Criminal Law Gershowitz, Summer 2010

# Background

## Definitions

* Retributivist: punishment is justified because the criminal deserves it
* Utilitarian: justification for punishment lies in the useful purpose it serves
* Attendant Circumstances: random requirements that are not part of the elements of the statute

## Theories of Punishment

1. Retribution

* Must be proportional. Punishment should fit the crime.
* When it becomes disproportionate, it also become unconstitutional

1. Deterrence

* General: punish the criminal to deter others
* Specific: incapacitation, punish criminal to prevent him from committing more crime

1. Rehabilitation
2. Substantiation of threat: future threats will be taken less seriously if past threats of punishment are not fulfilled

* Problems with punishment? Subjective

## 4 Elements of a Crime: All 4 must be present

1. Mens Rea: guilty mind / bad intent (sometimes not required, SL statutes)
2. Actus Reus: the act, took the necessary action required by the statute (rarely we also have crimes of omission, or failure to act)
3. Causation: the act caused the harm
4. Social Harm / Damage

## Other Comments

* Criminal statutes must be codified by the legislature to provide advance notice of what is criminal so that people can conform their behavior
* A statute can be held unconstitutional if it violates a particular provision of the constitution

# Chapter 1 – Setting the Stage

## Proof of Guilt At Trial

### Enforcing the Presumption of Innocence

* Each element of the crime must be proven beyond a reasonable doubt (BRD)
* The State (plaintiff) bears the burden of proof b/c of the Constitution’s Due Process Clause
* Affirmative Defenses (AD) must be proved by the defendant

### Standards of Proof

* Reasonable suspicion: 10-15%, standard required to pull someone over
* Reasonable cause: 20-25%, standard required to search, arrest, hold for trial, etc.
* Preponderance of evidence: 51%, standard for civil cases
* Clear and convincing evidence: 66%
* BRD: 95%-ish, standard for criminal cases
  + **BRD:** Does not require absolute certainty, does not require the Govt to disprove any hypothesis (no matter how ridiculous). BRD requires the Govt to disprove any plausible alternative theories.

*Owens v. State, MD Appeals, 1992; passed out in private driveway with motor running, empties in car, arrested for drunk driving*

* Q: Did he commit the actus reus?
* H: Totality of circumstances inconsistent with a reasonable hypothesis of innocence. Govt has eliminated all plausible alternatives except that he was driving on a public roadway while intoxicated.
* Case seems wrong b/c there are a bunch of seemingly reasonable scenarios that have not been disproven (it could have been his house or a friends house)

# Chapter 2 – Principles of Punishment

## Who Should be Punished?

* We regularly take account of the criminal himself, not what they have or have not been convicted of, to determine an appropriate punishment. Idea is that we punish the offender, not the offense (California 3-Strikes Rule)

*Queen v. Dudley and Stephens, 1884; 4 men stranded in boat for many days, Brooks objects, D/S kill youngest boy and all 3 eat him to survive, eventually saved*

* Any shortening of human life constitutes homicide
* Generally, no AD of necessity in murder cases

## Proportionality of Punishment

### 8th Amendment

* “Excessive bail shall not be required, nor excess fines imposed, nor cruel AND unusual punishment inflicted”

### Proportionality Principle

* Courts have mandated a proportionality principle, that the punishment must be proportionate to the crime committed
* *Solem* Factors for Proportionality
  1. Gravity of the offense and the harshness of the penalty (subjective)
  2. Sentences imposed on other criminals in the same jurisdiction
  3. Sentences imposed for commission of the same crime in other jurisdictions
  + Unless there is an inference of gross disproportionality, we never get to # 2 or # 3. If there is an inference, we look to # 2 and # 3, the benchmarks, to determine if it is grossly disproportionate

*Ewing v. California, SC, 2003; career offender stole 3 golf club, sentenced to 25-to-life under 3 strikes law*

* Q: D claimed punishment was disproportionate and violated the 8th Amendment
* Majority: Not disproportionate. In 99% of cases we defer to the legislature.
* Scalia’s concurring opinion: Punish him. The legislature decides what it wants to do and judges should just enforce it
* Dissent: courts should rigorously analyze the legislature to determine if the punishment is disproportionate
* TH:
  + Legislature is free to criminalize and punish however they want (defer to the legislature)
  + SC will step in to ensure proportional punishment in death penalty cases, but not usually in non-death penalty cases

# Chapter 3 – Modern Role of Criminal Statutes

## Principle of Legality

* Common-Law (CL) Crime: judges create the crimes by deciding cases. No longer exists in the U.S. today. Why?
  + Notice issues
  + Elements of the law are unclear
  + Dumb. Not right.
* Legislature, not courts, should define what a crime is b/c they can then act *ex ante* (in advance), whereas a court can only act once a case is before them (and the crime already committed)

### Requirement of Previously Defined Conduct

*Commonwealth v. Mochan, 1956; M telephoned lady several times and used profane language*

* H: Illegal b/c it affected public morality. Not illegal to ask to commit adultery, illegal to ask about sodomy
* §1101 said any CL crimes were now codified. Illustrated the problem of CL crimes. No longer allow judges to define what a crime is.
* TH: States should not be in the business of CL crimes. No CL crimes.

*Keeler v. Superior Court, CA SC, 1970; ex-husband kneed pregnant wife and killed fetus*

* H: Not murder b/c the fetus was not a “human being” as defined by the statute. It is too late, and not the Ct’s place, to change it now. Ct strictly construed the statute.
  + Looked to CL to see what the base line was because people would be influenced by CL when drafting the existing statute. CL said child had to be born alive to be a human being.
  + Ct said it would usurp legislative authority if they expanded the CL
  + Ct said constitution prohibits *ex post facto* laws – cannot punish you for a crime if it wasn’t a crime when you actually did it
* TH: If a statute is vague, we need to interpret it.

1. Figure out what the drafters said about it (ex, floor debates)
2. Look to the CL to fill in the gaps

* We allow a certain amount of this, but at the same time the statute cannot be so vague as to provide no notice. We cannot fill in gaps to change what the legislature intended.

