# **– I. Introduction to Criminal Law –**

* Elements of A Crime: *Actus Reus* [(1) voluntary act (or omission) (2) cause in fact (3) proximate causation (4) social harm] and mens rea.
1. **Nature, Sources, and Limits of The Criminal Law**
	1. **Distinction b/t criminal and civil law** – In criminal law society morally condemns the social harm and the actor causing the social harm (except in Justification situations). Damages are not enough for these acts.
	2. **Limitations on Criminal Law: Constitutional Law**
		* + 8th Amendment – prohibits cruel and unusual punishment
			+ 5th and 14th Amendments – persons may not be deprived of life, liberty or property without due process of law
			+ Art. 1 §9 and §10- no ex post facto legislation. Courts also can’t enlarge scope of the criminal statute. Because it results in retroactive criminalization and punishment, and exceeds modern rule of judiciary in crim law. Only legislature gets to set statutes.
			+ 6th Amendment – Trial by jury with 12 people
				- *Voire Dire*- if you have possibility of biased jurors.
2. **Principle of Legality**
	1. **Legality** – There is no criminal liability unless conduct is defined as criminal in a statute. Any ambiguity/doubt as to a statute will be rendered in favor of the accused/∆.
	2. **Rationale** – Statutes should be understandable and reasonable. Statutes should not be ambiguous.
		* + **Utilitarian Perspective** – Can’t deter people unless people know that their conduct is going to be illegal and punished.
			+ **Retributivist Perspective** – Can’t punish someone who isn’t morally culpable (if they didn’t know the conduct was going to violate the law).
	3. **Fair Notice/Due Process** – A corollary of the legality principle is that a person may not be punished for an offense unless the statute is sufficiently clear that a person of ordinary intelligence can understand its meaning. But what is “ordinary”? Obviously not strictly enforced. But an unduly vague statute violates the Due Process Clause of the Constitution.
		* + **Constitutional Doctrine of Void for Vagueness** – Requires the criminal law to be sufficiently clear so that individuals of ordinary ability can understand what their legal obligations are.
			+ **Test** – Sufficient notice if the wording puts an ordinary law abiding person on notice that proscribed area is reached by conduct.
	4. **Non-Discriminatory Enforcement** – A criminal statute can’t be so broadly worded that it is subject to discriminatory enforcement by law enforcement officers. Vagrancy laws violate this principle.
	5. **Rule of Lenity** – requires a court to construe criminal statutes strictly, resolving doubt in favor of the ∆. But MPC says you have to construe the statute according to the fair import of their terms. The MPC directs courts to further both the general purposes of criinal law and the specific purposes of the statute under consideration.
	6. **MPC 1.05 (1)-** no criminal liability unless conduct is defined by statute as criminal.
		1. ***Canna v. Baker*-**  Person dresses up corpse as if still living to collect remaining welfare check balance. No punishment in statute at that time aside from abuse of corpse (no welfare fraud statute). Couldn’t be held under anything else.
3. **Burden of Proof Beyond A Reasonable Doubt/Presumption of Innocence**
	1. **Proof Beyond A Reasonable Doubt** – Burden of proof is on the prosecution. Never shifts to the defendant. *In Re Winship*- must prove each element of crime charged.
		* + **Rationale**- *Harlan*- It is a fundamental value that it is worse to convict an innocent man than let a guilty man go free. *Blackstone* goes to an ever further extreme- Better to let 10 guilty men go free than let one innocent man suffer. The justice system basically stands by the fact that we value freedom more, and not as much on the guilt.
	2. **Circumstantial Evidence** – Particular circumstances or indirect evidence, which would allow the inference that particular event or action had taken place. Evidence that requires fact finder to infer a particular fact that is sought to be proven. [As opposed to direct evidence.] Circumstantial evidence alone is sufficient to support a criminal conviction. Prosecution doesn’t have to foreclose (disprove) all innocence hypotheticals, prosecution need only prove beyond a reasonable doubt its theory of guilt – does not have to disprove ∆s theories of innocence.
		* + *Owens v. State*- Court held it was a reasonable inference that person had DWI because the person was in the driveway, car running, no radio, empty beer bottles in back.
4. **Jury Nullification**
	1. **Definition** –In the face of overwhelming guilt, a jury acquits the ∆ instead of finding guilt.
	2. **Rationale** – Exists to protect against governmental oppression and allow the jury to send a message about some social issue that is more important than a particular case. As the “conscience of the community,” the jury may use this power to protect against socially undesirable convictions. The jury may choose to acquit where it would be unjust convict ∆ of a crime.
		* + **Bad** – If something is so egregious, there are other methods, besides jury nullification (such as changing the law), to change it.
			+ **Good** – However, that may take forever. Sometimes, we need jury to retain the power to nullify.
	3. **It’s A Power, Not A Right** – ∆ doesn’t enjoy a right to jury nullification – rather there is a power of jury nullification – something that exists that the jury may exercise. We don’t tell jury so they don’t exercise it all the time – and so that they only exercise it naturally when something is so egregious that jury nullification is necessary. Because jurors do not have the right to nullify, a ∆ is not entitled to have the jury instructed that it may nullify the law if it chooses to do so. *State v. Ragland*.
		* + Factors Considered:
				- Personal characteristics of D
				- Degree of harm caused by D
				- Victim’s partial fault
				- Morality/wisdom of law violated by D
				- If D has been punished enough/ harsh penalties
				- If police or prosecutor acted improperly
				- Race in non-violent crimes

# **– II. Principles of Punishment –**

1. **Utilitarianism – punishment serves useful societal function; justified b/c of societal benefit**

Utilitarianism holds that the general object of all laws is to augment the total happiness of the community by excluding, as much as possible, everything that subtracts from happiness (i.e. everything that causes pain).

* 1. **Underlying Premise of Utilitarianism:** People are rational and will do cost benefit analysis (so they are deterrable)**.**
	2. **Role of Punishment:** Crime and punishment are evil, and result in pain to individuals and society as a whole. But if punishment deters further societal harm, then punish.
	3. **Forward Looking** – Punishment is justified because its end benefits will be better.
	4. **Categories of Utilitarianism** –
		1. **Deterrence:**
			+ - **Notice and Threat of Punishment** – To be effective, ∆ must have notice of the threat of punishment;

**notice should be accurate** – if punishment is 5 yrs, but ∆ thinks 2 yrs he’s less deterred than he should be

**threat of punishment should be credible** – (1) ∆ thinks he will be captured and (2) believes that if captured, he will be punished as threatened

* + - * + **Specific Deterrence:** Deters a specific person. Here, ∆ is punished in order to deter ∆ from future criminal activity.
				+ **General Deterrence:** Deters community/society. ∆ is punished to send a message to others that crime does not pay. Those contemplating committing crimes and learning of threatened punishment will decide not to do so
				+ **Factors to Deterrence:** nature of offense, severity of punishment, type of offender, perceived risk of detection, arrest, and conviction, nature and severity of penalties [increase in detection, arrest and conviction rate is greater deterrence than increase in severity of punishment]
		1. **Incapacitation:** Physically prevents persons of dangerous disposition from acting; prevents offenders from reoffending
			- * **Ex:** imprisonment, probation/parole supervision, random drug tests, prohibition from use of alcohol or firearms, etc.
				* **Justified** only to the extent that the sentencing authority can reliably predict the future dangerousness of offenders and then only if the predicted reduction in crime from the incapacitation o/w the hardships that will be imposed on those incarcerated and the economic costs of their incarceration.
				* **Incarcerating more persons for longer terms is sometimes justified on dual grounds:**

**Specific Deterrence** – incarcerated criminals cannot commit more crimes while imprisoned

**General Deterrence** – likelihood of long prison sentences dissuade others from committing crimes

* + 1. **Reform/Rehabilitation:** Criminal law can prevent future crime by reforming an individual by providing her with rehabilitation, employment skills, psychological aid, etc., so that she will not want or need to commit offenses in the future.
			- * May require indeterminate sentence for each criminal b/c the symptoms and cure would differ with each criminal.
				* Incarceration is rarely imposed today for rehabilitative purposes. There was little proof that it worked.
	1. **Critique on Utilitarianism**
		+ - There are too many other variable factors that affect the crime rate that has nothing to do with deterrence, incapacitation, or rehabilitation. It’s hard to prove the efficacy of utilitarianism.
			- It’s unfair to use people as a means to an ends. A utilitarian would punish an innocent person if it was for a greater good.
	2. **Utilitarianism won’t punish when it is** : 1) Groundless/no mischief; 2)inefficacious; 3)unprofitable/too expensive; 4)needless mischief will cease without punishment.

**Retributivism – criminals deserve to be punished**

Retributivists argue that punishment justified b/c ∆ deserves it. Thus, as long as a person has freely chosen to commit an offense, punishment is justified. To the extent that a person lacks free choice, punishment is morally wrong.

* + - Retributivist would not allow state to punish those who [mentally ill or duressed] had no (or little) choice.
		- Would not allow criminal confinement based on prediction of future acts.
		- Retributivism is backwards looking in that the justification is found in prior wrongdoing.
		- Critics of retributivism have argued that it validates hatred and that there is no point in punishment if it does no good.

**Different Types of Retribution**

* + - **Negative Retribution** – It is morally wrong to punish an innocent person even if society would benefit from the action.
		- **Positive Retribution** – Not only must an innocent person *never* be punished, but, affirmatively, one who is guilty of an offense *must* be punished.
		- **Assaultive Retribution *Stephens*** – Criminals have forfeited their rights to participate in society and should be punished because they are “moral monsters/noxious insects” – hatred and anger are acceptable responses to a moral injustice.
		- **Protective Retribution *Morris*** – Not only does society have a right to punish culpable wrongdoers, criminals themselves have a right to be punished. Punishment demonstrates respect for the offender by paying deference to an individual’s free choice by connecting punishment to a freely chosen act in violation of the rules – you made a free choice, now you must live with the consequences. It’s a way for wrongdoer to pay his debt to the community and return to it in moral equilibrium.
		- **Harm Based** – Seeks to fit punishment in accordance with the gravity of the social harm inflicted on the community. Also takes into account culpability and morality, focus is on the harm.
		- **Intent Based** – The focus is on the intent and moral blameworthiness of the ∆. If his actions were not intentional, or he acted in ignorance, punishment should be lowered accordingly. Thus the focus is on the actor, not the act.
1. **Cases – How Much Punishment- Principles for Distribution of Criminal Liability and Punishment**

***People v. Du – Liquor Store Shooting Over OJ – Utilitarian Court***

* ∆ convicted of voluntary manslaughter, sentenced to 10 years. Sentence was suspended and ∆ was placed on probation.
* There is presumption against probation in this case b/c firearm was used but presumption can be overcome if court finds the case to be unusual. Case is unusual for three reasons – (1) statute is aimed at criminals who arm themselves when they go out and commit crimes not shopkeepers who lawfully possess firearms for protection (2) Du has no past criminal record (3) Du participated in the crime under circumstances of great provocation, coercion and duress – these reasons overcome statutory presumption against probation.
* **Rule:** Probation is a permissible punishment for voluntary manslaughter in unusual cases. Consider many factors.
* **MPC §1.02 (2)(c)-** General purpose of provisions governing sentencing and treatment of offenders are…to safeguard offenders against excessive, disproportionate or arbitrary punishment. . .

***USA v. Gementera*- This also applies to *Proportionality***

* + Gementera stole people’s mail. Was told to wear a sign by mail office (shaming and rehabilitation). *Bentham Mill*- Punishment is enough to deter conduct. *Kant*- retributivist eye for an eye- punishment sufficient for stealing the mail.

***United States v. Jackson – Robbed bank after release from jail***

* **Issue** – is imposition of a life sentence permissible punishment for a career criminal.
* **Holding** – The imposition of life in prison is permissible punishment for career criminals. The statute reflects judgment that career criminals who persist in possessing weapons should be dealt with most severely.

# **– III. Proportionality of Punishment –**

* **Requirement of Proportionality** – General principle of criminal law that punishment should be proportional to offense committed. Problem is in determining meaning of proportional.
* Proportionality requires ranking crimes according to their seriousness.
* Notions of proportionality are extremely fluid.
* Punishment is unconstitutional if either it has no measurable contribution to acceptable goals of punishment and results in purposeless or needless imposition of pain and suffering OR is grossly disproportionate to the severity of the crime.
* **8th Amendment – “Cruel and unusual punishment” Clause**
* **SCOTUS** – Determined that cruel and unusual includes *punishments that are* ***grossly disproportionate or excessive when compared to the crime committed***. The 8th amendment does not require *strict proportionality* between the crime and sentence, but rather, it only prohibits extreme sentences that are grossly disproportionate to the crime.
* **Death Penalty Context**
	+ Proportionality component is usually applied in cases involving death penalty/capital punishment. Usually, punishment of death is disproportionate in something less than causing the death of a human being.
	+ In the non-death penalty context, 8th amendment has an extremely nonexistent proportionality component.
* **Test for Disproportionality:**
* **Rule *–*** A punishment is excessive and unconstitutional if it either (1) makes no measurable contribution to the acceptable goals of punishment (is nothing more than purposeless and needless imposition of pain and suffering) or (2) is grossly out of proportion to the severity of the crime.
* **Cases:** *Coker-* raped a woman. But rape was not comparable in moral depravity or injury to person or public to get death penalty; *Kennedy v. Louisiana*- child rape, said the same thing- death is grossly disprop.
* **gravity of offense** – violent or non-violent offense and the harshness of the penalty
* **intrajurisdictional test** – court considers sentences imposed for commission of same crime on other criminals in same jurisdiction to see if it’s excessive
* **interjurisdictional test** – court considers sentences imposed for commission of same crime in other jurisdictions to see if it’s excessive
* **Parole** – Eligibility for parole may be a distinguishing factor.
* **Policy:**
* **Utilitarian** – Punishment is proportional if it inflicts no more pain (to the criminal and cost to society) than is necessary to fulfill its deterrent goal. No more than necessary to prevent the crime.
* **Retributivist** – Punishment should be proportional to the harm caused, taking into consideration the actor’s culpability (blameworthiness) for the conduct. Ex. a murderer more than a robber and a negligent murder less than an intentional one. More concerned with improportionality than a utilitarian.
* **Repeat Offenders – Three Strikes Rule: 3rd time felon gets 20 to life**
	+ **Utilitarian** – The threat of a long imprisonment may be necessary to deter a recidivist who has been undeterred by lesser punishment in the past. 3rd time felon has proven that he is likely to continue to transgress if allowed to do so. He may need to be incapacitated for a longer period of time. However, only if there is a reliable reason to believe that this is necessary for general or specific deterrent purposes.
	+ **Retributivist**– Wrongdoer should be punished ***proportionally to the*** ***crime just committed***. He has already paid his debt to society for his earlier offenses, so these crimes are irrelevant to the present punishment. A retributivist would not punish a person for predicted future crimes.
* **Problem here:** Death penalty won’t deter violent criminals from rape. It will increase the likelihood that the rape victim will die since the punishment for rape will be death. So the deterrent value, according to Utilitarian is gone.
* **Cases:**

**Coker v. Georgia – Death Penalty for Rape is Grossly Disproportionate**

* **Holding:** Death penalty is grossly disproportionate to rape b/c it doesn’t involve taking of a human life and thus prohibited by 8th amendment. While death penalty itself is not cruel and unusual, it may be punishment grossly disproportionate for crime of rape.
* **Dissent** – Rape is not a minor crime. GA should be allowed to formulate its own punishment, taking into account ∆’s criminal history. While punishment may be disproportionate to the crime, it’s not so grossly disproportionate that it’s prohibited by the 8th amendment.
* **Notes:** Result is consistent w/retributive theory – since ∆ took no life, his life should not be taken; however in prior cases the rapist in Coker had killed one and raped two, young women. Therefore based on the concepts of specific deterrence (utilitarianism), the death penalty might have been justified on the ground of the defendant’s personal dangerousness.

**Ewing v. California – Golf Club Shoplifter gets 25-life under 3 Strikes law**

* **Holding:** History of recidivism makes punishment proportionate
* **Concurrence Scalia & Thomas** – 8th amendment doesn’t have proportionality principle
* **Dissent Bryer** – punishment is grossly disproportionate to the crime committed
* **Rule:** The 8th amendment does not require *strict proportionality* between the crime and sentence, but rather, it only prohibits extreme sentences that are *grossly disproportionate* to the crime.

**Salem v. Helm**

* + Gravity of harshness and penalty, sentences of criminals who’d done the same crime in other jurisdictions, and sentences for the same crime in other jurisdictions are all factors in determining punishment proportionality.

**Harmelin v. Michigan**

* + **Proportionality principles** – Primarily the legislatures to determine; variety of penological schemes; the nature of the federal system; the requirement that proportionality be guided by objective factors.

# **– IV. Actus Reus – Voluntary Act/Omissions + Cause in Fact/Proximate Cause + Social Harm –**

1. **Actus Reus**
* **Voluntary Act** – Under both the common law and MPC §2.01, a person is not ordinarily guilty of a criminal offense unless his conduct includes a voluntary act [or the omission to perform an act of which he is physically capable].
	+ The prosecution must demonstrate that ∆’s act was motivated by a voluntary willed movement.
	+ It was not automated (automism)
	+ It was the use of the mind, not the brain
	+ You can broaden the actus reus time span, like dawn to to dusk *State. Utter.*
* **Omission** –If there was no voluntary act but there was a legal duty that was not fulfilled. List of legal duties:
	+ Statutory duties- ambiguous ones are in favour of D
	+ Special relationships- husband wife/parent child
	+ Assumption of contractual duty – doctor patient
	+ Voluntarily helping someone but then secluding them where they are helpless and others can’t provide aid.
	+ A moral duty to act does not create a legal duty to act.
	+ Person created the risk of harm to start out with.
* **Attendant Circumstance** is a condition that must be present in conjunction with the prohibited conduct or result, in order to constitute the crime. An attendant circumstance must exist at the time of the actor’s conduct or at the time of a particular result, and is required to be proven in the definition of the offense
1. **Voluntary Act**
	1. **Common Law/MPC §2.01 Rule** – A person is not guilty of a criminal offense unless his conduct includes a voluntary act.
		1. **Conduct** – There must be conduct. A person is never prosecuted solely for his thoughts/plans no matter how evil or dangerous. Can’t predict whether criminal behavior will result from thoughts/plans. There must be some externality of the thoughts/plans.
		2. **Common Law Definition** – A voluntary act is a willed muscular contraction or bodily movement by the actor. Not just a physical movement. Use of mind, not just brain.
			* + **Degree of movement required** – The slightest muscular contraction or bodily movement constitutes an act.
				+ **Willed** – An act is willed if the bodily movement was controlled by the mind of the actor.
				+ **Unwilled Acts** – Some bodily movements are the result of impulses from the brain that direct the person’s bodily movements. Seizures/Acts during sleep walking. Acts controlled by the brain and not by mind are involuntary.

