two? **No.**

ii. MPC

MPC focuses on the mens rea of the crime you are being prosecuted for (not the original crime). Necessity is a defense to a purposeful or knowing crime. Necessity is not a defense to a reckless or negligent crime.

Note - Under MPC, necessity is conceivably a defense for murder, but it is left up to a jury to decide.

Note - We typically do not give a necessity defense for civil disobedience.

XX. Duress

Note - Duress is an excuse defense. (What you did was wrong, but we will not punish you for it. But don't do it again.)

Note - Not a balancing of evils. It doesn't matter if you choose poorly, we will still let you off (just don't do it again)

Common Law - Another person must threaten to kill or grievously injure Δ or his family. This only applies to human threats.

- 1) Actor must have another person threaten to kill or grievously injure you or your family
- 2) The actor must reasonably believe it is a genuine threat
- 3) The threat must be imminent (not future harm)
- 4) There cannot be any reasonable escape from the threat

Note - At common law, duress may not be applied to intentional murder.

MPC - one significant variation is that duress can be a defense for intentional murder (i.e. a jury may consider it)

Note - Duress is a personal defense. It only applied to this Δ this time. (contra., necessity is a justification defense and is applicable to the world at large)

XXI. Intoxication

- A. Voluntary Intoxication - Actor is culpable for becoming intoxicated** (including smoking marijuana which is laced w/ cocaine - most cts say you took an illegal substance and knew there was a chance it was laced w/ something, you run the risk of what might be inside).

Voluntary intoxication is not a defense, it is a failure of proof. Voluntary intoxication may inhibit Δ from achieving the specific intent offense.

Ex. While voluntarily drunk one night, A stumbles into his neighbors house. A is charged with burglary. Voluntary intoxication is a suitable defense b/c while A did break and enter the dwelling house of another at night, burglary is a specific intent crime which requires the b/e be done with the intent to commit a felony therein. Voluntary intoxication will prevent the gov't from proving the mens rea element of the specific intent portion of the crime.

- i. Common Law** - Voluntary intoxication is never a defense to a general intent or strict liability crime. It can be a defense to a specific intent crime.

Note - Many jurisdictions oppose this theory. Because attempt is a specific intent crime, voluntary intoxication might be a defense to attempted sexual assault, but not for the underlying sexual assault.

- ii. MPC** - Voluntary intoxication can be a defense if it prohibits Δ from forming the necessary mens rea (purpose or knowing).

Note - This does not apply to reckless or negligent crimes. If the mens rea is reckless or negligent, we hold Δ responsible regardless of intoxication.

Ex. If you're involved in a vehicular manslaughter, you cannot use intoxication as a defense.

- B. Involuntary Intoxication - Actor is not responsible for becoming intoxicated**

Involuntary intoxication is an excuse defense (you should not have done that, but we'll let

you off). There are virtually no good cases of successful defenses involving involuntary intoxication.

Must demonstrate one of the following:

- 1) Δ was forcefully coerced to take the intoxicant (i.e. I open your mouth and put the pill in)
- 2) Δ ingests the intoxicant by mistake (i.e. I give you 'Tylenol' for a headache, but its really a roofie)
- 3) Δ becomes intoxicated by a prescription medication (Δ must not have reason to know the medication, or the combination of medications, has an intoxicating effect)

XXII. Insanity

Competency - Examines whether Δ is competent to stand trial now. We do not look at how Δ was when the crime was committed, but rather right now. There is a presumption that Δ is competent. Δ must prove otherwise. If Δ proves otherwise, it would violate due process to proceed. Therefore, we wait until he regains competency.

Note - You may *forcibly* medicate an individual to make them competent to stand trial, so long as the medication does not have too many side effects.

Policy - Δ must be competent b/c we want him to be able to work w/ his lawyer to mount a defense. If he cannot do this, it would violate due process to go forward with a trial.

Insanity - Examines Δ at the time of the offense

Δ may plead:

- 1) guilty
- 2) not guilty (nobody pleads innocent)
- 3) not guilty by reason of insanity (gov't proves all elements, but Δ was insane at the time)

Note - There is a significant risk for pleading NGRI. If the jury rejects an insanity plea, the judge/jury might get mad and sentence Δ more severely than if he hadn't pled it in the first place.

Note - People found NGRI are not released immediately. They are almost immediately forced to report to a mental hospital where they are "incarcerated" and treated. Of the people sent to mental health facilities, on average, they spend longer "locked up" than comparable people found guilty and sentenced to prison.

Four Tests for Insanity:

1. **M'Naughten Test** - We find someone insane when Δ is laboring under a disease of the mind that makes him unable to know the nature and quality of the act he is doing. Or, if he did know the nature and quality of the act, he did not know it was wrong.
 - This is purely a cognitive test (process of thinking - as opposed to behavioral)
 - Test is very rigid. When we say Δ is unable to know, what we are really saying is that he is completely incapacitated. **This is all or nothing - either he is able to know or he is not able to know. There is no in between.**
 - To many people, it defines insanity too narrowly.
 - B/c the legal standard is different than the psychological one, you're asking doctors to testify to something inconsistent w/ their professional expertise. **Inconsistent w/ psychology, so many experts don't like it.**
2. **The "irresistible Impulse" Test** - A person knows that the action is wrong, but they are

irresistibly driven by an insane impulse to do it anyway. **This is usually added to the M'Naughten Rule.**

- This is a volitional test (focuses on behavior - as opposed to thought process)
- This is difficult to prove - 1) you know its wrong, but couldn't stop yourself from thinking it; 2) I know its wrong, but I want it anyways. **It is difficult to differentiate and hard to prove whether someone's impulse really is irresistible.**
- If it is irresistible, who does it apply to? A person steals \$ to buy drugs? Probably not.
- **This is all or nothing - either the impulse was irresistible or not. There is no in between.**

3. The "Product" Test - An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

- It is tough to know if this is a cognitive or volitional test.
- **The benefit of this test is that it really emphasizes the use of expert testimony.**
- The test puts *enormous* responsibility in the hands of the expert to determine what the product of mental disease or defect is.
 - 1) Its hard to know what the product of the mental disease is - this leaves it almost entirely in the hands of experts to tell us what the product of the mental disease it
 - 2) The test does not define "mental disease." The whole ballgame relies on whether or not Δ has a mental disease, but that is not defined.
- Almost nobody uses this test anymore (1 state).

4. MPC Test - The Δ is relieved of criminal responsibility if as a result of mental illness, he lacked **substantial capacity** to appreciate the criminality of his conduct. Or, as a result of mental illness or disease, he lack substantial capacity to reform his conduct to the requirement of the law.

- The 1st part is cognitive and the 2nd is volitional.
- The MPC Test is more nuanced. It does not require *total* incapacity. Instead, it requires **substantial** incapacity. **This is not and all or nothing test.**
- It does not demand the Δ have *knowledge* of the wrongfulness. Instead, Δ must only be unable to *appreciate* the wrongfulness of his conduct.

Ex. Even though a child knows its wrong to shoot someone, they probably cannot *appreciate* the fact that the person is dead forever. As such, the child likely would qualify as insane.
- **Requires substantial capacity rather than total incapacity; allows for appreciation of wrongfulness rather than knowledge.**