### Statutory Clarity

* Problems with vague statutes?
  + **Fair notice** required: do not provide enough notice to allow a D to conform their behavior to the statute
  + They can be applied **arbitrarily**
* Rule of Lenity: (benefit of the doubt) if a statute can reasonable be interpreted favorably to either party, the statute should be read in the light favorable to the individual. Today, this principle is not applied very often.

*In Re Banks, NC SC, 1978; peeping tom statute*

* Statutes must be sufficiently definite to give required notice or they will be found unconstitutional. This means a reasonable degree of certainty.
* Opposite of *Keeler*, here the Ct “interpreted” the statute, narrowing it to “fix the legislature’s mess”
* Strict construction does not always equal the legislative intent
* TH: A ct may make slight adjustments to statutes

*City of Chicago v. Morales, SC, 1999; gang congregation ordinance to reduce loitering, challenged on constitutionality grounds*

* H: Vague. Scalia’s dissent: Said Cts shouldn’t micromanage the legislature
* TH: Vagueness may be shown by

1. Authorizing arbitrary or discriminatory enforcement: give the police a large amount of discretion, OR
2. Failure to give notice: not specific enough to tell people in advance what constitutes criminal behavior

* Vague statutes are unconstitutional

# Chapter 4 – Actus Reus (AR)

Actus Reus is the physical or external part of the crime. AR is to be interpreted as the comprehensive notice of act, harm, and its connecting link (causation).

* **Result Crime**: offense seeks to prevent a harmful result (ex, murder). AR includes the harmful result. Social harm easy to see.
* **Conduct Crime**: offenses punish mere conduct (ex, DUI). AR does not include any harmful result. Social harm harder to see.
* **Attendant Circumstance**: a condition which must be present, in conjunction with the prohibited conduct or result, in order to constitute a crime
  + I.e. It is an offense to drive an automobile in an intoxicated condition. AR = driving, attendant circumstances = intoxicated condition

How to analyze the AR element: Ask 1) was there an act, and 2) was it voluntary?

## Voluntary Act

*Martin v. State, AL Appeals, 1944; drunk at home, police dragged him onto public highway and arrested him*

* TH: AR typically requires that the act be voluntary. Without voluntariness, the AR element has not been met
* MPC §2.01(1) defines voluntary
  + The following are defined as involuntary: reflex or convulsion, bodily movement during unconsciousness or sleep, conduct during hypnosis or resulting from hypnotic suggestion, bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual

*State v. Utter, WA Appeals, 1971; son stabbed by father, dad was a WW2 vet, said it was a conditioned response when he was snuck up on from behind*

* Dad argued PTSD, that he didn’t voluntarily take the action. This is not a defense but rather saying that the Govt failed the burden of proof on the AR element
* 2 reasons that you cannot give a particular jury instruction

1. Instruction is BS
2. Instruction is an actual legal principle but you have no evidence of that principle

* Ct recognizes possibility of PTSD causing involuntary action, but not in this case b/c he hadn’t provided any evidence of it (issue only raised on appeal)
* TH: Mens Rea is the intent to commit the social harm. MR is completely separate from the act. However, there is some amount of mental processing necessary in a voluntary action. This is called volition. AR must be voluntary, and voluntary judged by the presence of volition.

### Time Framing Problem

*People v. Decina, 1956; epileptic drove, had episode and killed 4 children*

* Time Question. It was clearly involuntary when he crashes mid-seizure, but it was a voluntary act when he gets in the car knowing he has epilepsy.
* TH: Look at things from a temporal perspective and decide where to draw the line. Often the statute can provide direction on how the act should be framed

## Omissions – Negative Acts

Don’t generally punish for omissions b/c it is hard to draw a line and hard to prove. However, there are exceptions.

**When an omission satisfies the AR requirement** (i.e., when a duty is created)

1. Relationship – marriage or parental
2. Statutory imposition of duty – ex, police officer
3. Contractual assumption of duty – ex, LL
4. Created the harm, or risk of harm, to another
5. Commenced rescue / Voluntarily assumed the care of another - If you start a rescue and thereby deter other people from the rescue, changing your mind halfway and then failing to rescue is grounds for liability. Not liable if something reasonable gets in the way of completing the rescue.

*People v. Beardsley, MI SC, 1907; man and woman having affair, lady took morphine after he asked her to leave, he tried to stop her, she passed out and he brought her to the neighbors, she died*

* Failure to do the task that you have a duty to do is a punishable omission. RARE.

*Barber v. Superior Court, 2nd Dis Appeal, 1983; docs charged for withdrawing life support after family consented*

* H: Ct said it was an omission and they were not liable b/c there was no duty to continue treatment once its use became futile. Basically the Ct just didn’t want to hold the doc’s liable (b/c isn’t this really an act?)

# Chapter 6 – Mens Rea (MR)

Mens Rea is the mental element (usually) required for a criminal act.

* 2 meanings of MR
  + Broad: big picture, a defendant is generally culpable. Historically, society looked at the broad viewpoint and tried to find a bad or wicked state of mind.
  + Narrow: today we take the elemental approach, which says the defendant must have a particular statutorily prescribed mental state. You cannot convict b/c a D is just generally a bad person.
* Unlike torts, we are largely concerned with what this particular defendant was thinking (subjective)
* Motive is not relevant

*Regina v. Cunningham, Appeals, 1957; ripped gas meter off the wall but didn’t turn off the gas, accidentally poisons mother-in-law*

* General approach: malicious meant wicked and it was wicked to steal money
* H: Elemental approach: malicious means intentional or reckless. D is guilty b/c he disregards a substantial risk of gas escaping when you pull the meter off the wall.