*People v. Decina*-Even thought the seizure was involuntary, the person shouldn’t have been driving if they knew they suffered from epilepsy. Can prove actus reus.

*Martin v*. *State-* was carried to highway by police and then charged with DWI.

* + 1. **MPC 1.13(2) Definition** – Does not provide a definition of voluntary act except by providing examples of involuntary acts.
			- * **§2.01** – Requires voluntary act/omission to perform act which the actor is physically capable. No liability for involuntary acts where ∆ has no conscious control.
				* **Involuntary Acts Include:**

Reflex or convulsion.- Reflex like in *State v. Utter* could’ve been a partial defense. If he hadn’t been drinking all morning. They broadened the statute here so that they could reconcile the *People v. Du* case with *State v. Utter*. Since Du had been broaded to keep her on probation instead of free back to the streets.

Bodily movement while unconscious or asleep.

Conduct during hypnosis or as a result of hypnotic suggestion.

Bodily movement that otherwise is not a product of effort/determination of actor, either conscious or habitual.

* + 1. **Constitutional Law** – SCOTUS has never expressly held that punishment of an involuntary actor is unconstitutional. However, it has invalidated statutes that criminalize a status or condition rather than conduct.
			- * **Punishment of Drug Addiction** – Crimes that punish status (as opposed to acts or omissions) are considered unconstitutional, in violation of due process and the prohibition against cruel and unusual punishment.

But being a drug addict is a social harm, you’re seeking illegal activity. What about being addicted to molesting kids – Main argument is that drugs are nonviolent crimes.

**Utilitarian** – Does no net good to punish.

**Retributivist** – It is illegal to take drugs so you should be in jail. In turn this can help b/c it will help you associate the unpleasantness of drugs.

* + - * + **Vagrancy Statutes** – SCOTUS has invalidated laws that make it an offense to be vagrant.
		1. **Confusing Cases – Muddy Line: Was the act caused by the brain or the mind?**
			- * **Memory Loss** – Not involuntary just b/c ∆ can’t remember – still controlled by the mind.
				* **Coerced Acts** –An act is not involuntary merely because the individual is compelled to perform the act. Sometimes people do harmful acts b/c they are threatened w/death or serious injury or to avoid a greater harm. Though these acts are often done under a great deal of pressure, the criminal law usually considers them voluntary. Whether someone will be punished in such cases depends on whether a defense based on justification or excuse is available.

**Ex.** A points a gun at B to steal C’s car – This is still voluntary. Mind said: I prefer to steal than to die. He will be acquitted on the grounds of duress but the voluntary requirement is met.

* + - * + **Crimes of Possession** –MPC §2.01(4). Possession arises if person

Voluntarily takes control of proscribed object

OR omits his duty to dispossess himself of the article

Prosecution must prove that D was aware of possession.

* + - * + **Self Induced State** – Though you may have involuntarily acted when drunk – the voluntary act was getting drunk. Thus the previous voluntary act deprives the involuntary act defense.

It is sufficient that a person’s conduct included at least one voluntary act. *People v. Decina*.

* 1. **Rationale of Voluntary Act Requirement**
		1. **Utilitarian** – A person who acts involuntarily cannot be deterred. Therefore it is useless to punish the involuntary actor. It results in pain without the benefit of crime reduction.
			+ - **Counter Argument** – It is true that persons cannot be deterred during their involuntary conduct, but the threat of punishment might deter persons from placing themselves in situations in which their involuntary conduct can cause harm to others. (Ex. Decina – driving while prone to epileptic seizures).
		2. **Retribution** – A more persuasive justification for the voluntary act requirement is that blame and punishment presuppose free will: a person does not deserve to be punished unless she chooses commit a wrongful act.
	2. **Possible Essay Question: Why does an act have to be voluntary?**
		1. It would undermine personal security to punish involuntary actions
		2. Voluntary action means the person knows and willingly takes responsibility for the consequences of their actions.
		3. Above Utilitarian Reasons
		4. Above Retributivist Reason
		5. Address the purpose of the criminal law discussed (*Blackstone and Harlan*)
1. **Omissions**
	1. **Rule** – The criminal law generally punishes an individual only for the affirmative harm he himself inflicts. Generally, one cannot be held criminally liable for an omission unless an exception applies and creates a legal duty.
	2. **Rationale for General Rule**
		1. **Proving the Omitter’s State of Mind** – Criminal conduct requires a guilty state of mind (mens rea). It is too difficult to determine the state of mind of one who fails to act. Because there are a possible hundred reasons for why someone didn’t act. Maybe they were too shocked to act, maybe it all happened too fast.
		2. **Promoting Individual Liberty/Line Drawing Problems** – In a society that is premised on individual liberties and limited government, the criminal law should be used to prevent persons from causing positive harm to others, but it should not be used to coerce people to act to benefit others. Criminal law should be limited only to punishing the most serious moral wrongdoings and not non-doings. Otherwise, where do you draw the line at what people should do? Personal Autonomy is the most important.
		3. **Making Things Worse** – Well meaning bystanders may make matters worse by intervening. Therefore a rule requiring assistance might cause more harm than good.
	3. **MPC 2.01(3)(a) – Omission and Legal Duty**
		1. ∆ has a legal duty to act if the statute defining the offense expressly states that failure to act is a crime.
		2. ∆ has a legal duty to act imposed by civil law.
	4. **Exceptions to General Rule MPC §2.01(1) – When Legal Duty Arises**

Other Legal Duties:

* + - * **Statutory Duty** – Some statutes expressly require a person to perform specified acts. Failure to perform those acts constitutes an offense: a crime of omission. Ex. child abuse reporting statute
			* **Duty by Status** – A person has a common law duty to protect another with whom he has a special status relationship, typically, one based on dependency or interdependency, such as parent/child, spouse/spouse, and employer/employee. (*Ray Edward Billingslea-* There was no provision of duty from child to parent in the j(x). So no omission and no *actus reus; same for People v. Beardsley- could have prosecuted the person who actually took a little bit of care of the woman though, since he secluded her*)
			* **Duty by Contract** – A person may have an express contract to come to the aid of another or such a contract may be implied in law. Ex. nursing home or lifeguard.
			* **Duty by Voluntary Assumption** – One who voluntarily assumes the care of another must continue to assist if a subsequent omission would place the victim in a worse position than if the good Samaritan had not assumed care at all. Ex. if you isolate the individual and prevent others from rendering aid.
			* **Duty by Risk Creation** – One who creates a risk of harm to another must thereafter act to prevent ensuing harm. Ex. Attempted rape, then saw lady fall into river and drown. Had duty to try to save her from drowning.
	1. **Policy**
		+ - Criminalizing omission tells people to put themselves in danger and infringes on autonomy.
			- **Retributivist theory** would say you can’t punish someone for something that they have not done, because you can’t show moral culpability that deserves to be punished.
			- **Utilitarian theory**- Can’t deter because people wouldn’t have clear expectation of what constitutes a crime of omissions for deterrence. Punishing someone for not reporting a rape would not help, it would make it more likely people would have willful blindness or extra avoidance. Also, removes personal autonomy and wouldn’t be beneficial to society.
			- Don’t hold law to a higher standard because law is the low bar and morals are the high bar. So we might think its moral responsibility of person to act, but that is the high bar.
			- D should always try to plead invalid act instead of a defense. That way prosecutor has failure of proof.
	2. Cases
		1. *Linda Ruschioni*- picks up lottery ticket, there were some statutes on the book but the family said finders keepers and the prosecutors would not prosecute. It was morally condemned because the lottery ticket wasn’t there.
		2. *Barber v*. *Superior Court of CA*- MD allowed life saving measures to cease and charged with murder. But there was no affirmative action. There was a special relationship but no affirmative duty to be prosecuted for murder.
		3. Girl Chased by Pit-Bull – Closing door = act 🡪 possible criminal charges; Not opening door = omission 🡪 no charges, no duty
1. **Causation**
	* Generally- C/L and MPC §2.03- Use the But For Test
	* D’s act is proximate cause if the harmful result is “not too remote or accidental in its occurrence to have a just bearing on the actor’s liability or the gravity of his offense.”
	1. **Cause in Fact**
		1. **Rule:** A person is not guilty of an offense unless she is an actual cause of the ensuing harm. Both common law and MPC provide that conduct is the actual cause of the prohibited result if the result would not have occurred but for the actor’s conduct. [MPC §2.03(1)(a)]
		2. **But For Test** – But for ∆’s voluntary acts, would the social harm have occurred ***when it did*?**
			* + **Yes** – If the social harm would have occurred when it did even if ∆ had not acted, ∆ is not the actual cause of the harm and therefore, is not guilty of the offense.
				+ **No** – If social harm would not have occurred when it did but for ∆’s voluntary act, ∆ is actual cause of the social harm.
			* **Obstruction**- The first actor’s harm is interfered with or obstructed by a subsequent separate force that causes the social harm. 2nd actor becomes liable. (*Joseph Wood*- *Alma was an obstruction to Wood’s action of killing Lumen. Because Alma’s shooting of Lumen is what actually caused his death to occur. So she obstructed the effects of Wood’s shot*).
			* **Acceleration**- Must prove with greater than 50% probability that the second actor’s action accelerated the social harm in order to prosecute the second actor. Or do it for the first actor to get rid of the second actor’s liability. *Oxendine v. State- GF abuses child and then boyfriend disciplines child. Child dies. But his actions were not enough to have accelerated the death (couldn’t prove it).*
		3. **Concurrent Causes** – In rare circumstances, the But For test may fail to reach the morally sensible result. Problem arises when two acts, either one of which is sufficient to cause the resulting harm when it did, occur concurrently. But for test does not work when there are independent concurrent sufficient causes.
			* **Substantial Factor Test** – Was ∆’s conduct a substantial factor in the resulting harm?
				+ **Ex**. **Concurrent Sufficient Causes** – One actor shoots victim in head and one shoots in heart. Both are mortal wounds and both caused the death. Both proximate causes, as well as but for, so they are both liable.
				+ Ex. **Concurrent Insufficient Causes**- One person stabs in the arm, one person stabs in the leg. But the victim bled out because of both wounds together, each alone wouldn’t have killed. So both are held liable as proximate causes and cause in facts.
			* **MPC** – Does not apply the substantial factor test. Uses the But For test in all cases.

Commentary to Code explains, in deciding whether ∆ was a but for cause of a result, state the result w/specificity.

Ex. – Describe result as death by a bullet to the head and one to heart. This way, both ∆1 who shot V in head and ∆2 who shot V in heart are actual causes of the result. V would not have died from two bullet wounds but for each ∆’s conduct.

* 1. **Proximate Cause (Legal Cause)**
		1. After you prove the cause in fact, you have to determine Proximate Cause.
		2. **MPC § 2.03(2)(b):** In most cases Δ's act will be the proximate cause of the harmful result if the result is ***"not too remote or accidental in its occurrence*** to have a [just] bearing on the actor's liability or on the gravity of his offense.”
		3. **Note:** Proximate cause is an effort by the fact finder to determine based on policy considerations or a matter of fairness, whether it is proper to hold the ∆ criminally responsible for a prohibited result. Is the connection between the act and the harm so stretched that it is unfair to hold Δ liable for that harm? Is it morally just to hold ∆ causally responsible?
		4. **Look for two main types of proximate cause problems:**
			+ situations where type of harm intended occurred, and occurred in roughly manner intended, but *victim was not intended one*;
			+ cases where general type of harm intended did occur and occurred to intended victim, but occurred in an *unintended manner*.
		5. **Direct Cause:** A voluntary act that is a direct cause of the social harm is also a proximate cause of it. This is because there is no other candidate for causal responsibility.
			+ - Look at the facts of the case and determine whether there was any actual (but for) cause of the result that came into the picture after ∆’s voluntary act. If there was none, ∆ may be described as the direct cause of the social harm.
				- Ex. – ∆ shoots V. V dies instantly. As no other but-for causal force occurred after ∆’s relevant voluntary act, ∆ is the direct cause of V’s death. ∆ is the actual and proximate cause of V’s death.
		6. **Intervening Cause:** Intervening cause is an actual cause of social harm that arises after ∆’s causal contribution to the result. An intervening cause does not necessarily relieve a ∆ of causal responsibility for the resulting harm. But if ∆ can prove that the intervening act supersedes his act, ∆ is not liable.
			+ **Note:** An intervening cause exists when some but-for causal agent comes into play after ∆’s voluntary act or omission but before the social harm occurs. Typically an intervening cause will be:
				- an act of God
				- an act of an independent third party, which accelerates or aggravates the harm caused by the ∆
				- an act or omission of the victim that assists in bringing about the outcome- (*People v. Rideout- person causes car accident, but then removes self and victim from harms way. Victim on his own goes back into middle of the road, gets hit by a car.)*
			+ **Nature of Intervening Cause**
				- **Responsive/Dependent Intervening Cause:** An intervening cause is responsive/dependent if it occurs in response to the ∆’s earlier conduct. A responsive intervening cause does not relieve the initial wrongdoer of responsibility unless the response was not only unforeseeable but highly abnormal or bizarre. Reaction to conditions created by D, like victim’s action to avoid harm or actions of bystander to rescue him.
				- **Coincidental/Independent Intervening Cause:** An intervening cause is coincidental/independent if the factor would have come into play even in the absence of the ∆’s cause. A coincidental intervening cause relieves the original wrongdoer of criminal responsibility unless that intervention is foreseeable to a reasonable person in ∆’s situation. D’s actions put victim at certain place and time and since victim was there it was possible for intervening cause to occur.
			+ **Intended Consequences Doctrine** – In general, ∆ is proximate cause of a result, even if there is an intervening cause (or result occurs in an unforeseeable manner) if ∆ intended result that occurred. Be precise in stating result ∆ intended: ∆ may want V dead in a particular manner, in which case intended consequences doctrine only applies if result occurs in manner desired.
			+ **Apparent Safety Doctrine** – When person reaches position of safety, after primary harm from D is negated, original wrongdoer is no longer responsible for any ensuing harm afterwards.
			+ **Free Deliberate Informed Human Intervention** – In general, ∆ is not the proximate cause of a result if a free, deliberate, and informed act of another human being who intervenes.
				- **Retributivist** – Free will is a critical factor in the determination of moral responsibility for harm. When a person acts of her own free will, she should accept full responsibility for the results of her actions.
1. **Social Harm-**
	1. **Requires-** Result, Attendant Circumstances, and Conduct.
	2. **Rule** – Social harm may be defined as the negation of, destruction of, injury to, or endangerment of, some socially valuable interest. Result of a criminal offense.
	3. **Categories of Social Harm/Elements of Actus Reus** – A statute may have all of the elements or only some of them.
		1. **Conduct Elements (or Crimes)** – Prevent or punish persons who engage in a particular type of conduct – not necessarily causing any type of result. Some crimes prohibit specific conduct, whether or not tangible harm results thereby.
			* + Ex. A statute prohibiting DWI prohibits a certain type of driving (DWI) and not a result of that driving (such as the death of another or injury to property).
		2. **Result Elements (or Crimes)** – Some crimes prohibit a specific result. Punishes a person who causes a type of result.
			* + Ex. The social harm of murder is the death of another human being [result].
		3. **Attendant Circumstance Elements** – Attendant circumstance is a condition that must be present in conjunction with the prohibited conduct or result, in order to constitute the crime. An attendant circumstance is a fact that exists at the time of the actor’s conduct or at the time of a particular result, and which is required to be proven in the definition of the offense. Only examine actus reus (not mens rea) to determine AC.
		4. **MC Examples:**
			* + DWI – It is an offense to *drive* [conduct] an *automobile* [ac] in an *intoxicated condition* [ac] .
				+ Homicide/MPC §210.1 – A person is guilty of criminal homicide if he *purposely, knowingly, recklessly, or negligently* [mens rea] causes the *death* [result] of *another* [ac] *human being* [ac].
				+ Burglary – *Breaking* [conduct] and *entering* [conduct] a *dwelling house* [ac] *of another* [ac] at *nighttime* [ac] with the *intent to commit a felony* therein [mens rea].