MPC §2.02

4 mental states (descending, each higher one encompasses all those below it)

1. **Purpose (Intentional)**: with desire; individual’s conscious objective that it happened (their purpose)
2. **Knowledge**: aware that the result is practically certain
3. **Recklessness**: consciously disregarded a substantial and unjustifiable risk
4. **Negligence**: should be aware of the substantial and unjustifiable risk (objective viewpoint, whereas recklessness is more subjective)

* Presumption is that recklessness or higher is required to convict (do not read in negligence)
* Note: under CL, if no intent is specified the presumption is that the crime is a SL crime
* Under MPC, the mental state modifies every element of that crime
* Ex. False imprisonment = knowingly restraining another person unlawfully. Under MPC, must *knowingly* restrain another and *know* it is unlawful
* I.e. MPC does not have SI or GI

## Common Law

2 types of MR

1. **General Intent**: intent to commit the AR. Mental state is only required to conduct the AR.

* GI *can* be inferred

1. **Specific Intent**: intent do so something more than the AR

* Govt must prove MR to do AR + intent to…
  + Commit a future act
  + Special motive or purpose
  + Awareness of particular circumstances.
* Best indicator of SI is that, towards the end of the statute, it will say “with the intent to…”
* SI *cannot* be inferred
* SI crimes always have both a GI element and an SI element. GI element to do something and further SI to do another thing.

## General Issues in Proving Culpability

### Intent

*People v. Conley, Illinois Appeals, 1989; D meant to hit M with wine bottle at a party but hit P instead, charged w/aggravated battery*

* TH:
  + You cannot *presume* a mental state, but intent can be *inferred* from the facts
  + **Doctrine of Transferred Intent:** 
    - Intending to harm A, but accidentally harming B instead, we transfer the intent to person B.
    - Generally needs to be the same type of social harm

### Wilful Blindness (Ostrich Instruction)

*State v. Nations, Missouri Appeals, 1984; 16-yr-old dancing at club, D argued she didn’t know the girl was underage, statute required conduct to be knowingly (actually aware)*

* MPC says “knowledge” means aware of a high probability that something exists (actual knowledge not necessary)
* TH: 2 ways to find someone guilty under knowledge MR
  + Actually know or know of a high probability that something exists
  + Take steps to avoid knowing something (Enron)
  + In many jurisdictions, including federal ct, willful blindness is a way we can infer knowledge (although states are free to reject this notion)

## Strict Liability

* SL eliminates the MR element. It does not affect the other elements of the case.
* Typically used when
  + Little or no jail time
  + Regulatory
  + Public welfare (inherently dangerous)
* Strong presumption against SL offenses
  + B/C it does not deter or rehabilitate
  + CL allows for SL
    - MR is the presumption, and SL is the exception
    - If legislature is silent on the issue of MR and we have no reason to infer they just forgot it (if they put it in certain parts of the statute but not others, we assume they did this intentionally)
  + MPC strongly disfavors SL
    - B/C MPC is entirely premised on personal culpability
    - Minimum of recklessness required if statute is silent
    - Except for statutory rape

## Mistake and Mens Rea

***Malum in se***: bad all by themselves

***Malum prohibitum***: prohibited behaviors to benefit society

### Mistake of Fact

Note: heavily tested on the bar exam

*People v. Navarro, CA Appeals, 1979; D stole wooden beams from construction site*

* TH:
  + Affirmative Defense. Burden of proof on the defendant.
  + Mistake of Fact negates MR
    - To negate a GI element, mistake of fact must be honest (or genuine or good-faith) AND reasonable
      * Old approach was that the reasonable person was objective. Trend towards a more subjective approach that we look at a reasonable person in the D’s position
    - To negate a SI element, mistake of fact must be honest
  + No mistake of fact in SL crimes (no MR to negate)
  + Jury decides whether or not to believe the D when he says it was an honest belief
* 2 exceptions that exist in some jurisdictions, but not all
  + Moral Wrong Doctrine: even if D has a valid MoF, still accountable if he intentionally committed an immoral act. Not real popular today.
  + Legal Wrong Doctrine: if a reasonable/honest mistake still means you would be convicted on a lesser charge, you get convicted on the higher charge anyway

Common Law Analysis

* SI or GI crime?
* Does the mistake go to the SI or the GI element?
* Was it honest or honest + reasonable?
* Does the moral wrong or legal wrong doctrine apply?

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* No such thing as SI or GI, so MR applies to all elements of crime
* MoF is a defense when it negates the MR element of the statute
* No moral wrong or legal wrong doctrine

### Mistake of Law

In 99% of cases, this never works. But in law school, it often might.

General rule: ignorance of the law is no excuse

* Exceptions
  + Defense if reasonable reliance on an official statement of the law when that statement of law later turns out to be wrong.
    - It must come from a govt official who is charged w/ interpreting and enforcing (judicially) the law
  + If statute requires knowledge that something is illegal (*Cheek v. US, pilot was wrong about tax law*), an honest MoL may be sufficient to negate MR.

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* Same reasonable reliance exception
* Honest MoL, even if unreasonable, can result in acquittal if the mistake of law negates the mental state element of the crime (*Cheek*). These are very rare.

# Chapter 6 – Causation

## Actual Cause (Cause-In-Fact)

3 ways to show causation

* 1. But-For: A would not have happened but-for B. Most cases.
  2. Acceleration: liable if you accelerated the death of a person, even by a fraction of a second
  3. Substantial Factor: when more than 1 actor engages in an act that, on its own, could have caused the death, then they both satisfy the causation requirement.

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* Same

## Proximate Cause (Legal Cause)

Chain of events must be close enough to link the cause to the ultimate result. Usually arises when an intervening force exists.

If you are a proximate cause then you are necessarily an actual cause, but you can be an actual cause without being a proximate cause.

*Kibbe v. Henderson,2nd Circ, 1976; met at a bar and decided to rob S, robbed him and left him on side of road in cold, S sat in middle of road and hit by car, killed*

* TH: Test of Foreseeability.
  + Look for a superseding, intervening force or event that occurs after the defendant’s initial act/omission but before the resulting harm
  + S,I force breaks the chain if it was NOT foreseeable
  + Defendant still liable if S,I force was foreseeable

Apparent Safety Doctrine: when a person reaches a position of safety, the original wrongdoer is no longer responsible for any ensuing harm

* Foreseeability is irrelevant. Judge tosses the case.

A person’s own actions can be a superseding, intervening cause of his own death (*Velazquez v. State, drag racing accident*)

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* No PC requirement. Ask if defendant has the requisite culpability for the crime. Actual result must be in the contemplation of the actor (still liable if the extent or exact type of harm differs)
* Basically, jury makes a common sense judgment as to whether or not D was responsible

## Concurrence of the Elements

* There needs to be concurrence of the elements
* AR, MR, causation, SH must occur at the same time
  + *State v. Rose, driver hit pedestrian, body rolled under car and driver took off.* If he killed him at impact, and wasn’t negligent when he did it, him being negligent later on is not grounds for convicting him earlier.

# Chapter 7 – Homicide

Ct has declared that “deceased” means “brain dead” (*People v. Eulo*). We need a dead person before there can be a homicide.

## Common Law

Murder: unlawful killing of another human being with malice aforethought

* Malice Aforethought? The language is not very helpful anymore (w/o malice aforethought, human death will lead to manslaughter)
* 4 Types of Malice – all are murder and are treated the same. CL does not have degrees of murder. All forms were punishable by death.
  + Express Malice: death is the desired result
    - 1. Intent to kill
      2. Intent to commit grievous bodily harm
  + Implied malice: death is not the desired result. We can hold someone liable even if they didn’t intend murder
    - 1. Depraved heart murder. D acted in such a way to show depraved or malignant heart, extreme recklessness, or wanton disregard for human lift
      2. Felony murder. Death occurs during intentional commission of an predicate felony.

Manslaughter: occurs w/o malice, things that don’t make it to murder

* 2 types of manslaughter

1. Voluntary. Intended to kill but did so in the heat of passion
2. Involuntary. Unintentional killing that results from ordinary recklessness (not as reckless as depraved heart murder)

1 Year + 1 Day Rule: death resulting from an AR must occur within 1 year + 1 day or the defendant cannot be held liable. Most jurisdictions have gotten rid of this rule.

## MPC

Murder. MPC also has no degrees of murder.

1. Purposefully
2. Knowingly
3. Recklessly with extreme indifference to the value of human life (basically the same as CL depraved heart murder)

* NO felony murder b/c MPC is all about personal culpability

Manslaughter. Basically the same as CL, but without the voluntary/involuntary label.

1. Intentionally, but b/c of extreme emotional disturbance
2. Recklessly

Negligent Homicide. Lower form of manslaughter. Don’t worry about it for this class.

## Intentional Killings

### Deliberation and Premeditation

* Deliberation: quality of time. You had an opportunity to calmly think through the situation and decide what to do. Rational state of mind, free of passion. Cannot have deliberation w/o premeditation.
* Premeditation: quantity of time. Can have premeditation w/o deliberation.
* Cases suggest that you cannot form P & D instantaneously. Statutes often include a provision that the act must be willful, premeditated, and deliberate for higher degree murders. How long and how calm a person must be are questions for the jury. *State v. Guthrie (D stabbed co-worker with knife after repeated teasing)*
* Circumstantial evidence is often used to prove P & D. *State v. Forest (mercy killing of father).* Factors to consider:
  + Provocation by the deceased
  + Conduct before the killing
  + Threats before the killing
  + Ill will between parties
  + Dealing of lethal blows after deceased was dead or helpless
  + Killing in a brutal manner

### Heat of Passion

Murder Murder

Voluntary Manslaughter Involuntary Manslaughter

* Common Law
  + To invoke “heat of passion” defense, must fit into one of the following “pigeon holes”
    1. Discovering spouse in bed with another
    2. Mutual combat
    3. Serious assault or battery
    4. Seeing a relative killed and going after the killer
    - Unless you fit into one of these you **cannot** use the heat of passion defense
  + Rule of Provocation: Once you fit in a pigeon hole, need to complete the following test

1. Adequate provocation?
   * + - Words alone are not adequate provocation
       - Provocation is judged from an objectively reasonable person perspective
         * Were they subjectively provoked?
         * Was it reasonable for them to have been provoked this way?
2. Killing was done in the heat of passion
3. Sudden heat of passion, no cooling off period
4. Causal connection between the provocation, the passion, and the final act
   * Provocation defense ratchets you down from murder to voluntary manslaughter

* MPC
  + Provocation is not required
    - Words can be enough
  + “Extreme emotional disturbance” instead of “heat of passion”. Jury decides if the defendant suffered from EED.
  + Looser standards, no rigid approach
  + Response judged from an objective/subjective standard: a reasonable person standing in the defendant’s shoes. We consider the particular defendant’s unusual circumstances.
  + EED knocks defendant down from murder to manslaughter. Still have to link his behavior to a reason to downgrade the charge – mere proof of EED insufficient.

## Unintentional Killings: Unjustified Risk Taking

## Involuntary Manslaughter

Based on recklessness. Need to determine if it was ordinary or unintentional recklessness (involuntary manslaughter) or extreme recklessness (depraved heart murder).

Always begin with involuntary manslaughter and determine if we can ratchet up to DHM.

Depraved Heart Murder: Wanton and willful disregard of human life

1. Base, antisocial motive (serious illegal stuff)
2. High probability of harm

CL and MPC essentially the same

Ordinary or simple negligence is enough for manslaughter (*State v. Williams, infant died after no medical treatment of abscessed tooth*)

## Unintentional Killings: Unlawful Conduct

## Felony-Murder

Only exists at CL. Felony + Death = Murder. Arises in 2 ways

* Statutorily defined: statute contains a list of predicate felonies
  + Even though felony may not be inherently dangerous (burglary), a legislature can list whatever felonies they want
* Judicially defined: underlying felony must be inherently dangerous
* At CL this wasn’t very significant because all felonies were *malum in se* and were punishable by death anyway
* In most F-M cases the Govt could have charged the defendant with murder, but it is easier to use F-M

MPC

* §210.2(b): Extreme recklessness (DHM) *presumed* if you commit one of the enumerated felonies and someone dies. There is a presumption towards F-M, but it is rebuttable.