# – **V.** **Mens Rea: Common Law & Model Penal Code Approaches; Mistake**  –

* To establish a crime, the prosecution must also establish that ∆ acted with the requisite mens rea.
* **Under the common law:**
	+ Intentionally – A person commits the social harm of an offense intentionally if (1) it was her conscious object to cause the result or (2) if she knew that the harm was virtually certain to occur as the result of her conduct.
	+ Knowingly – A person acts “knowingly” regarding an existing fact if she either (1) is aware of the fact (2) correctly believes that it exists or (3) suspects that it exists and purposely avoids learning if her suspicion is correct (willful blindness). Willful blindness requires 70-90% chance that the fact suspected exists.
		- Rationale: Want to deter people’s willful blindness. But this also punishes negligence for failing to confirm, and willful blindness is not the same thing as knowledge, so we shouldn’t mix the two/pretend that it is.
		- Under Nations- *State v. Nations*- D argued didn’t know that girl was less than 17 years of age. Had a state statute that required knowingly. Court held that the recklessly standard had to be filled because she didn’t actually know (remember this is the problem with the willful blindness statute- Willful blindness is not the same thing as knowing).
* **Under the MPC:** the ∆ must have acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense.
	+ If the statute defining an offense is silent regarding the issue of mens rea as to one or more of the actus reus elements, the Code provides that “such element is established if a person acts *purposely, knowingly, or recklessly* with respect thereto.”
	+ If definition of a MPC statute only sets out a single mens rea element in definition of offense, mens rea term applies to every material element of the offense, unless contrary legislative intent plainly appears.
1. **Mens Rea – Culpable State of Mind – A Guilty Mind**
	1. **Broad and Narrow Meanings of Mens Rea**
		* + **Broad Culpability Meaning/CL** – A person has acted w/mens rea in broad sense if she committed the actus reus of an offense w/vicious will, evil mind, morally blameworthy or culpable state of mind. No particular state of mind required.

This is the common law approachto mens rea. If prosecution could prove that ∆ acted in a morally blameworthy fashion, then that is sufficient to establish mens rea.

Ex – ∆ has non-consensual sex w/V, a woman not his wife. He genuinely but *negligently (unreasonably)* believed that she consented to the sex. On these facts, ∆ committed the actus reus of rape with mens rea in the broad sense of the term: it does not matter that ∆ did not intend to act without V’s consent – his belief regarding V’s consent was negligent so he possessed a culpable a morally blameworthy state of mind.

* + - * **Narrow Elemental Meaning/ MPC** – Mens rea exists if a person commits the actus reus of an offense with a particular mental state set out in the definition of that offense.

Precise state of mind required by the law in order to convict offense (knowingly, recklessly, etc).

This is the MPC approach.Most modern statutes/courts take a narrow/elemental approach to mens rea.

Ex. – Assume that rape is defined in State X as “sexual intercourse by a male with a female not his wife, with *knowledge* that she did not consent.” Under the narrow meaning of mens rea, ∆ lacks the requisite mens rea of rape: this statute *requires proof that the actor had knowledge that the female did not consent*. Since he did not act with the particular state of mind, he lacks mens rea in the narrow, elemental sense. Even though he satisfied the broad culpability meaning of mens rea.

*Regina v. Cunningham –* D wrenched gas meter from pipes and didn’t turn off gas. Partially suffocated Mrs. Wade. Under statute- malicious. Judge instructed- Wicked- But malice does not equal wicked. Mens rea must modify the social harm because it’s a narrow approach j(x).

*People v.**Conley*- Guy swing bottle at Marty, Marty ducked, it hit the guy behind him and caused permanent disability. Appellate court affirmed conviction for aggravated battery because it required intent to cause permanent disability, and could infer from the D’s swinging of the bottle he wanted to do that to the original victim. So it transferred to the guy he did hit.

* 1. **Policy for Mens Rea Requirement**
		+ - **Utilitarian** – Punishment of someone who has no guilty mind is punishing someone who cannot be deterred or reformed so punishment would be counter-utilitarian if you don’t have mens rea.

**Contrary Argument** – May overstate the case in some circumstances. Some persons may be accident prone; although they cannot help what they do, they represent a danger to the community that may merit the application of the criminal law.

Furthermore, there may be deterrence value in punishing a person who innocently commits the actus reus of an offense as a lesson to others who might believe that they could otherwise avoid punishment by fraudulently claiming a lack of mens rea.

 Deterrence also encourages others to act with the greatest care possible.

* + - * **Retributive Argument** – A person who commits the actus reus of an offense in a morally innocent manner (i.e. accidentally) does not need to be punished, as they did not choose to act unlawfully.
1. **Common Law Approach**
	1. **Intentionally**
		1. **Defined:** A person commits the social harm of an offense intentionally if
			* (i) it was her conscious object to cause the result **or**
			* (ii) if she knew that the harm was virtually certain to occur as the result of her conduct.
				+ Ex – ∆ plants a bomb in a room in order to kill V. ∆ realizes that the explosion will kill not only V but five other persons in the room. The bomb explodes, killing all six persons. On these facts, ∆ has intentionally killed all six people: he killed V “intentionally” because V’s death was ∆’s conscious object; ∆ killed the other five persons “intentionally” because he knew that this result – their death – was virtually certain to occur from his action.
		2. **Intent to Harm Not Act:** Intent pertains to the social harm and not the act that causes the result. A person may intend an act, but for purposes of analyzing mens rea, the issue is whether the person intended the result of the act.
			* + Ex – A aims at a target and intentionally pulls the trigger. To A’s surprise V walks in front of the target and is killed by a bullet from A’s gun. A has caused the social harm of homicide – the death of another human being. But, A did not cause this result intentionally. It was not her conscious object to kill V, nor did she know that firing the gun would almost certainly result in a death. The pulling of the trigger was a voluntary act, a part of the actus reus, but for purposes of determining A’s mens rea, we focus A’s state of mind in relation to the social harm. A may have some mens rea as to this death, but on these facts, it is not an intentional killing.
		3. **Transferred Intent Doctrine(Narrow elemental approach)** – If D intends social harm towards one person and inflicts that same social harm on different person. Intent transfers. This is only true when the mens rea req’d is intent or knowledge.
			* + **Doesn’t Transfer**- D misIDs victim; or D also causes harm to original victim; definition of crime precludes transfer; social harm intended is different type of social harm that resulted.

**Ex.** – ∆’s conscious object is to kill V. With that purpose in mind, ∆ fires a gun at V, but the bullet strikes and kills X instead. The intent to kill V is transferred to X.

**Kill 2 But Intended 1**

*Mens Rea-* Punishment for death of two is disproportionate with intent to kill one.

Social Harm- Hold D responsible for death of both. The social harm is the same (death)

* + - * + **Note** – When reckless or negligent, transfer of intent even if the social harm isn’t the same as what you intended because you’re responsible for everything that happens regardless of your state of mind.
				+ **Criticism of the Doctrine** –

Transferred intent is unnecessary.Actus reus is specific in what it requires. So no need to transfer victims.

Mindlessly accepting transfer of intent leads to improper results.

Ex. Law: Offense to intentionally kill the President. D wants to kill FLOTUS but accidentally kills the President. Here, no intent to kill President, so not guilty. Can’t transfer the intent.

* 1. **Knowledge or Knowingly** – Some offenses require proof that the actor had knowledge of an attendant circumstance.
		1. **Defined** – At common law, a person acts “knowingly” regarding an existing fact if she either (a) is aware of the fact (b) correctly believes that it exists or (c) suspects that it exists and purposely avoids learning if her suspicion is correct (willful blindness).
		2. **Ex** – It is a crime to receive property with knowledge that it was stolen. This offense requires proof that the actor has knowledge of an attendant circumstance, namely that the property received was stolen. ∆ would have the requisite knowledge if
			+ (a) she was aware that the received property was stolen, because she saw it being stolen
			+ (b) she correctly believed that the property was stolen because she paid an extremely low price for it or
			+ (c) she accurately suspects (although her suspicion is not strong enough to constitute a belief) that the property was stolen because she bought it from a known purveyor of stolen goods and she told the seller, “Don’t tell me where you got the property.” (This is willful blindness). (70-90%)
		3. **Criticism of Willful Blindness** – ∆ only has suspicions and purposely avoided confirming knowledge, so how can it be said that ∆ had such knowledge? ∆ has a culpable state of mind – some mens rea – but it’s stretching to characterize it as knowledge.
	2. **Specific Intent and General Intent**
		1. **Specific Intent Offense** – one that explicitly contains one of the following mens rea elements in its definition:
			+ - **the intent to commit some act over and beyond the actus reus of the offense** (Intent to achieve some future consequences)

Burglary offense is defined at common law as “breaking and entering the dwelling house of another at night, with the intent to commit a felony therein.”

**Actus reus** is “breaking and entering the dwelling house of another at night.

**Mens rea** is “intent to commit a felony therein” – is a mental state pertaining to an act (commission of a felony) that is not part of the actus reus of the offense.

The crime of burglary is complete whether or not ∆ ever commits a felony inside the house; but it is incomplete unless ∆ has this specific intent of further conduct upon entering.

Possession with the intent to sell.

* + - * + **a special motive for committing the actus reus of the offense**

Larceny is the “trespassory (nonconsensual) taking and carrying away of the personal property of another [actus reus] with the intent to permanently deprive the owner of the property [mens rea].” Actus reus must occur with a specific motive – to permanently deprive the other person of the property.

Offensive contact upon another with the intent to cause humiliation.

**awareness of a particular attendant circumstance** (Knowledge of statutory attendant circumstances)

Receiving stolen property with knowledge that it is stolen; the specific intent of this offense is that the actor must be aware (have knowledge) of the attendant circumstance that the property was stolen.

Intentional sale of obscene literature to a person known to be under the age of 18.

* + 1. **General Intent Offenses** – Any offense that requires proof of a culpable mental state, but does not contain a specific intent.
			- * When no explicit mens rea term/particular mental state is set out in the definition of the crime, a prosecutor need only prove that the actus reus of the offense was performed with any culpable (morally blameworthy state) of mind.
				* Crimes that permit conviction for reckless/negligent/or any mental state in a definition that relates solely to the social harm of a criminal offense.
				* Ex. – Battery, the actus reus is the physical touching of another, no intent needed to cause injury, just intent to do the act of touching. No excuse if you just want to scare.
		2. **General vs. Specific Intent Examples:**
			- * Assault is a general intent crime. Assault with *intent to rape* is a specific intent crime.
				* Breaking/entering is a general intent. Breaking and entering *w/intent to commit a felony therein* is a specific intent.
				* Burning down house is a general intent. Burning down house *w/intent to obtain insurance* is a specific intent.
	1. **Statutory Construction: Common Law Interpretive Rules of Thumb**
		1. **Issue** – Whether mens rea term in definition of an offense applies to all or only some of actus reus elements in def. of crime.
		2. **Legislative Intent** – Determine what the legislature intended. A court will try to resolve interpretive problems by ascertaining the intention of the drafters of the law, sometimes by looking through legislative history. Often, however, evidence regarding legislative intent is non-existent or ambiguous, so courts must look elsewhere.
		3. **Position of Mens Rea term in Definition of Offense** – Courts often look at placement of mens rea term in the definition of the offense in order to ascertain legislative intent. What does mens rea term modify? Does it precede (likely to apply) or follow (less likely to apply) the phrase?
		4. **Punctuation** – Sometimes punctuation is relied upon to determine that a phrase set off by commas is independent of the language that precedes or follows it. (look out for parentheticals)
		5. **Attendant Circumstances** – Frequently courts assume that absent evidence to the contrary, mens rea terms in the definitions of offenses do not apply to attendant circumstance elements of a crime.
	2. **Natural and Probable Consequences Doctrine**
		1. Doctrine says that a fact finder can infer ∆’s state of mind based on what he did and the natural and probable consequences of his actions to result. Fact finder is permitted to infer that ∆ intended the natural and probable consequences of his doctrine.
		2. Permits reasonable inferences for proof of mens rea b/c you can’t know precisely what ∆ was thinking. Jury sees evidence that allows them to infer the natural and probable consequences of ∆’s act. Jury cannot presume but can only infer*. [Conley]*
1. **Model Penal Code Approach – No jurisdiction has adopted all of MPC, but many have adopted parts of it (particularly §2.02)**
	1. **§2.02(1)** – “Except as provided in §2.05, a person is not guilty of an offense unless he acted *purposely, knowingly, recklessly, or negligently*, as the law may require, with respect to each material element of the offense.”
* Contrasts w/common law, where there might be mens rea requirement as to one element but not as to other elements.
* MPC consistently applies an elemental approach to mens rea 🡪 prosecutor must prove that ∆ committed each material element of the charged offense with the particular state of mind required in the definition of that crime. Guilt cannot be based simply on proof that the ∆ committed the actus reus of an offense in a morally blameworthy manner.
* Mens rea terms modify/must be established as to all material elements which may involve (1) the nature of the forbidden conduct, (2) the attendant circumstances or (3) the result of the conduct.
	1. **§2.02(2) Definition of Culpability Terms (Purposely, Knowingly, Recklessly, and Negligently)**
* MPC provides different definitions depending on whether actus reus element under consideration involves a result, conduct, or an attendant circumstance.
* MPC Purposely and Knowingly = C/L Intentionally
* Purposely, Knowingly and Recklessly are all subjective standards. Negligence is the only objective standard
	+ 1. **Purposely [§2.02(2)(a)(1)]** – A person causes a result purposely wrt a material element of an offense if conduct/result is concerned, it is his **conscious object to engage in conduct** of that nature or to cause that result.
			- * This is a subjective look into ∆’s mind.
				* **Attendant Circumstances** – If attendant circumstances, he is **aware of the existence of such circumstances, or he believes or hopes they exist.**
				* **Conditional Intent** – MPC holds the existence of a condition doesn’t prevent the intent from still existing.

Ex: A breaks into B’s house but only intends to steal something if B isn’t home. Intent is still present because the evil sought to be prevented by laws against burglary is present despite the condition.

Ex: Pointing a gun to steal a car only if they don’t get out is still hijacking.

Ex of No Intent: I’m going to take car b/c it’s mine, if it’s yours I’ll return it. Mens rea is not to deprive another of his property, it’s to reclaim what he thinks is his. Thus, he doesn’t have required mens rea for car jacking.

* + 1. **Knowingly**
			- * **§2.02(2)(b)(ii) Results** – **A person knowingly acts or causes the result when he is practically certain that his conduct will cause such a result.**[Ex – ∆ kills V and 5 others w/ a bomb. ∆ purposely killed V and knowingly killed the others 5.]
				* **Attendant Circumstances** – A person acts knowingly as to an attendant circumstance if he **is aware that the circumstance exists** [§2.02(2)(b)(1)], or if **he is aware of a high probability of its existence**,

unless he actually believes that it does not exist [§2.02(7) Willful Blindness].

* + - * + **Distinction b/t Knowingly and Purposefully** – The difference is primarily in stages of awareness.
				+ Most jurisdictions like MPC provide that ∆ who is willfully blind regarding a material fact possesses the equivalent knowledge of that fact.
				+ **Presumption** – statute or judge made presumption may be used to prove that ∆ acted knowingly

**Ex.** – Statutes say that ∆’s unexplained possession of stolen property gives rise to the presumption that ∆ knew the property was stolen.

**Knowledge of Attendant Circumstances** – Where a statute requires that ∆ act knowingly and the statute also specifies attendant circumstances, usually the requirement of knowledge is held applicable to all these attendant circumstances.

* + 1. **Recklessly** – A person is said to have acted recklessly if he **consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.**
			- * Subjective standard.Strong retributivism – punish ∆ only if he deserves it.
				* **Minority Rule – Objective Standard** – ∆ can be reckless if he behaves extremely unreasonably even though he was unaware of the risk; apply objective person standard – should have known. Strong utilitarian deterrence.
				* **Standard for Evaluating Conduct** – Measure the gravity of foreseeable harm, the probability of its occurrence, and the reasons for taking the risks. **One is reckless when the risk-taking involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation**.
				* **Compared to Negligence** – With recklessness, actor is conscious of the substantial and unjustifiable risk but proceeds anyways; with negligence, actor is not aware of risk but should be.
				* **Role of Jury** – Jury is asked to (1) examine the risk and the factors that are relevant to how substantial it was and to the justifications for taking it (2) the jury is to make the culpability judgment in terms of whether the ∆’s conscious disregard of the risk justifies condemnation.
				* **Malice** – A person acts w/malice if they intentionally or recklessly cause the social harm of an offense (Malice is not found in the MPC – MPC only has the big 4) Example: ∆ throws a stone at V, misses and breaks a window. He’s charged with malicious damage to property. To prove ∆’s guilt, the prosecutor must show that ∆ either intended to damage the property (actus reus of the offense charged) or that he recklessly damaged it.
		2. **§2.02(2)(d) Negligently** – A person acts negligently when **he should be aware of a substantial and unjustifiable risk.** This is a risk that constitutes a *gross deviation* from standard of care that a reasonable person would observe in the actor’s situation. This is ABSOLUTELY OBJECTIVE.
			- * Usually, criminal negligence is *"gross"* negligence; that is, the deviation from ordinary care must be greater than that which would be required for civil negligence.

**Retributivism** – This clearly goes against retributivism.

**Utilitarian** – This is used to deter.

**Criticism** – Many scholars believe that the criminal law should not be used to punish people for negligence. One who acts negligently doesn’t choose to cause harm. It’s one thing to require a person to pay civil damages and another to take their freedom b/c they failed to live up to an objective standard.