### Limitations

Inherently Dangerous Felony

* What is inherently dangerous? Felony, by its very nature, cannot be committed w/o creating a substantial risk that someone will be killed
* How do we determine if a felony is inherently dangerous?
  + Abstract: objective viewpoint. If there is any way you could commit the act in question without it being inherently dangerous, it probably isn’t (*People v. Howard, evading police*)
  + Contextual: subjective viewpoint. Problem is that it always looks inherently dangerous b/c there is always a dead body

Independent Felony / Merger Limitation

* Predicate felony must have an independent purpose collateral to the felony
* The predicate felony cannot be an integral part of murder. If it is then you cannot charge under felony-murder.
  + F-M requires a completely independent felony
  + Assault and voluntary manslaughter are barred from application of the F-M rule (the two crimes “merge” together)

Killings “in the Perpetration” or “in Furtherance” or a Felony

2 Theories

1. **Agency Theory** (majority)
   * If “killer” is a neutral 3rd party, defendant does not get charged with F-M
     + Ex. During a robbery, the Police kill Felon #1. Felon #2 is not liable for Felon #1’s death. No F-M.
   * If “killer” is an agent of the defendant, or if they are on the same team, defendant does get charged with F-M
     + Ex. During a robber, Felon #1 kills the Victim. Felon #2 is liable for the Victim’s death. F-M.
2. **Proximate Causation** (minority)
   * Hold defendant responsible if it is foreseeable that death would occur during commission of the felony

## Capital Murder

* Application of death penalty must be statutorily listed in advance, clear, and thorough. Must provide for aggravating factors and mitigating factors.
* Bifurcated trial required
* If you commit FM in a “major way”, eligible for the death penalty b/c it shows wanton and willful disregard for human life
* Exceptions: mentally retarded, juvenile at time offense was committed, underlying offenses where someone does not die

# Chapter 8 – Rape

## Common Law Rape

* Rape: Carnal knowledge of a woman forcibly against her will
  + Carnal knowledge: ordinary vaginal intercourse only
  + Victim could only be a woman
  + Only a male can be a perpetrator
  + Must be forcible **and** against her will (lack of consent)

### Force

* Physical force or the threat of force (shows the D’s MR)
  + Hard to show force w/o physical violence or resistance
  + Clear showing of reasonable fear of serious bodily harm
* How Much Force?
  + Causing or threatening serious bodily injury or death
    - If a threat, P must show a **reasonable** threat of force, not just a subjective fear of force
  + Enough to overcome the victim’s resistance
* If defendant used or threatened force involving serious bodily injury or death, can be convicted even if no resistance.
  + If D uses a lesser amount of force, victim must have resisted to the utmost
  + Force must be more than what is simply necessary to achieve sexual penetration (*State v. Alston*)
* At CL, we usually focus on the victim’s resistance

### Rape Reform

* Law moving to focus on Ds actions, not the Ps actions
* In many states, reform means we can show rape simply by showing lack of consent plus penetraction

## Consent

* Express or implied consent
* Consent can be withdrawn at any time. After this point, if a person continues, that person is guilty for all acts from that point on
* Under CL, victim must withdraw and provide some sort of resistance

## Mistake of Fact

* Rape is a GI crime, so any mistake of fact must be honest + reasonable
* A reasonable person is a reasonable person in the defendant’s circumstances

## Fraud

* **Fraud in Factum**: the consent fails b/c what happens is not what the victim consented to
  + Ex: Doc tricks patient. Patient consents to a medical procedure, not sexual intercourse.
* **Fraud in the Inducement**: consent effective, fraud just used to induce the act
  + Ex: If you sleep with me, I’ll get you a record deal. Still consenting to the sexual activity.

## Rape Shield Statutes

* Rule: D does not get to introduce evidence of the victim’s prior sexual history
* Reasons
  + Irrelevant to the legal questions (primary reason)
  + Harassing and humiliating
  + May deter victims from coming forward
* Exception
  + Allow evidence of prior sexual history to demonstrate motive to fabricate (i.e. prior allegations of rape)
* Public acts directed toward the D are admissible b/c they can help show a mistake of fact
* Private or public sexual behavior is not relevant unless directed at the D – how one behaves to third parties is irrelevant
* Statues remove discretion from trial judges

# Chapter 10 – Inchoate Offenses

Inchoate = incomplete

3 types of inchoate offenses

* Attempt: focuses heavily on the AR of the crime
* Conspiracy: focuses on the MR
* Solicitation: illegal to ask someone to do something illegal (even if they don’t do it)

Merger doctrine: usually the inchoate offense merges with the underlying crime, such that you cannot be charged with both. It is possible to be charged with the target offense and be convicted only of attempt

Preparation is not illegal. Perpetration is.

## Attempt

* Majority Rule: attempt is punished less severely than the target offense
  + Social harm is not accomplished
  + Retain incentive to stop before fully committing crime
  + Difficult to determine intent
* Usually the criminal code has lots of target offenses and one general attempt statute that says it is a crime to attempt any of the target offenses
* 2 types of attempts
  + Complete but Imperfect: pull the trigger but the gun jams
  + Incomplete: defendant stopped before being able to pull the trigger

### Mens Rea

* CL: attempt is always a SI crime, even if the complete offense is a GI crime
  + Intent to commit the acts that make up the AR of the completed crime
  + Intent to actually commit the target offense
    - Cannot attempt a reckless or negligent offense
    - Cannot attempt DHM
    - Cannot attempt F-M
    - Cannot attempt involuntary manslaughter
* MPC: attempt requires the crime be committed purposefully or knowingly