* 1. **§2.02(3) No Mens Rea Terms Set in Statute – Default Position** – MPC requires some mens rea term for each element of an offense. If the statute defining an offense is silent regarding the issue of mens rea as to one or more of the actus reus elements, the Code provides that “such element is established if a person acts *purposely, knowingly, or recklessly* with respect thereto.” In other words, you fill in the blank w/purposely, knowingly, or recklessly.
	2. **§2.02(4) When Just One Mens Rea Term Is Mentioned** – If definition of a MPC statute only sets out a single mens rea element in definition of offense, mens rea term applies to every material element of the offense, unless contrary legislative intent plainly appears.
		+ - * Ex. – False imprisonment means “knowingly restraining another so as to interfere substantially with his liberty.” Because one mens rea term is set out (knowingly), but there is requirement of proof of mens rea as to each material element of an offense, the MPC requires the prosecutor to prove that the ∆ knowingly restrained the victim *and* knowingly interfered substantially with the victim’s liberty.
				* Ex. – “Anyone who does A, B, and knowingly C is guilty of X.” Knowingly is not set out at the start of the statute but near the end. Therefore, this may be a case where a contrary legislative intent “plainly appears.” The legislature probably intends that the word knowingly modify C but not A and B. Otherwise, why didn’t the drafters of the statute put knowingly at the start of the sentence? So then we return to the default position of §2.02(3) and the prosecutor would need to prove elements A and B occurred purposely, knowingly or recklessly.
	3. **Essay Question**: Do we want to only punish Social Harm? Or do we want to have Mens Rea as well?
		1. **For Social** **Harm**- We can give lesser punishment because the harm has been done; Punish even if we don’t morally condemn (Retributive). Mens Rea isn’t important because we want to address the social harm
		2. **For Mens Rea**- People actively make a choice to be morally condemned; Postive Retributivism says it is to punish ill acts that create debt to society, not accidents. So if you accidentally cause social harm, Positive Retributivist doesn’t want to punish that act; Utilitarian thought is that you can’t deter accidents, only things with purpose.
		3. **Case***: Burmese Boy Case*- He was dumb, raped a girl. The social harm was not considered a crime because of his distinct lack of mens rea.
1. **Strict Liability Offenses – No Requirement of Mens Rea**
	1. **Strict Liability** – When you don’t need mens rea
		1. Don’t really call strict liability for crimes that have severe punishment.
	2. **Public Welfare Offenses**- exceptions to mens rea. DWIs, pure food, anti narcotics, motor violations and traffic regulation, factories.
		* + **Statutory Rape is the exception (Not a public welfare offense- but serious enough to warrant strict liability)**
			+ **Characteristics of Most Public Welfare Offenses**

**Nature of Conduct** – Typically involve ***malum prohibitum conduct*** – wrongful only b/c it is prohibited (motor vehicle laws) as distinguished from ***malum in se conduct*** – inherently wrongful conduct (murder).

**Punishment** – Penalty is usually minor, such as a monetary fine or a very short jail sentence.

**Degree of Social Danger** – A single violation of the offense often threatens the safety of many persons. Ex. transportation of explosives on a highway not designated for such use.

* 1. **Constitutionality of Strict Liability Offenses** – Strict liability offenses are not per se unconstitutional.
		1. Super strong presumption against strict liability even if no *mens rea* term is present in the statute.
	2. **MPC §2.05** – MPC abolishes strict criminal liability except as to violations. [MPC §1.04(5): A violation is an offense, (not a crime) the violation of which involves no other sentence than a fine, or fine and forfeiture or other civil penalty.]
		1. **Still have Statutory Rape**
	3. **Essay- We don’t like Strict Liability because:**
		1. It doesn’t deter criminals- you’ll always be liable if you do something. Well maybe its supposed to deter criminals
		2. Punishment without mens rea means people get the stigma of conviction but aren’t morally blameworthy (societal condemnation is normally for something society morally condemns)
		3. Conduct without awareness of what makes it criminal doesn’t mean someone should be punished
		4. The entire system is incompatible with the criminal culpability idea.
1. **Mistake of Fact –** Defense to Negate Mens Rea- Not a real defense. Defednant has initial burden to produce evidence that he had mistake, but prosecutor still has burden to persuade.
	1. **Common Law Approach**
		1. **General Rule** – ∆ is not guilty of a crime if her mistake of fact negates the mens rea of the offense charged.
		2. **Specific Intent Offenses –**– ∆ is not guilty of a specific intent crime if her mistake of fact negates the specific intent element of the offense. It doesn’t matter if the mistake of fact is reasonable or unreasonable as long as the mistake negates the mens rea required for the offense.
			* *People v. Navarro*-Navarro thought he could take the blocks because they didn’t belong to anyone since the wood was abandoned. So couldn’t prove mens rea for larceny. (Requires specific intent).
		3. **General Intent Offenses –**– ∆ is not guilty of a general intent offense if, as result of her **reasonable** mistake of fact, she committed actus reus of offense w/a ***morally blameless*** ***state of mind***, i.e., if she acted w/o mens rea in culpability sense.
			* Criticism:
				+ The punishes people for negligence (unreasonable behaviour) even if they made a mistake.
				+ It punishes the D with intent the same way as someone without intent
		4. **Moral Wrong Doctrine** – If the facts had been as D believed, and the conduct is immoral in the eyes of the court the D is culpable.
			* S**ee facts from mistaken actor’s perspective**: Assume facts were as ∆ reasonably believed them to be.
			* **Second, moral judgment**: looking at facts as ∆ understood them to be, was ∆’s conduct morally wrong?

*Plaintiff kidnaps girl who he thought was older from her parents care. Assuming the facts were as D believed them, D’s conduct was morally wrong according to the court.*

* + - * **Argument Against Moral Wrong Doctrine**
				+ Who determines morality?
				+ Conflates immoral conduct into illegal conduct and violates legal principles
		1. **Legal Wrong Doctrine**- if the mistake is reasonable, what did the D think that he was doing? If the act was illegal (whatever he thought it was, then he can be held culpable).
			- **Critique**- mens rea is at lower level than required by the higher grade offense but can still punish as if at the higher offense.
	1. **MPC Approach**
		1. **§2.04(1)(a) General Rule** – Subject to the exception below, a mistake of fact is a defense to a crime if the mistake negates a mental state element required in the definition of the offense.
			+ - MPC doesn’t use common law distinction b/t general intent and specific intent offenses b/c of elemental approach. All crimes are specific intent. Mistake of fact rule applies to all offenses in same manner. Reasonableness is irrelevant.
		2. **§2.04(2) Exception to the General Rule** – The defense of mistake of fact law is inapplicable if the ∆ would be guilty of a lesser offense had the facts been as she believed them to be.
			+ - Under such circumstances – unlike common law – ∆ will be punished at level of lesser, rather than greater offense.
				- Ex. ∆ has sex w/ an 11 year old girl although he believed that the girl was 14. Assume that under the law, ∆ is guilty of first degree statutory rape if he purposely or knowingly has sex with a girl under 12 and is guilty of second degree statutory rape if he purposely or knowingly has sex with a girl between 12 and 16. Under MPC, ∆ will be punished as if he had committed second degree statutory rape, the crime he believed that he was factually committing. In contrast, under common law legal wrong doctrine, ∆ would be convicted of first degree statutory rape.
1. **Mistake of Law – Defense to negate mens rea**
	1. **Rule:** Knowledge of the law is not an element of the offense. [MPC §2.02(9)]
		* + Mistake of law, even reasonable one, does not ordinarily relieve actor of liability for commission of a criminal offense.
			+ Mistake of law exceptions are applied extremely narrowly.
	2. **Justifications for Rule:**
		1. **Certainty of Law** – The law is definite. Therefore, any mistake of law is inherently unreasonable.
			* + **Rebuttal** – This rationale may have been accurate at original common law when there were few crimes and all of them involved malum in se conduct. Today however, there are almost countless criminal statutes, many of which involve malum prohibitum conduct, and some of which is exceedingly complex. It is perfectly reasonable today to be unaware of some laws or to be confused as to their meaning.
		2. **Concern About Fraud** – If a mistake of law defense were recognized, it would invite fraud. Every ∆ would assert ignorance or mistake and it would be nearly impossible to disprove the claim.
			* + **Rebuttal** – The risk of fraud exists in many aspects of civil and criminal litigation. For example, the doctrines of mens rea and insanity are susceptible to fraudulent claims, but we trust juries to determine which claims are fraudulent.
		3. **Promoting Knowledge of the Law** – We want people to learn the law. To promote education – to deter ignorance – the law must apply strict liability principles. Mistake of law fosters lawlessness by encouraging ignorance of the law. Policy favors knowledge.
			* + **Rebuttal** – The strict liability rule may be counter-utilitarian. If citizens knew that they could avoid punishment if they made reasonable efforts to learn the law but they would be punished for unreasonable mistakes of law, they would have an incentive to learn the law. But under current law, they are punished even for reasonable mistakes of law, so they may not make the initial effort to educate themselves.
				+ **Rebuttal** – Retributivists would argue that unless person chooses to do wrong, he should not be punished; if person does not knowingly commit a wrong (or act unreasonably in learning the law), society has no basis for exacting retribution.
				+ **Answer** – Rule will result in occasional unfair outcome, yet the larger societal interest in promoting knowledge of the law is more important.
	3. **Exceptions to General Rule**
		1. **Mistakes that negate the mens rea** **MPC§2.04(1)(a)** – ∆ is not guilty of an offense if his mistake of law, [whether reasonable or unreasonable], negates an element of the crime charged.
			* + **Rationale** – Either a person has, or does not have, the requisite mens rea of an offense. It is rare that knowledge of some law is an element of an offense, but when it is, the prosecutor must prove such knowledge.
		2. **MPC §2.04(3)(b) Authorized Reliance Doctrine** – A person is not guilty of a criminal offense if, at the time of the offense, he reasonably relied on an ***official statement of the law***, later determined to be incorrect, obtained from ***a person or public body with responsibility for the interpretation, administration, or enforcement of the law defining the offense***.
			* + **On Whom or What Body is Reliance Reasonable** – Although common law is less clear than the MPC, apparently a ∆ may reasonably rely on an *official statement of the law found in a statute, judicial opinion, administrative ruling, or an official interpretation of the law given by one who is responsible for the law’s enforcement or interpretation*, such as the US or State Attorney General. Interpretation of the law should be formal or official.
				+ **THIS ONE WAS NOT IN THE COMMON LAW AS AN EXCEPTION (NEW)**
				+ *People v. Marrero-* This is the defense he tried but even though statute was ambiguous they said he should’ve tried harder to find an authourity upon which to rely.
		3. **Due Process Clause/ Fair Notice** – In rare cases, it may offend due process to punish a person for a crime of which she was unaware at the time of her conduct. ***Due process may be violated if the following three factors co-exist***: (a) the unknown offense criminalizes an *omission* (b) the duty to act is based on a *status condition* *rather than conduct* (c) the offense is *malum prohibitum* in nature.

#

# **– VII. Criminal Homicide –**

1. **Criminal Homicide: Overview**

|  |  |  |
| --- | --- | --- |
| **Common Law / Pre-MPC Murder** | **Pre- MPC Murder** | **MPC Murder** |
| **Murder:** Unlawful killing of another human being with malice aforethought (Unjustifiable, unmitigatable and inexcusable)1. **Intent to kill another human being*** Jury can infer intent
* **Deadly Weapon Rule-** jury may infer intent to kill if D intentionally uses a deadly weapon directed at a vital part of human anatomy

**2. Intent to cause grievous bodily harm*** Imperils life/likely to have dangerous/fatal consequences

**Unintentional Killings**3. Depraved Heart- extreme reckless disregard for value of human life/indifference to human life. (Knoller/Berry)* **Extreme indifference** is manifested if he consciously takes a substantial and unjustifiable foreseeable risk of causing human death
* Some j(x) will find recklessness on basis of objective standard that person should’ve been aware of risks of actions
* Most courts require conscious risk taking
* Deter reckless behaviour

4. Felony Murder- intent to commit a felony during commission/attempt commission of which a death accidentally occurs* You only need to prove the Felony mens rea
* Then, but for causation of murder
* Utilitarian- deter negligent and accidental killings.
* Deter dangerous felonies
* Criticism- better to increase punishment for felony itself, not get people on murder because that is disproportional. Intent to commit felony gets transferred
* Retribution- justifies conviction because felony is evil mind and then killing happened so criminal is responsible for felony and every result of that.

**Limitations on FM Rule****1. Inherently Dangerous felony limitation**- * *Abstract-*Would offense be committed without high probably of loss of life or chance that someone will die? If yes normally no one dies, not considered inherently dangerous. OR
* *as perpetrated*- is it a dangerous felony in light of circumstances of case.

2. **Independent Felony Merger Limitation-**If felony is assaultive in character- can’t use felony for fm. Because that lets you skip mens rea. Must have other intent than inflictin harm.* Ex. Larceny with assault with deadly weapon. Usually limitation doesn’t apply if felony is independent felonious act. Deterrence is more impt. Than fairness.
* Ex. D kills V during armed robber. Robbery included assault with deadly weapon, the independent felonious purpose was to obtain V’s property. So this robbery part is independent- can use Felony Murder rule. Because want to deter.

**Causation Limitation****1.** There must be causal connection bt/ felony and harm.**Killing by a Non Felon Limitation****1.** Ex. 4 ppl robbing restaurant. Off duty officer kills two. Can the last two be convicted of felony murder?* **Literal-** yes.
* **Deterrence-** No because felon can’t control others actions (bystanders or cops)
* **Agency Approach-** felon is only responsible for homicides committed in furtherance of the felony by person acting as his agent.
* **Proximate Cause test- Minority** – Felon responsible for killing by a non felon if felon was proximate cause of the killing (foreseeable).
 | 1. **First Degree Murder**: C/L murder with premeditation and deliberation* Enumerated felonies- robbery, arson, rape, burglary (if you’re trying for felony murder in a place that splits into degrees)

2. **2nd Degree murder**: C/L murder w/o premeditation and deliberation* Typically includes “Intent to cause grievous bodily harm”
* Non-enummerated felonies – if you’re in a j(x) that uses degrees.
 | 1. **Criminal Homicide**- 210.1- a person is guilty of criminal homicide if he purposely, knowingly, recklessly, or negligently causes the death of another human being.2**. Murder**- if committed purposely/knowingly **OR** recklessly under circ. Manifesting extreme indifference to value of life- presumed if actor is engaged in or accomplice in (felony murder felonies 210.2 (1)(b))* Purposely and Knowingly= Intent to kill C/L
* Recklessly= C/L intent to grievous/depraved heart/felony murder but with built in merge limit and inherently dangerous limit.

3. **Negligent Homicide**- inadvertent risk taking. MPC 210. 4- * Committed negligently-should be aware of substantial and unjustifiable risk that material element exists or will result from his conduct. Must be Gross Deviation from reasonable person in actor’s situation.
 |
| **Felonies- Robbery, Rape, Arson, Burglary.** Anything that wasn’t a felony was a misdemeanor. | **1. Premeditation**: Some j(x) say no time is too short to premeditate- intent to kill only required for an instant. Others say more than a blink of an eye. 2. **Critique**- if instant is premeditation then every intentional killing is premeditated homicide. 3. **Criteria** for premeditation and deliberation as first degree murder:* Lack of provocation by the deceased
* Conduct and statements of the D before and after killing
* Threats and declarations of the D before and during course leading up to death
* Previous ill will between the parties
* Lethal blows after the deceased felled and helpless
* Brutal manner of killing
 | **Felonies:** Robbery, Rape, Deviate Sexual Intercourse by Force/Threat of Force, Arson, Burglary, Kidnapping, Felonious escape. (210.2 b). |
|  | **Deliberation:** To measure and evaluate the major facets of the problem. Must premeditate longer than an instant. |  |
|  | **Diff. b/t Premed and Delib:** Premed is quantity of tiem taken, Deliberation is quality fo thinking process (cool calm thinking). Can’t deliberate without premeditating. |  |

**MANSLAUGHTER**

|  |  |  |
| --- | --- | --- |
| **Common Law** | **Pre-MPC Statutory Variations** | **MPC** |
| 1. **Manslaughte**r- unlawful killing of human being by another human being w/o malice aforethought, justification or excuse**OR**2. With head of passion upon adequate provocation* Partial defense to murder because mitigate to manslaughter since recognizing fallibility
* Sudden: must be twinkling of an eye. An accumulation of events leading up to him snapping doesn’t count as “sudden”
* Must be a passion- anger, fear, jealous, deep depression
* Must be adequate provocation:
	+ Judge determined- serious battery, mutual combat, husband saw wife committing adultery; abuse of a relative
* Words are never adequate provocation.
* Must have causal connection between provocation and reaction.

**OR**3. Misdemeanor manslaughter. | 1. **Voluntary manslaughter** – intentional killing in sudden quarrel or heat of passion* Result of Adequate Provocation

2. **Involuntary manslaughter** – * Unintentional killing. **Misdemeanor manslaughter** – is the result of an unlawful act, a misdemeanor.
* **Lawful act performed in unlawful manner resulting in death-** Lawful act performed in an unlawful manner and without due caution and circumspection. Killing occurred in criminally negligent manner.

**Determine Misdemeanor Manslaughter**1. Liability attaches even where culpability isn’t there- its just like Felony Murder but with misdemeanor.Ex. Running a stop sign and killing someone by mistake- super unfair/unproportional**Determine Involuntary Manslaughter Test:**1. How far did the accused deviate from standards of reasonable care? Objective negligence standard. 2. Was the accused aware of the risk of death or bodily harm. Ex. Parents wait too long to take child to hospital, don’t know seriousness of child’s illness but should have. This is negligence. This could be negligent homicide under MPC or it could be involuntary manslaughter in pre-MPC. | §**210.3 Manslaughter-** recklessly extreme mental and emotional disturbance. \*C/L Heat of Passion\*; or just reckless.**Test:** Could the D reasonably suffer? Was he extremely upset from emotional disturbance and was he reasonable to be so disturbed? *People v. Cassassa- the guy who asked that chick out and she said no so he stalked and then killed her. Failed reasonable person.***Actual Test Phrase**: MPC 210.3(1)(b)- Is the person acting under influence of mental disturbance (subjective) and under the circumstances as the actor believed them to be is there a reasonable explanation or excuse for emotional disturbance?**For Adequate provocation**- no rigid categories- words can qualify if disturbance was reasonable. * Don’t need provocation as long as jury concludes that there is reasonable excuse for actor’s extreme emotional distress.
* Don’t need to cool off.
* Ex. Someone always keeps parking space spotless and one day someone pulls in to their space. They come back and then stab the person who parked in the space.