### Actus Reus

* Do we define the AR broadly or narrowly?
  + Narrow: difficult to convict
  + Broadly: easy to convict and perhaps some people who started down a path and then changed their minds will be convicted anyway
* Approaches
  + Look backwards on what has already been done
  + Look forwards to what remains to be done

Common Law

* Series of tests that exist around the country to determine an attempt (know for exam)
  + Last Act Test: only convict D if they have performed all of the acts necessary to commit the target offense
    - Most narrow, most favorable to D
    - Used almost nowhere
  + Physical Proximity Test: convict D when target offense is within grasp – physically close to completion and could be completed almost immediately
  + Dangerous Proximity Test: convict if D is on the verge of being able to commit the crime
    - Balancing act between dangerousness of the crime and the social harm
    - Can’t be in dangerous proximity if victim is nowhere to be found (*People v. Rizzo*)
  + Indispensable Element Test: don’t convict D unless he has ALL of the necessary instrumentalities to commit the crime (if missing one small thing, not guilty)
  + Probable Desistance Test: ask if the D has passed the point of no return and we are sure he isn’t going to turn back
    - Vague
    - Ordinary person standard
  + Unequivocality (res ipsa) Test: convict D if, looking only at his actions, it is clear he was going to carry out the crime. Like a TV on mute, look only to actions, not works. Only convict if there can be only one reasonable explanation for future behavior.
    - Stupid
    - Very pro-D b/c there are often several reasonable explanations

MPC

* Substantial Step
  + Looks backwards at what has already been done
  + Look for an overt act that shows direct movement toward the crime
  + If you have possession of materials to be used in a crime, have them at or near the scene of the crime, and there is no other good reason to have them except for criminal activity, jury is entitled to find that the D took a substantial step towards commission of the crime

### Impossibility

* Factual Impossibility: if facts had been as D believed, the crime would have been committed
  + Not a defense
  + Look for a situation where the D misunderstands the facts but his end goal is still illegal
* Legal Impossibility: what a D did is not a crime
  + Always a defense b/c it isn’t against the law
  + Ex. German tourist trying to steal ketchup packets from McDonalds
* Hybrid: think what you are doing is a crime, really a fancy version of factual impossibility
  + Not a defense
  + Don’t worry about this one

### Abandonment

* MPC: Voluntary abandonment is a complete defense to an attempted crime
  + Must voluntarily abandon (purely internal). Involuntary (influenced by external events) abandonment does not count.
  + Must be a complete and permanent abandonment
  + Affirmative defense
* Cannot abandon a completed crime

## Solicitation

* Inviting another person to participate in a felony or misdemeanor
  + Not solicitation to ask someone to get you the tools to commit the crime
* CL: crime of solicitation usually a misdemeanor
* MPC: D punished the same as what they would be if the offense was completed
* SI crime
  + Intent to do the AR (inviting, encouraging, etc)
    - At this point, guilty of solicitation, even if the target offense is never complete
  + Intent that the target crime actually be completed
  + Jokes or unintentional solicitations do not count b/c you lack the SI
* Merger doctrine applies

## Conspiracy

* Crime of agreeing to commit a crime
* CL
  + Punished lightly
  + Conspiracy DOES NOT merge with target offense
* MPC: more serious b/c you had a MR
  + Merger doctrine does apply to avoid “double punishment”
* Evidentiary rules relaxed for conspiracies
  + Hearsay evidence rules do not apply. Statements of one conspirator admissible against the other conspirators
  + Agreement itself is the requisite AR
    - In some jurisdictions, an “overt act” is required – need at least one overt act or step in furtherance of the agreement. In practice, doesn’t mean much
    - Only one overt act is needed
    - Overt act does NOT need to be illegal, but does need to be something more than the agreement
    - Overt act is taken as a symbol of the agreement and proves the conspiracy

Conspirator Liability

* Can have a continuous conspiracy
* CL: if you don’t withdraw from the conspiracy, you are liable for 1) the conspiracy, and 2) all acts of the conspirators that are in furtherance of the conspiracy (if foreseeable)
  + Applies even if you didn’t commit the acts or were unable to commit the acts
* MPC: rejects the above. Only liable for the acts of a co-conspirator if you had the intent to do those acts
* How do you withdraw?
  + Tell someone or thwart the activity

Culpability

* Specific Intent crime (don’t need for everyone in the conspiracy to know every detail to be guilty)
  1. Need intent to agree
  2. Intent to commit the target offense
     + Cannot intend to commit a reckless offense (like DHM)
  + Cannot conspire to commit an implied malice (unintentional) crime
  + MPC requires at least purpose to convict of conspiracy
* Mere knowledge of criminal activity is NOT enough to involve you in the conspiracy
  + Need purpose to participate
  + Very rarely, we can infer “purpose”, or knowledge+
    - D charging an inflated price for something involved in the conspiracy
    - No legitimate use for the goods or services
    - Grossly disproportionate volume of goods or services
* Conspiracy is plotting in advance. Accomplice liability means you helped somehow. They are NOT the same thing. You can be a conspirator but not an accomplice, or vice versa.
  + Conspiracy requires an agreement before the act

Bilateral v. Unilateral Conspiracy

* CL: requires a bilateral conspiracy. Must have 2 people who agree to commit a crime (and since conspiracy is a SI crime, you need intent to conspire and intent to commit the offense). Problem? If one is an undercover cop, no conspiracy.
* MPC: allows for unilateral conspiracy. Still need 2 people, but one of them can have no intent to commit the crime (the undercover cop). Reason? MPC concerned with culpability.

Abandonment or Withdrawl

* Conspiracy, the crime of agreeing to commit a crime, is complete when
  + Agreement is formed, or
  + Agreement is formed + overt act performed
* CL: If you take action to withdraw, still guilty of conspiracy and of any substantive offenses that have already occurred, but not guilty of anything else that might happen
* MPC: If you thwart the conspiracy, not guilty of conspiracy and not guilty of anything else that might happen. Still guilty of any offenses that have already occurred.

# Chapter 11 – Liability for the Conduct of Another

## Accomplice Liability

Accomplice liability is NOT the same thing as conspiracy.

* Conspiracy = crime of agreeing to commit a crime. Do not need to participate in the actual crime.
* Accomplice liability = requires proof that the accomplice helped or assisted. No agreement necessary.
* (Exam Q – there will be a scenario where someone is one or the other but not both)

Accomplice liability is not a crime in and of itself. It is **derivative**.

* Derive criminal responsibility from the acts of the principle
* Illegal actions of the principle become the illegal actions of the accomplice
* There is no such thing as the crime of “accomplice liability.” It is a theory by which the D is found guilty.

Common Law Rules

* Accessory cannot be tried before the principle
* Accessory cannot be convicted if principle is not convicted (b/c then there is nothing to derive from)

MPC Rules

* Accomplice can be tried first
* Accomplice can be convicted even if the principle is not

Actus Reus

* The aiding and abetting
* RULE: Mere presence at the scene is not enough.
* Pretty much any act that provides even a tiny amount of assistance is sufficient
* CL: there must be some type of **actual** help (i.e. it needs to be effective)
  + Trying to help, but not actually helping, is insufficient
  + If A unlocks a door so that B can rob a house, but B breaks in through the window, A is not guilty on accomplice liability theory
* MPC: any attempt to help, even if ineffective, makes you liable

Mens Rea

* SI crime
  + Need intent to assist plus intent to commit the crime
  + Cannot recklessly be an accomplice
* Derivative liability
* Accomplice cannot be convicted of a higher level of crime than the principle with the exception of homicide
* CL: Natural and probable consequences
  + Accomplice guilty of original crime committed by principle, plus any crimes that were a natural and probable consequence of the original crime
* MPC: Rejects natural and probable consequences. Accomplice only liable for the crimes that they intended.

Causation

* Under both CL and MPC, causation is irrelevant
* Guilty of assistance even if assistance wasn’t necessary. The fact that the principle would have completed the crime w/o your assistance is irrelevant.

Limitations

* Cannot be an accomplice if you are a member of the protected class
* Can abandon accomplice liability just like you can abandon conspiracy
* Justification helps the principle and the accomplice (b/c no liability exists, there can be no derivative liability)
* Excuse only helps the principle

1. Did the principle attempt or commit the target offense?
2. Is the D an accomplice?
3. Did the principle commit a second offense beyond the target offense?
4. Was it foreseeable?

If all YES, then the accomplice is guilty of all the offenses.

# Chapter 9: General Defenses

## Self Defense

* Justification defense – complete affirmative defense
* May never respond to non-deadly force with deadly force. Overarching concept of proportionality.
* Exam hint: always highly debatable who was the aggressor. This would be a carefully discussed question on the exam.
* CL:
  1. Threat to you must be imminent (meaning about to happen)
     + Must be objectively reasonable
  2. Response to the imminent threat must be proportionate (minimum force required to stop the crime)
  3. Cannot be the aggressor (no unclean hands)
     + If the aggressor retreats, and then is pursued and must defend himself, loses aggressor status and can use self defense
  4. Must retreat if able to do so safely and completely
     + Castle Doctrine exception: do not have to retreat from your own home. Does not apply if someone else lives there and you are the aggressor (domestic violence cases)
* MPC

1. Imminent has a looser meaning. Looks at whether the force of self defense must be used immediately.
2. Same as CL, response must be proportionate
3. If D was the aggressor with non-deadly force, and victim retaliates with deadly force (a disproportionate response), D may invoke self defense
4. Must retreat if able to do so safely and completely

### Reasonable belief requirement

* May respond with deadly force if
  + You face deadly force, or
  + You reasonably think you face deadly force, but you are wrong
* You can look at the circumstances surrounding the act, not just those immediately preceding the act
* Reasonable person in the Ds position
* CL: D must subjectively believe he is being threatened, and his belief must be objectively reasonable. I.E. - a reasonable person in the D’s position would reasonably believe that he needed to respond with force
  + Mistake of fact must be honest AND reasonable
  + SD is a complete defense. If honest but unreasonable, SD is an imperfect defense, meaning it might ratchet you down from murder to voluntary manslaughter.
* MPC: Belief must be objectively reasonable.
  + If D was mistaken, ask if it was reckless or negligent. If reckless or negligent, then you cannot convict the D of a crime that requires purposeful or knowing conduct. If the mistake was negligent, and the required mens rea for the crime is negligence, then the D can be convicted anyway.

## Defense of Others

* Defense of others is a recognized defense
* May use force or deadly force
  + Including an unborn fetus, depending on the jurisdiction
* CL Exceptions
  + At CL, defense of others only applied to relatives
  + Alter ego rule: someone who intervenes to help another only gets the defense of others protection if the third party would have been justified in using self defense
* MPC:
  + Did not have the “relatives-only” rule
  + No alter ego rule
* Today
  + No alter ego
  + You can use defense of others if you reasonable believe the force is necessary

## Defense of Real Property

* CL: D may use deadly force if he thinks it is reasonably necessary to prevent imminent unlawful entry
* MPC: D must reasonably believe the intruder is there to dispossess him of the house
* Note, broader than the self defense rule b/c the force does not have to be proportionate

## Defense of Personal Property

* CL & MPC: non-deadly force is appropriate, deadly force is not
* CL: you do not get to use deadly force to protect personal property, even if it is the only way to protect the property
* MPC: typical scenario means no deadly force, but it is permissible to use deadly force to prevent someone fleeing after committing a particular crime (prevent commission of the crime)

## Spring Guns

* CL: you may claim self defense if the resident would have had a claim of self defense if he had shot the intruder himself had he been present (spring gun takes the place of the D)
  + Note – difference is that if you were mistaken, even reasonably, there is no mistake of fact defense when a spring gun was used
  + Ex: police officer rattles door, homeowner thinks a burglar and shoots – self defense available if reasonable. Suppose instead the homeowner had a spring gun set up and it shot the PO when he rattled the door – self defense is no longer available.
* MPC: you can never use a spring gun

## Misc “Self Defenses”

* Most states now recognize battered woman syndrome as a defense. To do so, courts usually relax the “imminence” requirement. Usually involves a considerable amount of expert testimony.