**Reasonableness of ∆’s explanation or excuse for EMED** should be determined from perspective of a person in the actor’s situation under the circumstances as he believes them to be. This allows for considerable subjectivism of the objective standard. [She will ask a MC on this] §210.4 Negligent Homicide = \*pre-MPC Involuntary manslaughter |

**Homicide –** Homicide is a legally neutral term. A homicide may be justifiable, excusable, or criminal.

* 1. **English Common Law Definition** – The killing of a human being by a human being. (Includes suicide)
	2. **American Common Law Definition** – The killing of a human being by another human being.
	3. **Criminal Homicide** – A criminal homicide is a homicide committed without justification (self-defense) or excuse (insanity). MPC 210.1- A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.
	4. **Human being** – MPC 210.0 (1)- A person who has been born and is alive (so not a fetus
	5. Cases for Intentional Killings
		1. Premeditation and Deliberation- *State v. Guthrie,* body dysmorphia, towel snapped to nose. Premeditated and deliberated because the person took a second look and time to think; *Midgett v. State*- man who regularly beat child. Drunk, hit and killed son but not premeditated or deliberated.; *State v. Forrest*- D has gun, takes to hospital, kills father and was visibly upset and said stuff before he killed his father. Premeditated and Deliberated.
	6. **Murder vs. Manslaughter**
		1. **Intentional Killings can be mitigated down to manslaughter.**
		2. **Unintentional Killings** – An unintentional killing can constitute either murder or manslaughter.

Reckless killings are murders

Criminally Negligent killings are manslaughter

An accidental killing does not constitute criminal homicide unless it occurs during the commission of a wrongful act. In general, if a death occurs during the commission of a felony, the homicide is murder; if it results during the commission of a misdemeanor or some other unlawful act, it is manslaughter.

* + 1. **Rationale of Provocation Doctrine – Justification vs. Excuse** Courts and commentators disagree.
			- * **Partial Excuse** – Majority View. Focuses on the mens rea element, culpability, and the actor. Defense is partial excuse, a concession to normal human frailty. Social harm is unmitigated (provoker does not deserve, even partially, to die), but the culpability of the actor is reduced because of the provocation. The provocation understandably undermined the actor’s ability to control his conduct.
				* **Partial Justification** – Minority View. Focuses on actus reus component, the social harm or act that is committed. Partial justification for a killing, death of provoker victim constitutes less of a social harm than killing an entirely innocent person. Victim, by provoking the killer partially forfeits his right to life by his unlawful conduct. The victim somewhat deserved to die.
				* **Critique** – Undermines utilitarian goals by rewarding (lesser punishment) people who respond violently to non-violent provocations. Attacked by feminists: defense partially excuses male aggression at the expense of women.
				* **Duncan – MC Question** – This is a combination of justification and excuse.

**Justification** – Cheating wife bad for society. **Excuse** – He was adequately provoked so he’s not that bad.

**Justification** – Society is better b/c of my act. **Excuse** – Mitigating under the circumstances.

* + - * + **Combination of justification and excuse.**

Adequate provocation is a justification for the homicide. Whereas heat of passion is an excuse.

This matters b/c heat of passion is an excuse, so if ∆ hurts someone else, he is still morally blameworthy, the mens rea has not been negated.

But if he is adequately provoked, he is justified, meaning the social harm is negated and thus if he hurts an innocent victim by mistake, he is not culpable.

**Based on this reasoning, manslaughter is a partial excuse for murder, not a justification.**

* + 1. **§210.3(1)(b) Extreme Mental or Emotional Disturbance** – Murder can be mitigated to manslaughter upon a showing that

**State v. Hernandez – Drunk Driver W/ Bumper Stickers**

§2.02(2)(d) the mens rea provision of the MPC which sets forth negligently as mens rea and negligently is objective but it’s not entirely irrelevant the knowledge that ∆ has. “Considering the nature and purpose of his conduct and the **circumstances known to him** involves the gross deviation from reasonable person.” It’s no wholly immaterial that ∆ knew how the alcohol would affect him. ∆’s awareness is relevant.

# **– VIII. Rape –**

1. **Forcible Rape**
	1. **Definition**
		1. **Common law** – carnal knowledge of a woman, not one’s wife, *forcibly* and against her will.
		2. **Statutory** – The elements of the offense statutorily vary by jurisdiction. Traditional forcible rape statutes generally did little more than codify the common law. Traditional rape statutes provide that forcible rape is sexual intercourse by a male, with a female not his wife, by means of force or threat of force, against her will and without her consent.
			* + **Typical Elements for Forcible Rape in Statutes:** (1) vaginal intercourse (2) by force or threat of force (3) against her will (4) without her consent. Against her will and without her consent are essentially the same and merged as one element in some statutes.
		3. **MPC §213.1(1)** – prohibits four forms of rape, of which one form is forcible rape; most states have NOT adopted MPC
			* + **Def.** – A male who has sexual intercourse w/a female not his wife is guilty if of rape if he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone.
				+ **The definition shows that the Code is gender specific and recognizes the marital immunity rule.**

Rape cannot be committed by a woman. Only a man can be convicted of rape.

Rape can only be committed against a woman. There is no such thing as same sex rape.

No rape within marriage. MPC recognizes marital immunity rule.

* + - * + Code does not use the term non-consent but instead uses the word “compels.” Compulsion by the male implies non-consent by the female, the intent of the drafters was to shift the trial focus from the female to the male. Thus, the MPC does not include a resistance requirement.
				+ Reckless, knowing, or purposely will satisfy mens rea.
				+ **The Code grades rape as a felony of the second degree except in two circumstances, in which it is aggravated to a felony of the first degree. It is first degree if:**

The male actually inflicts serious bodily injury upon anyone during the course of the rape or

The female was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties. So if the female is voluntarily sexually intimate with a male and remains his voluntary social companion, then her subsequent rape is considered less serious than if such intimacies had never occurred before.

* + - * + **Sexual intercourse is defined in §213.0(2) to include oral/anal sexual relations, broader than common law.**
	1. **Actus Reus**
		1. **Key Elements** – In the typical statute, the prosecution must prove three elements: force or threat of force; that the intercourse was against the will of the victim; and that the victim did not consent.
			+ - “Force is an essential element of the crime and to justify conviction, evidence must warrant a conclusion either V resisted and her resistance was overcome by force, or she was prevented from resisting by threats to her safety.”
				- Rape is a conduct offense.
		2. **Sexual Intercourse by Male With Female**
			+ - The common law offense was not complete in the absence of penetration by a male of the female’s vagina. Nonconsensual oral and anal sexual penetration constituted the separate offense of sodomy.
				- **Modern Reform Statutes**

Many states that have reformed their law have renamed the offense sexual assault or sexual battery. These offenses typically prohibit all forms of forcible sexual penetration and not simply vaginal intercourse.

They also tend to be gender neutral: male on male and female on female sexual penetration is included, as is nonconsensual female on male sexual penetration.

Also, some states prohibit sexual contact – undesired contact that does not result in penetration – as a lesser degree of the offense.

* + 1. **Marital Immunity** – At original common law, a husband was immune from prosecution for rape of his wife. He could be convicted as an accomplice in the rape of his wife, but could not be convicted for personally committing the crime. On the other hand, he could be convicted of simple assault or battery of his wife.
			- * **Rationale:**

**Consent** – According to common law, by their matrimonial consent and contract, the wife has given up herself in this kind to her husband, which she could not retract. But it’s impossible today to defend the principle that upon marriage, a woman (and only a woman) loses her personal liberty to say no to intercourse with her husband on a given occasion.

**Property Law** – A female was considered the property of her father or husband in very early English common law. Therefore, she had no right to refuse her husband’s wishes in this regard. This property rights view was never accepted in the US. Nor is it consistent with the fact that the immunity rule does not apply to the charge of assault or battery: if a wife was the property of her husband, it would seem that he could use his property any way he chose, and thus would be immune from assault or battery prosecution as well.

**Protect Marriage** – It’s argued that the marital immunity rule is necessary to protect against intrusion by the government into marital privacy and to promote reconciliation of the marital partners. This argument is hard to defend: if the act of forcible intercourse by the husband is an isolated act, it’s unlikely the wife would want to see her husband prosecuted for an offense that will result in a long prison sentence. If the husband is guilty of ongoing physical abuse, there is little or no chance of reconciliation. In any case, a wife’s safety should outweigh any legitimate privacy concern.

* + - * + **Modern Law** – England abolished the marital immunity rule in 1991. The law in the US is in transition. Some states have abolished the rule outright and others have repealed the exemption if the husband and wife are legally separated or, at least living apart at the time of the rape.
		1. **Non-Consent** – Essence of rape is the nonconsensual nature of the sexual intercourse. Non-consent is an element of crime rather than consent being a defense. This means that the prosecutor must prove non-consent beyond a reasonable doubt.
			- * Non-consent emanates from the victim. Focus on the victim. But whether ∆ is aware or reckless as to her non-consent is important but that aspect relates to the mens rea.
				* Against her will is a common law embellishment of non-consent.
				* The crime of forcible rape is not complete simply upon proof of nonconsensual intercourse. Proof of non-consent is not enough. Rape is not non-consensual sex, it requires force.
		2. **Force** – Must also be shown that male acted forcibly or by threat of physical force. (*State v. Alston*)
			- * Force emanates from the perpetrator and focus is on the ∆, on the actus reus component of the crime.
				* Non-consent and force are separate elements.
				* How much force? At original common law, prosecutor had to prove that the male used or threatened substantial force upon the female in order for a forcible rape prosecution to succeed. This developed a resistance requirement.

**Resistance Rule** – If the male uses or threatens to use force likely to cause death or serious bodily injury to the female, she is not required to resist. If the male uses lesser force, the female is required to resist the rapist to the utmost or until exhausted or overpowered. Thus, rape is not forcible unless the male uses force sufficiently great to overcome her resistance.

**Criticism:** The resistance requirement has been criticized: it forces the female to escalate the danger to herself; it assumes that verbal resistance – saying no – is not enough; and it ignores the fact that many females may freeze up out of fear of the male aggressor.

* + - * + **Moving Away from Force and Requiring Less Force** – Some states have begun to reshape forcible rape law by requiring far less proof of force, at least in cases involving unusual facts.
				+ **Changing the Resistance Requirement** – A few states have abolished the resistance requirement. Most states still retain the requirement, but extent of resistance required has been reduced: resistance to the utmost is rarely required now; only reasonable resistance is required, which leaves it to the jury to determine the sufficiency of the female’s resistance. Effect of these changes is to permit rape prosecutions based on less force by ∆ than in the past.
				+ **Abandoning the Force Requirement Altogether** – Forcible rape is proved upon evidence of sexual intercourse, unless the female, by words or conduct, reasonably appears to give permission for the intercourse. Makes all cases of sexual intercourse forcible and leaves the only remaining issue is whether the intercourse was nonconsensual.
				+ **Reasonable Resistance** – Many states retain the resistance rule but say that only reasonable resistance is required.
				+ **Duncan: Resistance Requirement Helpful**:

Resistance by V demonstrates to a jury and the attacker her lack of consent. Demonstrates one of the attendant circumstances of the actus reus of rape – lack of consent.

Resistance by V helps to establish force by the perpetrator because resistance by V puts the perpetrator in the position to use force to overcome V’s resistance.

Resistance is helpful because it indicates to the jury that the social harm is worth protecting – that V was trying to protect something that is valuable to her and should be recognized as a legal social harm.

* + - * + **Resistance not helpful:**

Telling women not to resist the actual attack but then requiring in court they show resistance

Should prove what the perpetrators *mens rea* was, not the victim’s

Shifts the burden back to the D if you go ahead and get rid of resistance requirement. Otherwise D has to prove that she resisted and fought back with evidence.

* 1. **Mens Rea**
		1. **Rape is a general intent offense.** Most jurisdictions provide that a person is not guilty of rape if, at the time of intercourse he entertained a genuine and reasonable belief that the female voluntarily consented. Some courts now provide that ∆ is not entitled to an instruction on mistake of fact in absence of equivocal conduct on V’s part. Therefore, especially in jurisdictions applying the resistance rule, equivocal conduct will rarely exist: the female’s resistance is an unequivocal act of non-consent.
			+ - The only significant mens rea issue in forcible rape prosecutions occurs when ∆ claims that he had intercourse on the mistaken belief that the woman was consenting.
		2. **Minority Rules:**
			+ - **No Mistake of Fact Defense** – A few states provide that even a ∆’s reasonable mistake of fact is not a defense. This rule effectively converts forcible rape, an offense with very severe penalties, into a strict liability offense.
				- **Unreasonable Mistake of Fact as a Defense** – England says that even an unreasonable mistake of fact is a defense to rape. It concludes that rape requires proof of intent, and that this mens rea element modifies all of the actus reus elements of rape, including the element of non-consent. Treats rape as a specific intent crime. No American state has adopted this reasoning and the English Parliament has redrafted its rape statute to permit conviction for rape if the male was at least reckless in regard to the female’s lack of consent.
	2. **Rape Shield Laws** – Rape shield laws are an effort to swing the pendulum in favor of the victims and are present in the majority of jurisdictions. These laws prevent certain information (victim’s sexual history) from being presented and entered into evidence absent some compelling reason. Defense cannot cross examine victim about her sexual history.

**State v. Alston (Force/threat of force is independent element and must have immediacy emanating from perpetrator**

**Facts:** Black girl, college, went to football players house with her bf who was kind of threatening. Had sex with him, just lay there etc.

**Issue**: Force?

**Holding**: No, she didn’t fight back, no immediate sign of his forcing.

**State v. Rusk (Resistance) –** Lady at bar, man takes keys, the majority claim that there was no sign of rape was overturned. Forces women to endanger self. But original majority had said she must Resist.

**Hazel-** Young girl (Resistance) on her way back from school, didn’t show full signs of resistance.

**Commonwealth v. Berkowitz – Verbal Resistance**

**Facts:** College student is convicted of raping his girl in his dorm room after she voluntarily entered his dorm room and repeatedly say no to his sexual advances although she did not physically resist.

**Issue:** Whether ∆ used the degree of force/forcible compulsion necessary to establish forcible rape.

**Holding:** Court reverses. Although victim did not consent, there was no forcible compulsion, threat of forcible compulsion, or some mental coercion. To prove force, verbal resistance alone is not enough. Nonconsensual sex is not rape.

**State of NJ in the interest of MTS - Resistance**

**Facts:** 17 year old is convicted of rape of 15 year old who was asleep at the time of penetration.

**Issue:** Whether there was sufficient force. Prosecution sought to establish ∆’s use of force by showing that the sex was not consensual.

**Holding:** Case goes beyond the idea that no means no. It embraces the concept that silence means no. In the absence of affirmatively provided permission, a ∆ who proceeds in sexual relations with V has used sufficient force to support the crime of rape. Person must give affirmative permission to sexual contact. Permission doesn’t have to be verbal but it must be an affirmative grant of permission.

**Note:** For statute in NJ, consent is not actually required. But the absence of consent can be used to demonstrate the element of use of force.

**People v. John Z – Withdrawn Consent**

**Facts:** After initially appearing to consent to sex, V said that she wanted to go home but ∆ continued having sex with her and on the basis of this action was convicted of forcible rape.

**Majority Rule:** Female’s withdrawal of consent to sex serves to nullify any earlier consent V has given and subjects ∆ to forcible rape charges if he persist in what has then become nonconsensual intercourse.

**Dissent:** Agrees that withdrawal of consent can under some circumstances constitute forcible rape. But in this case, the record doesn’t tell us whether there was sufficient force used after her withdrawal of her initial consent. The issue is whether V withdrew her consent and ∆ forcibly persisted. In this case, ∆ just persisted, but facts do not indicate whether he forcibly persisted.

**Note:** Duncan asks, can post-penetration constitute rape?

**People v. Williams – Mens Rea:Mistake of Fact**

 **Facts:** homeless lady to hotel, claims rape. Man says no she forced sex on him. Well can’t just apply mistake of fact defense because there is no neutral ground from which in the story the D could reasonably misinterpret as consent.

 **Mayberry Test:**

1) Did D in honesty and food faith mistakenly believe there was consent?

2) Was the mistake reasonable under the circumstances.

# **– IX. General Defenses to Crimes –**

1. **Introduction – Defense – Any set of identifiable circumstances or conditions that might prevent a conviction for an offense.**
	1. **Failure of Proof Defense** – A negation of an element required by the definition of the offense. All elements of a criminal offense cannot be established by the prosecution. (**Intoxication** and **Mistake of Fact** go here)
		1. **Not A True Defense** – however it’s a complete defense in the sense that ∆ may prevent conviction
		2. **Example** – Mistake of Fact: Hunter shooting someone he thinks he’s shooting a deer. This negates the “intent to kill a human being” element of the crime of murder.
	2. **True Defense – Offense Modification** – Operates to modify the definition of the offenses. Defenses typically apply to only one or a few crimes. As opposed to excuse/justification which are general defenses applicable to all crimes.
		* + - Circumstance where actor has apparently satisfied all elements of the offense charged, but he has not in fact caused the harm or evil sought to be prevented by the statute defining the offense.
				- Ex. – Parent, against the advice of police, pays $10K in ransom to the kidnapper of his child. Parent has satisfied elements for complicity in kidnapping, but has a defense to the charge.
				- **People who commit the crime but didn’t cause the evil.**
	3. **True Defense – Justification** – A justification defense is one that indicates a society’s belief that ∆’s conduct was proper, lawful, and that there was no social harm. Ex. The killing of another human being, ordinarily a moral wrong or socially harmful outcome, is considered proper (or at least neutral) if it occurs for a justifiable reason, such as self-defense. **Can be Partial or Full defense.**
		1. Social harm is outweighed by the need to avoid an even greater harm or to further a greater societal interest.
		2. **All justification defenses require:**
			* **(1) a triggering condition-** circumstances that have to exist before actor can use justification defense. *Did the D reasonably believe his life was in danger?*
			* **(2) a necessary –** D only acts when and to the extent necessary- ex. If someone says will kill you at noon the next day, threat is trigger for self defense. But if D is in no danger at the time, not justified in using physical force against aggressor. *Response must be necessary at the time to resist present or imminent use of unlawful deadly force. Imminency is responsive.*
			* **(3) proportional response.-** Limits maximum harm that you can use to protect/further interest. *Can’t use more force than necessary to defend yourself.*
		3. **Explanatory Theories of Justification**
			* + **Public Benefit Theory** – Conduct is not justified unless it is performed in the public interest; Usually limited to the actions of public officers. Societal benefit from actor’s conduct is the underlying motivation for the actor’s conduct. No longer the dominant theory of justification.
				+ **Moral Forfeiture Theory** – People possess certain moral rights or interests that society recognizes through criminal laws, but which may be forfeited by the holder of the right. (Forfeiture of rights is distinct from waiver – you can’t waive moral interests.) Under certain circumstances, society may determine that it will no longer recognize the wrongdoer’s interest in a certain right. So for example, if V freely chooses to wrongfully threaten ∆’s life, V forfeits her right to life; consequently, when ∆ kills V in self defense, no socially recognized harm has occurred. Focuses on the wrongdoing of the victim/aggressor.
				+ **Moral Rights Theory** – Conduct may be justified in on the ground that the actor has a right to protect a particular moral interest. Provides the actor with an affirmative right to protect her threatened moral interest. Ex. when ∆ kills V, her conduct may be justified because she was enforcing a natural right of autonomy that V’s conduct threatened. ∆ is protecting her interest against V, who would violate her right. This theory does not treat V’s death as socially irrelevant like moral forfeiture; rather it views ∆’s conduct as affirmatively proper.
				+ **Superior Interest/Lesser Harm Theory** – Authorizes conduct when the interest of the ∆ outweighs those of the person she harms. Interests of the parties are balanced. In each case, there is a superior and/or non-inferior interest. Ex. If ∆ trespasses by entering V’s house in order to avoid a tornado, her conduct is justified. Protection of human life is more important than property protection.
	4. **True Defense – Excuse** – Although ∆ committed all the elements of the offense and although his actions were unjustified, the law does not blame him for his wrongful conduct. Excuse defense does not negate mens rea, it’s a statement that ∆ is not morally blameworthy. This is burden on the D to show with preponderance of evidence showing an excuse. *Typically where conduct is undeterrable and punishment is an unnecessary evil.*
		1. **Theories:**
			* Bentham Mill the problem with excuses is that punishing everyone makes it unlikely that a criminal can convince a jury he is non deterrable. Prosecutions will be faster and the threat of deterrence will be more credible.
			* Hart- excuses confine liability to cases where people freely choose. Satisfaction of the lawbreaker in knowing there is a price to pay for breaking the law
			* Excuses are the essence of the moral code, but if you withdraw the element of blame from finding criminality then you don’t have to worry about excuses.
		2. **Ex. Insanity** – An insane person will be acquitted of a crime. The acquittal does not mean that what the person did was good, permissible, or tolerable – the insane actor has caused a harm – but the insane person is not punished because the law does not hold him morally and legally accountable for his actions.
			* **Rationale** – More retributive support than utilitarian.
				+ **Utilitarian** – Some people suffer from conditions that make them incapable of being deterred by the threat of punishment. Since punishment is only justified in a utilitarian system if it will result in a net reduction of pain in the form of crime, the imposition of punishment on an undeterrable person represents an unnecessary evil.

[Answer: Even if a person cannot be deterred by the threat of punishment, the actual infliction of punishment may have the positive effect of taking a dangerous person off the street; and punishment of an undeterrable person may serve as a useful object lesson for other, deterrable individuals.

* + - * + **Retributive** – Blame in a retributive system assumes that the actor freely chose to commit the wrong, so excuses are recognized when we are prepared to say that the person’s free choice was significantly undermined, either by internal facts (mental illness) or external ones (coercive conditions).
		1. **Explanatory Theories by Dressler**
			- **Causation Theory** – A person should not be blamed for her conduct if it was caused by factors outside her control. Since ∆ is not to blame for being ill or the victim of coercion – the cause of her actions, she is not to blame for the crime itself.
			- **Character Theory** – A person’s moral character is central to the concept of deserved punishment. If we brand someone as a criminal, they are a bad character. But a person who is operating under duress or insanity is not a bad person. Just a person who suffers from the [common] shortcomings of human beings.
			- **Free Choice Theory** – A person may be properly blamed for her conduct if, but only if, she had the capacity and fair opportunity to function in a uniquely human way – freely to choose whether to violate the moral/legal norms of society. Free choice exists, if at the time of wrongful conduct, actor has substantial capacity and fair opportunity to (1) understand the facts relating to her conduct (2) appreciate that her conduct violates society’s mores and (3) conform her conduct to the dictates of the law. A person lacking in any of these regards does not deserve to be punished because she lacks the basic attributes of personhood that qualify her as a moral agent. ∆ was not in a position to exercise his free choice – we should only punish someone who is making decisions for themselves; we should excuse their conduct if they did not.
		2. **In class- we recognize things like duress because as humans all across the world we understand that any one of us in that situation, as a fallible member society, would make the choice between the harms that the person under coercion/duress did make.**
	1. **Justification vs. Excuse**
* Justification defense = non-wrongfulness/type or severity of social harm committed (actus reus).
* Excuse= non-blameworthiness of the actor and looks at the ∆ (mens rea).
* Remember that justification takes precedence over excuse; justification means you acted lawfully; excuse means you acted unlawful but you are not blameworthy.
* There is a plausible argument that can be made that there should be a rule requiring that the government carry the burden of persuasion for justification defenses and for the ∆ to bear the burden with excuse defenses.

Prosecutor is allocated burden of proof regarding elements of a crime because no one should be punished if reasonable doubt exists that ∆ has committed an unlawful act.

For excuse, it’s not unfair to require that ∆ persuade the jury that it should show compassion for excusing her for her unjustified, socially harmful conduct.

* 1. **Nonexculpatory Public Policy Defenses** – purely policy based bars to prosecution to further important societal interests
		1. **Ex:** statute of limitations (fosters a more stable and forward looking society); diplomatic, judicial, legislative, and executive immunity; incompetency
		2. Different from justification. In justification, harm done by ∆ is outweighed by societal benefit that it creates and as a result he is not blameworthy. In nonexculpatory defenses, ∆’s conduct is harmful and creates no societal benefit; ∆’s conduct is blameworthy – ∆ escapes despite his culpability.
			+ Societal benefit underlying the defense arises not from his conduct, but from foregoing his conviction. Recognized for public policy reasons unrelated/extrinsic to doctrines and purpose of criminal law
1. **Justification: Self-Defense – law of necessity; it arises only when the necessity begins; ends when the necessity ends**
	1. **Common Law-** justified in using deadly force if he reasonably believes such force is necessary to protect himself (*People v. Rodriguez)*
		1. **General Rule** – A person is justified in using deadly force against another if (a) he is *not the aggressor* and (b) *he reasonably believes* [objective] that such force is necessary to repel the imminent use of unlawful deadly force by the other person.
			* + Current majority law recognizes an objective standard.
				+ MPC reflects minority law.
		2. **Deadly Force –** Force likely to cause, or intended to cause, death or serious bodily harm.
		3. **Aggressor** – An aggressor may not use deadly force in self-defense. But it is possible for an aggressor to lose his status as an aggressor and regain the right of self defense. [*US v. Peterson*]
			* + **Definition of Aggressor** – A person who commits an unlawful act reasonably calculated to produce a fray foreboding injurious or fatal consequences.
				+ **Losing Aggressor Status**

**Nondeadly Aggressors** – A non-deadly aggressor, may regain her right of self-defense against V, if V responds to his nondeadly aggression by threatening to use excessive, deadly force in response.

**Majority Rule** – If B responds to A’s nondeadly aggression by threatening to use deadly force against A, A immediately regains the right of self-defense to use deadly force. A’s aggressor status is purged due to B’s disproportionate response.

**Minority Rule: Duty to Retreat** – If B responds to A’s nondeadly aggression by threatening to use deadly force against A, A may not use deadly force in self-defense unless A first retreats and B continues to threaten A with deadly force. If no safe retreat is possible, A may immediately use deadly force.

**Deadly Aggressors** – An aggressor cannot use deadly force for self-defense in a deadly conflict unless she clearly indicates to the other that she intends to withdraw from the situation.

Ex. A wrongfully pulls a knife on B and threatens to kill her. B pulls out a gun in self-defense. As A is a deadly aggressor, she may not use deadly force against B unless she demonstrates to B that she no longer poses a threat, such as dropping her knife and running away. If B chases after her with the continued intention of killing A in “self-defense,” A now has a right to defend herself and B becomes the deadly aggressor.

(You could say this is *U.S. v. Peterson* because here the aggressor had a bat and then the other aggressor had a gun. There was a duty to retreat which the person on the porch didn’t do).

* + 1. **Unlawful Force/Unlawful Threat** – A person has no right to defend herself against lawful justified force. She may only respond to unlawful threats of force. Ex. Can’t shoot and kill and officer who tells you to “stop or I’ll shoot” b/c officer’s threat of deadly force was lawful in order to prevent suspect from escaping.
		2. **Imminency** – Generally speaking, a person may not use deadly force in self-defense unless the aggressor’s threatened force will occur immediately, almost at that instant.
		3. **Necessity to Use Deadly Force** – A person may not use deadly force unless it is necessary.
			- * **Proportionality of Force** – Deadly force may never be used in response to a non-deadly threat, even if this is the only way to repel the non-deadly threat.
				* **Use of Less Force** – A person may not use deadly force to repel an unlawful deadly attack if more moderate/less (nondeadly) force will do the job.
				* **Duty to Retreat** – At common law there is a duty to retreat before using deadly force in self-defense. But currently, non-MPC jurisdictions are in conflict over duty retreat.

**Majority Rule** – Majority of jurisdictions today have no duty to retreat.

**Minority Rule** – **Castle Doctrine**- May not use deadly force for self defense if you know of completely safe place to retreat. However if you arein your own home you don’t have to retreat

**Florida Stand Your Ground**- Over expands the Castle Doctrine- making it 1) you have a right to defend yourself wherever you have a legal right to be. 2) Can use deadly force to protect yourself, don’t have to retreat 3) and in any cases there is a presumption that you weren’t reckless or negligent in assuming that you needed deadly force.

**MPC**  tempers the self defense because it doesn’t allow people to use it as an excuse for their use of deadly force if they were reckless or negligent in figuring out whether they were faced with deadly force (§3.09 (2)) and if they injure innocent bystanders §3.09 (3).

Duty to retreat rule applies only to deadly force. There is no duty to retreat before use of non-deadly force.

* + 1. **Reasonable Belief** – A person may use deadly force in self-defense if she has reasonable grounds to believe [objective] that she is in imminent danger of death or serious bodily harm and that use of deadly force is necessary to protect herself. [Even if reasonable belief is mistaken, it’s ok.]
			- * **Imperfect Defense** – In most common law jurisdictions, a ∆ who acts on the basis of an unreasonable belief entirely loses her self-defense claim and therefore, will be convicted of murder. Some jurisdictions, however, recognize an imperfect defense in homicide prosecutions: if ∆ kills another in unreasonable self-defense, ∆ will be convicted of the lesser offense of manslaughter.
				* **What is a reasonable belief?** A reasonable belief is a belief that a reasonable person would hold.

∆’s physical characteristics may be incorporated into the reasonable person. [ex. blindess]

Many courts today also hold the view that prior experiences of the ∆ that help the ∆ evaluate the present situation are relevant. [*People v. Goetz]* - the guy who shot the teenager in the subway in the Northeast after he’d been mugged once before.

* + 1. **Battered Women and Self Defense**
			- * ***State v. Norman*- Woman was abused for years and killed husband while she was sleeping.**

C/L- Self Defense requires imminent threat of force (instantaneous)

MPC- Could satisfy immediate- but most jurisdiction want the last alternative to be deadly force so unlikely to accept that this was imminency.

* + - * + Should this be a type of self defense? Should we even admit this kind of evidence? Should we admit it under insanity? What about PTSD?

Could be abused- could be used to justify vengeance killings.

Most courts do not allow self defense if the homicide occurred in nonconfrontational circumstances because no reasonable juror could believe that D as a reasonable person would believe a sleeping man is a reasonable threat.

Some courts don’t permit the case to go to jury if BWS evidence is introduced to show BWSs

* + - * + **Essay**- The batterer’s rights depend on whether we classify BWS as justification or excuse

**Justification-**

No moral condemnation for actus reus because although the social harm was death it was better for society that the person be dead

But according to rape law, this isn’t a justification because death is never proportional to anything less than death.

**Excuses**

 Mental defect- perhaps its insanity so we should give them moral condemnation and a hospital

Retirbutivist would say yes because they did do a harm and they are morally culpable for murder so this is an excuse

Utilitarian- Yes because you want to prevent more women from going above the law. There are legal remedies that need to be exhausted.

* + 1. **MPC §§3.04(1), 3.04(2)(b)**
			- **Rule** – A person is not justified in using deadly force against another unless ***she believes*** that such force is immediately necessary to protect herself against the exercise of unlawful deadly force, force likely to cause serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat, by the other person on the present occasion.
				* MPC is a subjective standard. Common law is an objective standard. Majority of jurisdictions have an objective.
				* **Compared to Common Law**

**Belief Requirement**

Thus code is consistent w/minority of common law jurisdictions that recognize an imperfect defense. Self defense is not a complete defense in these situations.

**Immediately Necessary** – Immediately necessary is broader than imminency. A person may use force if it is immediately necessary at the time. MPC provides that a person may use deadly force in self-protection even if the agressor will not use deadly force immediately. Issue under MPC is not when the aggressor’s unlawful force will be used, but when the non-agressor will need to use force on the present occasion.

**Ex.** ∆, a battered wife, is in the kitchen making dinner. A, her abusive husband enters and says, “Today I’m going to kill you. I am going to the bedroom in a few moments to get my gun, come back, and kill you.” A turns his back on ∆, perhaps to go get the gun. ∆ reasonably fearing for her life, stabs A to death in the back. At common law, ∆ would likely not have a valid self-defense claim, since A is still unarmed, the harm to ∆ is not imminent as defined under common law, she has to wait for him to come back and attempt to shoot her. Under MPC, ∆ has a plausible self-protection claim, the use of force was immediately necessarily – realistically, it was now or never.

Imminency is reactive. Immediately necessary is like a proactive strike.