## Necessity

Necessity is a **justification** defense, meaning we would want to **encourage** this type of behavior.

Necessity must be

1. Naturally created (economic necessity usually rejected)
2. Balancing of harms

* Choice of evils defense: requires the D to make a choice between the lesser of two evils
  + Does not work for murder. No killing one to save two.
* CL elements of necessity

1. Imminent danger
2. Individual reasonably believes his actions will stop the danger
3. No legal alternative
4. Harm you cause is less than the impending harm
5. Clean hands – cannot have a self-created necessity

* MPC – 2 major differences

1. Necessity is a defense to a purposeful or knowing crime, not a defense to a reckless or negligent crime
2. Necessity can be a defense to murder

### Civil Disobedience

* Violate the law as a protest, but also willing to take the punishment for it
* **Indirect** civil disobedience: break one law to protest another
  + Can NEVER claim necessity
* **Direct** civil disobedience: break the law you are protesting
  + Can NEVER claim necessity

## Duress

Duress is an **excuse** defense, meaning we **do not want to encourage** this behavior but in this particular case we will forgive the D.

* CL elements

1. Another person (must be human) has threatened to kill or grievously injure the D or his family
2. D must reasonably believe it is a genuine threat
3. Threat is imminent (not future harm)
4. No reasonable escape from the threat
5. Actor not at fault for the situation

* CL, not allowed to use duress for intentional murder
* MPC, can be a defense to murder

### Duress v. Necessity

* Natural threats (necessity) versus human threats (duress)
* Necessity is a balancing of the harms, and you get the defense when you balance them correctly. Justification, we would encourage it. If you balance them incorrectly and make the wrong choice, too bad for you.
* Duress does not require a balancing of evils. Excuse, don’t encourage it. Still an excuse even if you balanced them incorrectly.
* Case where the guy escaped from prison b/c of rape threats. Necessity, guard isn’t supposed to do anything. Duress, guard can try to stop his escape.

## Intoxication

### Voluntary Intoxication

* Not a defense, but a failure of proof. Says D did not form the necessary MR.
* Only works for SI elements
  + Ex. Drunk cannot be convicted of burglary, but could be convicted of breaking and entering
* CL: voluntary intoxication is grounds for acquitting a D of the SI offense b/c it eliminates the SI MR for that offense. Voluntary intoxication is never a defense to a GI or SL crime.
  + Note, many jurisdictions oppose this theory
* MPC: look to the mens rea required for the crime
  + Purposeful or knowing – voluntary intoxication is a failure of proof b/c the D could not form the required MR
  + Recklessness or negligence – voluntary intoxication is irrelevant

### Involuntary Intoxication

* Excuse defense
* General rule: it is a complete failure of proof or a complete defense
  + If a jurisdiction says it is a complete defense, then it negates SL crimes
  + If a jurisdiction says it is a failure of proof b/c of the lack of MR, then it does not affect SL crimes
* Must have one of the following
  + D was coerced to take the intoxicants
  + D ingests the intoxicant by mistake
  + D becomes intoxicated by a prescription medicine or OTC medicine
    - D must not have a reason to know the meds or combo of meds have an intoxicating effect

## Insanity

Competency is a threshold question that asks whether the D is competent for trial to begin. Required for due process. It is presumed that a D is competent, and the D has the burden to prove he is not competent.

* Note, you may forcibly medicate an individual to make them competent as long as the medication does not have too many side effects

Insanity relates to the time at which the offense occurred.

* D may plead
  + Guilty
  + Not guilty (people don’t plead innocent)
  + No contest (guilty plea but cannot be used as evidence in a civil trial)
  + Not guilty by reason of insanity: prosecutor proved every element of the offense, but we find the D insane at the time of the crime. Usually an AD.
    - Note, if jury rejects, D usually gets a harsher sentence than they would if they hadn’t tried to plead insanity
    - People who are found NGRI are not released immediately. Usually go to a mental hospital to be treated and spend longer there then they would have spent in prison

### 4 Tests for Insanity

**M’Naughten Test**: when the D is laboring under a disease of the mind that makes him unable to know the nature and quality of the act he was doing. Or, if he did know the nature and quality, he did not know it was wrong

* Purely cognitive test. Product of the mind.
* Largely criticized b/c of the language “unable to know”
* Very rigid. D must be completely incapacitated.
* All or nothing test
* Defines insanity too narrowly. Permits conviction even if the D knows something is wrong but cannot stop himself from doing it.
* Requires expert testimony. Inconsistent with psychology b/c it asks for a black or white answer.

**Irresistible Impulse (Compulsion) Test**: in some cases, it replaces M’Naughten, in others, it adds to it. D knows that the action is wrong but they are irresistibly driven by an insane impulse to do it anyway.

* Volitional test. Focuses on behavior. Doesn’t look at D’s mind, just whether or not you can control your behavior.
* Hard to prove whether or not it is irresistible
* All or nothing test

**Product Test (Durham Test)**: an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect (only 1 state in the country that still allows this test)

* Hard to say if it is cognitive or volitional
* Emphasizes the use of expert testimony
* Puts enormous responsibility in the hands of experts
* Does not define mental disease, meaning we go expert shopping to find someone who will testify that the D has a mental disease
* Battle of the experts, mushy test
* One thing it got half right is that the act must be caused by the mental disease or defect

**MPC Test**: D is relieved of criminal responsibility if, as a result of mental illness, he lacked **substantial capacity** to **appreciate** the criminality of his conduct. OR, if, as a result of mental illness or disease, he lacked **substantial capacity** to **conform** his conduct to the requirements of the law.

* Mix of #1 and #2, cognitive and volitional
* Not an all or nothing test b/c it doesn’t require complete incapacitation
* Appreciate ≠ knowledge