* + 1. **Limitation on General Rule**
			- * **MPC §3.04(2)(b)(i)∆ as Aggressor** – As with common law, the self-defense is not permitted if the actor is the aggressor. MPC defines aggressor as one who “provokes” the use of force against herself “in the same encounter” for the “purpose of causing death or serious bodily injury.”
				* **§3.04(2)(b)(ii) Retreat** – MPC follows the minority common law position that a non-agressor must retreat if she knows that she can thereby avoid the need to use deadly force with complete safety to herself. But a person need not retreat from her own dwelling or work. But at work, if you are being attacked by a person who also works there, you have to retreat.
				* **§3.04(2)(b)(ii) Non-Necessity Circumstances** – MPC explicitly provides that deadly force may not be used if ∆ can avoid doing so “by surrendering possession of a thing to a person asserting a claim of right thereto or by complying w/ a demand that he abstain from any action that he has no duty to take.
* **Question:** Is MPC/Common Law approach utilitarian or retributivist?
1. **Justification: Necessity – Choice of Evils**
	1. **Common Law** - originally required that natural force cause the necessity
		1. *Nelson v. State* – truck got stuck, not imminent harm. Trespassed and stole. Was not necessity.
		2. Statute:
			* Reasonable belief conduct was necessary (objective)
			* To prevent significant and imminent evil.
			* No adequate legal alternative
			* Harm caused is less than harm avoided.
			* “Must be objectively reasonable that it was necessary to keep crime from occurring and harm sought to be prevented is greater than that which was committed”
		3. **MPC 3.02**- Subjective determination of reasonable and doesn’t require imminency for choice of evils necessity justification
			* If actor is reckless or negligent in bringing about choice of evils, there is no justification for any crimes that need negligence or reckless ness for culpability.
			* *John Charles Green* escaped from being raped in prison after he was raped a couple of times. Subjectively, he was reasonable in his choice to commit a felony and escape to keep crime from occurring and his escape is definitely greater according to penal code than that of allowing individual liberty and autonomy to be destroyed t the hands of the state.
		4. **Elements**
			* + **Lesser-Evils Analysis** – Person must be faced w/a choice of evils or harms and he must choose to commit lesser of evils. Harm ∆ seeks to prevent by his conduct must be greater than harm he reasonably expects to cause. The balancing of the harms is conducted by the judge (matter of law) or jury (question of fact); the ∆’s belief that he is acting properly is not in itself sufficient. In measuring the competing harms, the court or jury must put itself in the actor’s shoes at the time the choice had to be made: the harms to be weighed and compared are those that a reasonable person, at that moment, would expect to occur. The after the fact unforeseeable reality is not relevant.
				+ **Imminency of Harm** – Actor must be seeking to avoid imminent harm – harm that appears likely to occur immediately. Objective standard of reasonable person – actor must reasonably believe that his act is the only way to prevent the greater threatened harm. This rule is strictly enforced: if there is sufficient time to seek a lawful avenue, the actor must take that route.
				+ **Causal Element** – The actor must reasonably believe that his actions will abate the threatened harm.
				+ **Blamelessness of the Actor** – Although some judicial opinions and statutes are silent in this regard, many courts and/or statutes provide that the actor must not be at fault in creating the necessity.
		5. **At common law, necessity was a defense to homicide. But now it’s not longer a valid defense to homicide.**
2. **Excuse: Duress- Lack of Free Choice**
	1. **Duress as an Excuse Defense** – Majority of courts treat duress as an excuse defense and not as a justification defense. The essence of duress is that a person is not to blame for her conduct if, because of an unlawful threat, she lacked a fair opportunity to conform her conduct to the law.
	2. **Duress as a Justification Defense** – A minority of courts treat duress as if it were under necessity and thus a justification defense. That is, when a person is forced to commit a crime, the duress exculpates her on the ground that she did the right thing – the lesser of two evils – in light of the coercive threat. According to this view, the only difference b/t necessity and duress is that necessity involves natural, non-human pressures, whereas duress involves human based threats.
	3. **Common Law**
		1. **Elements:** ∆ will be acquitted of an offense [other than murder] on the basis of duress if she proves that she committed the offense b/c (a) another person unlawfully threatened (b) to imminently to kill or grievously injure her or another person unless she committed the crime and (c) she is not at fault in exposing herself to the threat.
			* ***U.S. v. Contento Pachon*-** smuggled crack into the United States while his family was being watched in Colombia. Threat of death against him and his family and serious bodily harm.
				+ At common law, excuse defense of duress was only available for crimes other than murder. Not available for murder.
				+ **Deadly Force** – Excuse applies only if the coercer threatens to use deadly force (force likely to cause death or serious bodily injury). A lesser threat will not excuse.
				+ **Imminency** – The deadly force must be present, imminent, and impending. The coerced actor had no reasonable lawful alternative to the threat. The threat of future unspecified harm is not sufficient.
				+ **Reasonable Belief** – Although few cases speak to the issue (b/c it rarely arises), ∆’s actions must be based on a reasonable belief that the coercer is serious about the threat and has the capacity to inflict the harm immediately.
				+ **No Fault ∆** – This element is also rarely raised although courts often mention it as an element.
	4. **MPC §2.09**
		1. MPC treats duress as an excuse, not a justification. Thus, defense may be raised although ∆ did not commit the lesser of two evils. Instead, Affirmative defense “Would a person of reasonable firmness have been unable to resist?”.
			* Committed offense because coerced by another person’s use or threat to use unlawful force against him eor a third party.
			* A person of reasonable firmness would have been unable to resist and also have committed the offense.
		2. The Code further provides that the defense is lost if the coerced actor put himself in a situation in which it was probable that he would be subjected to duress.
		3. Furthermore, if he was negligent in placing himself in the situation, the defense is unavailable if he is prosecuted for an offense for which negligence is sufficient to prove guilt.
		4. **The MPC version of duress is broader than common** **law.**
			* + Neither the deadly threat nor imminency requirements of the common law apply in the MPC. It is enough that the coerced used or threatened to use, any form of unlawful physical coercion.
				+ MPC permits a duress claim to be based on prior use of force not simply a threat of future harm.
				+ Like common law, force used or threatened must be unlawful. Duress is limited to human caused coercion because natural threats are not capable of being characterized as unlawful.
				+ **Reasonable Firmness Standard** – Although any type of threat or use of force can trigger a duress claim, ∆ will not be excused unless a person of reasonable firmness would also have acceded to the threat.
		5. Unlike common law, there is no bar to use of duress defense in murder prosecutions. It is up to the jury to decide whether, in view of the facts of the particular case, a person of reasonable firmness would have killed an innocent person.
3. **Intoxication- Failure of Proof defense because it lets you avoid prosecution under mens rea- can’t form specific intents.**
	1. **Common Law**
		1. Typically, a person may not avoid conviction of an offense because he voluntarily became intoxicated.
		2. The criminal law of intoxication is not limited to ingestion of alcohol. Intoxication may be defined as a disturbance of an actor’s mental or physical capacities resulting from the ingestion of any foreign substance (alcohol or drugs).
		3. **Not An Excuse Defense!** – A person is never excused for his criminal conduct on the ground that he became voluntarily intoxicated. Voluntary intoxication is NOT an excuse defense.
			* But evidence of voluntary intoxication is relevant towards the mens rea of an offense and thus MIGHT operate to support a failure of proof defense disputing an element of specific intent of an offense.
		4. **Mens Rea Defense** – Although voluntarily intoxication is not an excuse for criminal conduct, most jurisdictions following the common law provide that a person is not guilty of a specific intent offense if, as the result of voluntary intoxication, he lacked the capacity or otherwise failed to form the specific intent required for the crime. However, voluntary intoxication does not exculpate for general intent purposes.
			* + A minority of states today have statutes that bar a ∆ from introducing evidence of voluntary intoxication to avoid conviction for any offense, including specific intent offenses.
				+ Although such laws are unfair b/c they deny the ∆ the right to prove, that in fact, he lacked a required element of the offense, SCOTUS upheld the constitutionality of such laws in MO v. Egelhoff.
				+ **Temporary Insanity** – Voluntary intoxication is not temporary insanity, which presupposes a mental illness.
				+ **Fixed Insanity** – Long term use of alcohol or drugs can cause brain damage or cause the individual to suffer from chronic mental illness. In such circumstances, the ∆ who seeks acquittal is not claiming he should be exculpated because he was voluntarily intoxicated at the time of the crime, but rather, that because of long-term use of intoxicants, he is insane (whether he is currently sober or intoxicated). Should be arguing insanity not intoxication.
				+ ***Veach v. United States***- Federal officer was assaulted during the traffic stop by a drunk guy. There was a retrial because he should’ve been allowed to present intox. Defense since he couldn’t form specific intent to impede federal officers.
	2. **MPC**
		1. **§2.08 Voluntary Intoxication**- Only negates purposely or knowingly and specific intent crimes.
			* + **§2.08(1)** – Voluntary intoxication is a defense to any crime, if it negates an element of the offense [subject to one exception].
				+ **§2.08(2) Exception** – If ∆ is charged w/an offense for which recklessness suffices to convict, she cannot avoid conviction by proving that, b/c of intoxication, she was unaware of the riskiness of her conduct.

That is, even if the ∆’s actual culpability is that of negligence – she should have been aware that her conduct created a substantial and unjustifiable risk of harm – she may be convicted of an offense requiring recklessness (which ordinarily requires actual awareness of the risk), if the reason for her failure to perceive the risk is her self-induced intoxication.

* + 1. **§2.08(5)(c) Involuntary Intoxication**
			- * Not a defense unless it negates an element of the offense. Issue is the affect of the involuntary intoxication on the ∆’s behavior or the capacity of ∆ to control or understand his conduct.
				* True cases of involuntary intoxication are extremely rare. Intoxication is involuntary if (a) coercion: the actor if forced to ingest the intoxicant; (b) mistake: the actor innocently ingests an intoxicant (c) prescribed medication: the actor becomes unexpectedly intoxicated from ingestion of a medically prescribed drug; or (d) pathological intoxication: the actor’s intoxication is grossly excessive in degree, given the amount of intoxicant, to which the actor does not know he is susceptible.
				* **§2.08(1) Lack of Mens Rea** – ∆ will be acquitted if, as a result of involuntary intoxication, the actor lacks the requisite mental state of the offense for which she was charged, whether the offense could be denominated as specific intent or general intent. This is the common law and MPC rule.
				* **§2.08(4)** – Involuntary intoxication is an affirmative defense if ∆ “lacks the substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.” This is common law and MPC.
1. **Insanity**
	1. **Rationale of Insanity Defense**
		1. **Utilitarian Argument** – A person who suffers from a severe cognitive or volitional disorder, i.e., a disorder that undermines the actor’s ability to perceive reality (cognition) or to control her conduct (volition), is undeterrable by the threat of punishment. Therefore, punishment is inefficacious.
			* + **Counter Argument: Specific Deterrence** – Infliction of punishment by incapacitation is justified. Because person’s otherwise undeterrability if dangerous.
				+ **Counter Argument: General Deterrence** – Although the threat of punishment may not deter the insane person, her actual punishment can serve as a warning to sane people who might otherwise believe (correctly or not) that they could escape punishment by feigning mental illness.
		2. **Retributive Argument** – The insanity defense distinguishes the mad from the bad; it separates those whom we consider evil from those we consider sick. A person is not a moral agent, and thus is not fairly subject to condemnation, if she lacked the capacity to make a rational choice to violate the law or if she lacks the capacity to control her conduct.
		3. **Notes:**
			* + Mental illness is a medical concept; insanity is a legal term. One can be mentally ill without being insane – but one cannot be insane without being mentally ill.
				+ **Workable insanity test must: (*State v. Johnson)***

Reflect principles of criminal law

Reflect community values

Comport with realities of science

Allow admission of psychiatric testimony

Be comprehensible to the experts and jury

Leave the decisions in the hands of the jury.

* + - * + **Arguments for abolition of insanity defense:** The insanity defense results in abuse. It is a defense too easy to raise and too difficult to refute – thus a guilty person avoids conviction and walks free. Defense is abolished in four states.

**Rebuttal:**

**Statistics** – Rarely raised and very rarely successful, Jurors are skeptical of insanity claims.

**Role of the Jury** – When the defense of insanity is raised by the accused, the trier of fact has the burden of accepting or rejecting the evidence, including the testimony of the expert witnesses. The court will instruct the jury that the state has the burden of proving all the material elements of the crime. The jury is free to disregard or disbelieve the witness’ evaluation of the ∆’s mental condition. Under the Insanity defense reform act of 1984, which constitutes the federal insanity statute, neither side may offer the testimony of an expert as dispositive conclusions of the issue of the ∆’s sanity; this is left to the jury. Thus despite a substantial amount of expert testimony to the contrary, the jury could conclude that ∆ was/wasn’t insane. Fraud is not a problem unique to insanity and it is up to the jury to separate the wheat from the chaff.

**Going Free** – An insane acquittal never goes free – they are committed to a mental institution.

* 1. **M’Naghten Test of Insanity- Focuses on intellectual and cognitive capacity**
		1. **Rule** – A person is legally insane if, at the time of the criminal act, ∆, due ***to mental disease or defect***, he either: *(1) not to know the nature and quality of the act he was doing*; **or,** *(2) he did not know what he was doing wrong*.
			+ - **Know vs. Appreciate** – When first implemented, the test was knowing. Many jurisdictions have modified the test to appreciate. Knowing is broader, appreciating is narrower. Appreciate conveys a deeper or broader sense of understanding than knowledge.

To appreciate the wrongfulness of conduct is to realize that it is wrong; to understand the idea as a matter of importance and reality; to grasp it in a way that makes it meaningful.

Some jurisdictions, therefore, will not find a person sane – accountable for his actions – unless he has a deeper appreciation of what he is doing and right from wrong.

Ex. Kid w/gun knows but doesn’t appreciate.

* + - * + **Right/Wrong** – Courts are split on whether this prong refers to legal or moral wrongfulness.

In jurisdictions that use the moral wrong test, the relevant issue is not whether ∆ believed that his act was morally right, but rather whether he knew (or appreciated) that society considered his actions morally wrong.

In most cases, the distinction b/t moral and legal wrong will not matter.

* + - * + First test for sanity; heavily criticized – but has been the majority rule in the US (except for a brief period in the 70’s).
		1. **Criticisms**
			- * **Outmoded** – Test was developed at a very primitive time in our understanding of the human mind, focuses exclusively on cognition. Puts a very subjective emphasis on ∆. Only question, did the disease affect his ability to know what he was doing was wrong.

Focuses on what ∆ knew – it refuses to recognize a volitional component. Under M’Naghten, a person is sane if he knows what he is doing and knows that what he is doing is wrong, even if he cannot control his conduct, (ex. he suffers from a volitional disorder and therefore is undeterrable). **Super Intellectual.**

* + - * + **Know/Appreciate** – Jurisdictions that use the word know apply a test that recognizes no degrees of cognitive disability. It results in a finding of sanity – and moral condemnation – of persons whose cognitive capacities are substantially but not totally undermined. All or nothing approach requiring total incapacity of cognition.
				+ **Expert Testimony Hampered** – Test is narrow and outdated; psychiatrists may be prevented from giving the jury the type of information needed to determine whether ∆ deserves blame and punishment. Deprives jury of true picture of ∆’s mental condition. It limits admission of expert testimony.
	1. **Irresistible Impulse (Control) Test** – supplements M’Naghten Test; inquires into both cognitive and volitional components
		1. **Rule** – ∆ is criminally insane if due to a mental disease or defect he is irresistibly driven by aninsane impulse to commit the criminal act, even though he may abstractly know that thecriminal act is wrong.
			+ - Advantage over M’Naghten is that it considers the volitional aspect of ∆, his ability to control himself based on the disease or defect. Requires that mental disease or defect overcame ∆’s free will.
		2. **Criticisms**
			+ - **All or Nothing** – If taken literally, a ∆’s ability to control herself must be totally lacking, a standard virtually impossible to satisfy.
				- **Impulse Element** – Test seems to require proof that ∆’s conduct was impulsive. As such, it would exclude from its coverage a person who (due to mental disease) plans a crime, but who is otherwise unable to control her actions [unable to resist sustained psychic compulsion or to make any real attempt to control her conduct]. Many courts, however, do not seem to apply this concept as literally as it seems. Better characterized as control test.
				- **Reliability of Proof** – Mental health profession is not at the point that it can reliably distinguish between a person who cannot control her conduct and one who simply does not control it. Thus, the APA has recommended that states not include a volitional prong in the definition of insanity.
				- **Limits Testimony** – that is unrelated to impulse
	2. **Product/Durham Test** – only 1 state currently applies a version of this test (New Hampshire)
		1. **Rule** – *A person is criminally insane if his criminal act was the product of a mental disease or defect.*
			+ - A mental disease or defect is any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.
				- Thus, to be acquitted according to this rule, it must be shown that (1) ∆ suffered from a mental disease or defect at the time of the crime and (2) but for the mental disease or defect, he would not have committed the crime.
				- Very broad test. Product means causation.
				- Mental health professionals prefer this test. It focuses attention on the actor’s mental illness; they expected the test would channel sick persons into mental health arena rather than prisons. Likewise, mental health professionals expected the test to permit them to testify more freely, w/o the need to fit their testimony w/in M’Naghten’s artificial cognitive prongs or to testify regarding elusive irresistible impulses.
		2. **Criticisms**
			+ - **Penological Arguments** – Test is unwise and will result in acquittal of persons who could be deterred by the threat of punishment. It will also result in the exculpation of some persons w/sufficient capacity for free choice that they deserve condemnation.
				- **Psychiatric Influence/Usurps Jury** – Gives experts too much influence. A defense psychiatrist would testify that the ∆'s mental illness caused the outcome. The prosecution would put on competing psychiatric testimony. There is nothing left for the jury, representatives of the moral views of the community, to decide, except as to which expert’s testimony to believe.
	3. **MPC §4.01** widespread acceptance
		1. **Rule** – ∆ is criminally insane if due to ***mental disease or defect, she lacked the substantial capacity*** to either ***(a) to appreciate the criminality/wrongfulness*** of her conduct [cognitive]***; OR (2) to conform her conduct*** to the requirements of law [volitional].
			+ - **Lacks Substantial Capacity** – Avoids all or nothing judgments. Does not require complete impairment. Reflects judgment that no test is workable that calls for complete impairment of ability to know or to control.
				- **Cognitive Prong** – Code uses word appreciate rather than know to permit the deeper, fuller analysis – broader sense of understanding than simple cognition. Drafters also chose not to decide b/t legal wrong and moral wrong by allowing choice b/t ***criminality (legal wrong) and wrongfulness (moral wrong – broader definition)***.

**Wrongfulness**

**Societal Morality View** – ∆ is criminally insane if he lacks substantial capacity to appreciate that his conduct is wrong based on ***society’s sense of morality***. In other words, he is criminally insane if he believes that his act is proper based on society’s view of morality. [Ex. If ∆ goes to cops and turns himself in, then he knows that his conduct is wrong based on society. Will never be the test of wrongfulness.]

**Personal Morality View** – ∆ is criminally insane if he lacks substantial capacity to appreciate that his conduct is wrong based on ***his own personal view of morality***, even if he may appreciate that society considers his conduct immoral. In other words, he is criminally insane if he believes that his act is proper based on his own personally held view of morality.

**Hybrid View** – ∆ is criminally insane if he lacks substantial capacity to appreciate that his conduct is wrong based on ***his subjective belief of societal morality***. In other words, he is criminally insane if he believes that his act is proper based on his subjective belief of societal morality.

* + - * + **Volitional Prong** – Acknowledges the volitional component of legal insanity. Avoids the undesirable or potentially misleading words: irresistible and impulse. A person who has a very strong, but not irresistible, desire to commit a crime, including one who acts non-impulsively after considerable, can fall w/in the language of the MPC.
				+ **Easier Language** – Easier for jury to understand what meaning of legal insanity is.
		1. **§4.01(2) Sociopath Not Included** – Mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Sociopaths cannot assert defense of legal insanity.
			- * **Duncan asks why exclude sociopaths?** - because they have abnormal behaviour manifested by repeat criminal actions. They can’t be fixed or deterred and are morally condemned.

**Why isn’t that more of a reason for them to end up in a hospital (use insanity defense?**)- because they’ll never be rehabilitated. Under Retributivist theory you don’t want them to just be rehabbed. Must address Social harm they caused. But under Utilitarian you want them to have the defense because punishing them won’t deter them, its their nature.

# **– X. Inchoate Offenses: Attempt –**

1. **Attempt**
	1. **General Principles**
		1. **Inchoate Offenses** – conduct that is designed to culminate in a substantive offense but has failed
			* + Examples: attempt, solicitation and conspiracy.
				+ Preparation vs. Perpetration.
		2. **Basic Definition** – An attempt occurs when a person, with the intent to commit a criminal offense, engages in conduct that constitutes the beginning of the perpetration of, rather than mere preparation for, the target offense.
			* + In general, crimes of attempt require that ∆ have the specific intention of bringing about the criminal result required for the underlying crime that he is charged with attempting and engages in conduct that constitutes a substantial step toward the commission of the target (i.e. intended) offense.
				+ **Two types of attempts:**

**Incomplete** – The actor has not completed the last act necessary on his part. The actor does some of the acts that she set out to do but then desists or is prevented from continuing by an extraneous factor, such as intervention by police.

**Complete** – The actor has done every act necessary on his part to commit the target offense, but has failed to produce the intended result/commit the crime. Shoots and misses.

* + 1. **Rationale** – The principle behind punishing an attempt is not deterrence. The threat posed by the sanction for attempt is unlikely to deter a person willing to risk the penalty for the object crime. Instead, the primary function of the crime of attempt is to provide a basis for law enforcement officers to intervene before an individual can commit a completed offense. Also, sense of security and prevent apprehension among the public.
		2. **Ashworth Article page 737**
			- * **Harm Based Retributivism**

∆’s propensity to cause harm – culpable causing of harm

Best rationale for complete attempts – Security of person and property, apprehension or fear in others

* + - * + **Intent Based Retributivism**

Intent Principle – Culpability – ∆ should be held liable for what he intended to do

Belief Principle – ∆ should be judged on the basis of what they believed they were doing, not on the basis of actual facts and circumstances which were not known to them at the time

Best Rationale for Incomplete Attempts – ∆ w/incomplete offense is just as culpable as someone who has completed the offense

* + - * + **Fairness** – It would be unfair to let ∆ go just b/c of chance factors
		1. **Grading of Offense** – At common law, a criminal attempt was a misdemeanor. Thus although murder was a capital crime, attempted murder was a misdemeanor.
			- * **Felony** – Today, modern statutes provide that an attempt to commit a felony is a felony.
				* **Attempt as a Lesser Crime** – Most states that are based on the common law treat a criminal attempt as a lesser offense than the targeted crime. Typically, an attempt is punished half as severely as the target offense.
				* **Criticism of Tradition Grading Approach** – A person who attempts to commit a crime is just as dangerous and morally culpable as the successful criminal; only luck or poor implementation of criminal design prevented the successful completion of the crime, so attempts should be punished as severely as completed offenses. [***Utilitarian deterrence and intent based retributivist.***]
				* **Defense of Traditional Grading Approach** – A criminal attempt causes less social harm than a successful crime. The attempter, therefore, has a lesser debt to pay for her wrongdoing and punishment of an attempt should be less. [***result based retributivist***] Also, from a ***utilitarian perspective,*** the legal system may wish to give a person an incentive to desist from completing an offense, by mitigating the punishment for an attempt.
				* **MPC** – MPC generally treats inchoate offenses of the same degree and thus subject to the same punishment as the target offense. MPC §5.05(1). The exception is that for a felony characterized as a felony of the first degree (max. punishment of life in prison), an attempt to commit such an offense is a felony of the second degree, a lesser offense. MPC §6.06(1).
		2. **Merger Doctrine** – A criminal attempt merges into the target offense, if it is successfully completed. ∆ may be convicted of either attempted X, or X, but not both. Typically ∆ will be charged w/X – the attempt merges into the offense. This is also the MPC approach.
	1. **Mens Rea** – all attempt crimes require specific intent
		1. **Dual Intent** – Criminal intent involves two intents:
			+ - **First Intent –** ***The actor must intentionally commit the acts that constitute the actus reus of an attempt*** – he must perform an act that brings him in dangerous proximity to commission of the target crime. **∆ cannot commit an attempt recklessly or negligently here** – must at the very least intend the act. [Pulling the trigger.]
				- **Second Intent** – Actor must commit the actus reus of an attempt with ***specific intent to commit the target offense***.

Only the specific intent to kill satisfies the intent element of the crime of attempted murder.

There is no attempted felony murder because criminal attempt requires specific intent, a conviction for felony murder does not require intent to kill.

There can be no attempted/inchoate offense if the attempted crime is accidental. Ex. involuntary killings, involuntary manslaughter, for example, because you can’t have specific intent to commit the target offense.

A criminal assault is an inchoate offense because a criminal assault is an attempted battery.

Ex. ∆ intentionally aims a loaded gun at V – she is arrested before she can pull the trigger – not guilty of attempted murder unless her intent was to murder, if her intent was merely to scare then it is not murder.

* + 1. **Comparing Mens Rea of Attempt** **to Target Offense**
			- * **Higher Mens Rea** – Attempt requires a higher level of mens rea than is necessary to commit the target offense.
				* **Specific Intent vs. General Intent** – Attempt is a specific intent offense [2nd intent], even if the target crime is general intent. Thus rape is a general intent crime, whereas attempted rape is specific intent.
				* **Ex.** As a practical joke ∆ fired a gun into a building – if some one died she could be convicted of murder b/c it was extreme recklessness-depraved heart (malice aforethought). However if no one dies then she is not guilty of attempted murder as she did not have the specific intent to kill. (Can’t get attempted murder for driving drunk – Good way to throw this in!) – Argue substantially certain and this may be enough to satisfy the intent requirement.
				* **Substantial Certainty Exception** - Normally one can not be convicted of attempted murder by recklessly bringing about a near killing, since the result embodied in the definition of murder is a killing, and for attempted murder one must therefore intend (not merely recklessly disregard the possibility of) a killing. But where the ∆ knows w/substantial certainty that a particular result will follow from his contemplated action, most courts (and the MPC) take the position that this is tantamount to intent to bring about that result. [Argue how it was substantially certain that people would die (i.e. bombing a building and your plan gets foiled)]
		2. **MPC §5.01** – A person guilty of attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime [this is attendant circumstance], he:
			- * “***purposely*** engages in ***conduct*** that would constitute a crime if the attendant circumstances were as he believes them to be” [MPC 5.01(1)(a)] **or**
				* “when causing a particular ***result*** is an element of the crime, does or omits to do anything with the ***purpose*** of causing or with the ***belief*** that it will cause such ***result*** without further conduct on his part; [MPC 5.01(1)(b)]; **or**
				* “***purposely*** does…an act…constituting a ***substantial step***” in furtherance of an offense [MPC 5.01(1)(c)]

Purpose = Intent in MPC.

Does case involve complete or incomplete attempt?

If complete attempt, is target offense a result or conduct crime?

If conduct, (1)(a)

If results, (1)(b)

If incomplete, (1)(c). Read w/(2), which elaborates on meaning of substantial step

***Potential Policy Question: Why should we punish inchoate offenses/attempt crimes at all? Apprehension/Security/Prevention***

1. **Attempt Actus Reus – Problems in Book Page 768**
* There is no single common law test to identify point at which conduct moves from the preparatory stages to one of perpetration.
* There are a number of tests that focus on how close the actor is to completing the target offense.
* Tests focus on either how close/proximity to completing the crime or how much ∆ has already done.
* Mere preparation is not enough to support the actus reus of an attempt offense! There must be some ***appreciable fragment*** of the crime committed. But where is line b/t preparation and perpetration?
	1. **Physical Proximity Test** – Requires an overt act for an attempt, proximate or physically near where crime would be completed.

**Peaslee**

**Facts:** Peaslee concocted a plan to burn a building and all its contents, but he changed his mind before plan was accomplished.

**Issue:** Do Peaslee acts come near enough to the accomplishment of the substantive offense to be punishable?

**Holding:** No, b/c he turned around ¼ mile from building, not physically near enough to the scene of the attempted crime.

* 1. **Dangerous Proximity To Success Test** – No attempt unless ∆’s conduct is so near to result, that the danger of success is very great. The more serious the offense, the less close the actor must come to completing the offense to be convicted of attempt.
* 3 factors: nearness of the danger, the substantiality of the harm, and the degree of apprehension felt.
* Turns on evaluating the Δ’s overt act and determining whether the Δ was dangerously close to committing the target offense.
* Has less to do w/ physical proximity and more to do with how close the Δ was to actually going through w/ target offense.

**Rizzo**

**Facts:** R drove around in their car looking for a man to rob a payroll from, but they were unable to find him before being arrested.

**Issue:** Do the acts performed by R constitute the crime of an attempt to commit robbery in the 1st degree?

**Holding:** No danger/threat of crime (attempted robbery) b/c no victim. Because ∆ lacked the ability to complete the crime (the victim was missing), the court concluded that they were not yet dangerously close to success/committing the offense.

* 1. **Indispensable Element Test** – A variation of the proximity tests which emphasizes any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control. Δ’s conduct shows that he has engaged in a particular act that was indispensable to the crime. Courts that use this test find that the Δ has engaged in sufficient acts to constitute the actus reus. Note 1 pp. 759
	2. **Probable Desistance Test** – Conduct constitutes an attempt if, in the ordinary and natural course of events, without interruption from an outside source, it will result in the crime intended. Looks at the dangerousness of ∆’s conduct. Seems to require judgment that the actor had reached a point where it was unlikely that he would have voluntarily desisted from his efforts to commit the crime.
		+ - A person is guilty of attempt if she has proceeded past the point at which an ordinary person is likely to abandon her criminal endeavor.
			- See Henthorn
	3. **Unequivocality/Res Ipsa Loquitur Test** – An attempt is committed when the actor’s ***conduct*** unequivocally manifests an intent to commit the target criminal offense. Conduct from an objective perspective indicates that the ∆ was going to commit the target offense. This test reduces the risk of a false conviction of an innocent person, but it may also increase the risk the police will be unable to act quickly enough to prevent the target offense.

**Miller**

**Facts**: M threatened to kill V. Later that day, M, armed with a rifle, entered a field where C, the local constable, and V, standing 30 yards further away, were present. Miller walked in their direction, stopped, loaded his rifle but did not aim it, and continued to walk. V fled at a right angle form M’s line of approach. C took possession of M’s weapon w/o resistance.

**Holding:** M was not guilty of attempted murder, because no one could say with certainty whether M had come into the field to carry out his threat to kill V or merely to demand his arrest by C. ∆’s conduct was not unequivocal.

* 1. **Abnormal Step Approach** – An attempt is a step toward crime which goes beyond the point where the normal citizen would think better of his conduct and desist. But then any step toward crime is a departure from the conduct of the normal citizen. This approach would mean that almost any act undertaken for the purpose of committing a crime would constitute attempt. Also, who would determine where the normal citizen would stop and what kind of proof is appropriate for such a determination? This test is inapplicable.

**Reeves**

**Facts:** Reeves-∆ and a friend devised and tried to carry out a plan to kill their homeroom teacher and steal her car.

**Issue:** Does simply planning a crime and possessing materials required to commit such crime constitute a substantial step towards the commission of the crime? Whether girls made substantial step towards committing the crime. [Yes]

**Holding:** Court applies the abnormal step test – what these girls did was sufficient to constitute perpetration. The rat poison was sufficiently close to the to-be victim and served no lawful purpose, so the girls had taken an abnormal step toward commission of the crime. Jury found that girls had taken an abnormal step and conviction was sustained.

**Rule:** The jury may find that an actor has taken substantial step toward commission of a crime when the actor possesses required materials near the scene of the crime and the course of action corroborates the criminal purpose.

**Note:** Difference between statute used by the Reeves court and MPC – Reeves statute did not have subsection § 5.01(2), so no list of acts that would be a substantial step.

* 1. **MPC** – Attempt occurs if ∆ takes a substantial step in the direction of committing a crime. ∆ doesn’t have to be close to committing the crime, he just has to have taken a substantial step.
		+ - Substantial step is not defined but MPC states that the substantial step should corroborate the intent/criminal purpose.
			- Examples of behavior that are legally sufficient to constitute a substantial step:

Searching for V.

Reconnoitering the crime scene.

Unlawfully entering a building where ∆ contemplates committing the crime.

Possessing tools or instruments necessary for committing the crime near the crime scene.

Soliciting an innocent agent to do an element of the crime.

* + - * Distinction from Common Law – Common law looked to see how close the ∆ was to completing the crime, whereas the MPC looks to see how far the ∆ has gone from the point of initiation of the target offense – what has he done?
	1. **Example Problem 3 page 756** – ∆ altered prescription from 1 refill to 11 refills. Attempt offense?
		+ - No – ∆ would have had to come back twice in order to attempt the crime b/c he was entitled to one refill (2 orders).
			- Under probable desistance test? ∆ was prosecuted under this test.
			- Under dangerous proximity? – No, b/c you have to wait for ∆ to come back for one he’s not entitled to.
			- Physically proximity? – No same as above.

**US v. Alkhabaz – Punishing Pre-Attempts**

**Facts:** Alkhabaz-∆ was arrested for posting fictional stories involving abduction, rape, torture, mutilation, and the murder of women and young girls on the internet.

**Issue:** Do fictional stories constitute a communication containing a threat under 18USC875? [No]

**Holding:** The court decided that this type of conduct is insufficient for the actus reus of an attempt crime.

**Policy Qs:** Should we be concerned as a society that people can be convicted for evil thoughts only? Friends should be able to talk about whatever evil things they want amongst each other. Should we be prosecuting for *pre*-attempts? What should we do about people we think are bad and are up to no good, but haven’t physically acted yet?

**Rule:** To constitute communication containing a threat under 18USC875, a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm [mens rea] and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation [actus reus]

* 1. **Attendant Circumstances**
		+ - At common law, ∆ must know the circumstances of the target offense.
			- **MPC** – The “purpose” requirement does not apply to AC, a person is guilty of an attempt if he possesses the mental state that would suffice for the target offense

Thus no mens rea needed for SL.

Still can’t have attempted reckless murder just b/c your reckless b/c even though the AC are satisfied (you acted reckless w/respect to the AC) – you still did not have the specific intent for the result (Killing, the rapist did have the specific intent for the result (Sex with a minor) – even if he didn’t know her age. This will be a Multiple choice.

* + - * Ex. ∆ engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in sexual intercourse with V (a 15 yr old girl who he believes is 18) – if he actually had sex he would no doubt be guilty of rape – is he guilty of attempted statutory rape if he’s arrested beforehand?

Under common law no, b/c he did not intend the girl to be under 15.

Under MPC, yes, b/c age is a strict liability circumstance element of the target offense.

1. **Defenses to Attempt: Impossibility/Abandonment**
	1. **Impossibility** – The common law distinguished between factual and legal impossibility.
		1. **Factual Impossibility** – At common law, not a defense to attempt. Occurs when an actor’s intended end constitutes a crime, but he fails to complete the offense because of a factual circumstance unknown to him or beyond his control. Crime is factually impossible.
			* + If the facts had been as the ∆ believed them to be, would his conduct have constituted a crime? If yes, then it’s a case of factual impossibility.
				+ Ex. Where ∆ is prosecuted for attempted murder after pointing an unloaded gun at someone and pulling the trigger, where ∆ believed the gun was loaded.
				+ Ex. ∆, a pickpocket puts his hand in an empty pocket. ∆ is guilty of attempted larceny.
				+ Ex. ∆ sexually assaults V, but fails to consummate the sexual intercourse because he is impotent. ∆ is guilty of attempted rape.
		2. **Legal Impossibility** – At common law, is a defense to attempt.
			* + **Pure Legal Impossibility** – Will bar an attempt conviction. When the action that the Δ sets in motion, even if fully carried out as desired, does not constitute a crime. Exists if criminal law does not prohibit ∆’s conduct or the result he has sought to achieve. Applies when an actor engages in conduct that he [incorrectly] believes is criminal, but is not actually prohibited by law. There can be no conviction of criminal attempt based on ∆’s erroneous belief that he was committing a crime.

Ex. A man believes that the legal age of consent is 16 and accurately believes that the girl with whom he had consensual sexual intercourse is 15. IF the law actually fixed the age of consent at 15, he would not be guilty of attempted statutory rape, despite his mistaken belief that the law prohibited his conduct.

Rationale – Conduct is not criminal just b/c someone incorrectly believes it as so, to convict her **would violate the principle of legality**

* + - * + **Hybrid Legal Impossibility** – Is more problematic than pure legal impossibility. Occurs when an actor’s goal is illegal, but the commission of the offense is impossible due to a mistake by the actor regarding the legal status of some factor relevant (attendant circumstance) to her conduct. Combines legal and factual impossibility.

A hybrid legal impossibility exists if the actor’s goal is illegal, but commission of the offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the charged offense.

Hybrid b/c involves both a legal and factual aspect. Problem is that it’s possible to view virtually any example of hybrid legal impossibility as an example of factual impossibility.

* + 1. **Distinction B/T** **Factual/Legal Impossibility?**
			- * If there is no law making what the ∆ intended to accomplish a crime, then it’s a legal impossibility and is a defense to attempt. Otherwise, most cases involve factual impossibility which is not a defense to attempt.
				* Many states have followed MPC approach and have abolished [hybrid] legal impossibility defense. Reasons:

Distinction is artificial. The distinction b/t factual and hybrid legal impossibility is largely non-existent. Virtually any case can logically be characterized as either factual or legal impossibility

The people who are acquitted on the ground of legal impossibility are as dangerous and culpable as those who are convicted on the ground of factual impossibility.

* + 1. **MPC**
			- * **§5.01 Legal Impossibility** – Requires the actor to intend to do something that is a crime.
				* **§5.01 Factual Impossibility** – Not a defense. ∆ is guilty of attempt if he would have committed the target offense had the facts or conditions been as he believed them to be. We care about what ∆ believes w/regard to facts.

Ex - ∆ can be convicted of an attempt o purchase or receive stolen property b/c he believed the property to be stolen and he would have committed the target offense if his belief were true.

Ex - ∆ who believed his victim to be alive and shot at him to kill can be convicted of attempted murder even though the victim had already died.

**People v. Thousand**

**Facts:** Sheriff’s Deputy logged into a chat room, posing as a 14-yr old female, and chatted w/Thousand-∆, who was later charged w/attempted distribution of obscene materials to a minor.

**Defense:** That it was impossible for Δ to commit this crime b/c there was no minor child. Court decides that this is a case of factual impossibility, is not a defense here b/c whether the minor female existed or not is not relevant. Δ thought that she existed, and therefore, he committed a crime.

**Dissent:** This is legal impossibility. ∆ should not be guilty of the crime of “attempted distribution of obscene material to a minor” b/c the police officer is not a minor.