Criminal Law

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Contents

1 Basic Principles of Criminal Law

1.1 Introduction

1. Henry Hart argues that criminal law is a method with five features:
   (a) It operates by a series of commands ("don't kill or steal").
   (b) A community makes the commands binding.
   (c) There are sanctions for disobeying the commands.
   (d) The distinction between civil and criminal sanctions is that criminal violations draw a community's moral condemnation.
   (e) Violations are punished.
2. Murray: laws are framed as conditions ("if you do x, then y"—e.g., punishment), emphasizing agency and choice.
3. *nulla poena sine lege*: no punishment without law authorizing it.
4. Sources of criminal law:
   (a) Codification (statutes, administrative rules, etc.).
   (b) Common law (based on the English system, as distinct from a civil-law system).
   (c) Case law.
   (d) Model Penal Code.
5. What distinguishes criminal punishment?
   (a) Criminal penalties can restrain personal liberty (but civil penalties don't).
   (b) Moral stigma.
   (c) Judgment is collective—it isn't about two parties.[1]
6. **Probable cause** is necessary to make an arrest.
7. **Indictment** by a grand jury is usually necessary before a case can go to trial.
8. Sixth Amendment guarantees a right to a speedy and public trial, by an impartial jury.
9. **Due process clauses** in the Fifth and Fourteenth amendments guarantee persuasion **beyond a reasonable doubt** (as determined by the factfinder).

[1] See Schelling, "Ethics, Law, and the Exercise of Self-Command."

1.1.1 Beyond a Reasonable Doubt: *Owens v. State*

1. What does it mean to prove something "beyond a reasonable doubt?"
2. Driver was found drunk and asleep behind the wheel of a running car in a private driveway. Circumstantial evidence gives equal weight to two interpretations of the facts: either he had just arrived (guilty) or had not yet left (not guilty).
3. If each interpretation is equally likely, the factfinder could not fairly choose the guilty option beyond a reasonable doubt. But after analyzing the evidence, the court found "the totality of the circumstances are, in the last analysis, inconsistent with a reasonable hypothesis of innocence."
4. The trial court convicted the defendant of driving while intoxicated. The appellate court affirmed.

1. Can you satisfy the burden of proof with only circumstantial evidence?
2. What is required to meet the reasonable doubt standard?
3. How should a judge instruct a jury on the definition of "reasonable doubt"?

1.2 Principles of Punishment

1. Some types of punishment: prison, fines, community service, shaming.
2. Two key questions:
   (a) Who should be punished?
   (b) How much punishment is appropriate?
3. Two predominant (and non-mutuallly-exclusive) theories of punishment: **retributivism** and **utilitarianism**.

1.2.1 Utilitarianism

Punishment is justified because it's useful.

1. Jeremy Bentham: the **principle of utility** evaluates actions in light of their effect on the happiness of the interested party. Laws aim to augment a community's total happiness.
2. Kent Greenawalt: "Since punishment involves pain, it can be justified only if it accomplishes enough good consequences to outweigh this harm."[2] The consequences of an action determine its morality.
3. Goals of utilitarian punishment:

[2] Casebook p. 35.

(a) General deterrence (i.e., discourage an action from occuring in a community).

(b) Specific deterrence (i.e., discourage a specific person from doing something).

(c) Incapacitation.

(d) Reform.

1.2.2 Retributivism

Punishment is justified because criminals deserve it.

1. Michael Moore: "the desert of an offender is a sufficient reason to punish him or her."[3]

2. Immanuel Kant: penal law is a categorical imperative.

3. James Fitzjames Stephen: **assaultive retribution** holds that hatred and vengeance in the name of morality are socially beneficial; criminals are "noxious insects."[4]

4. Herbert Morris: **protective retribution** holds that rules exist to provide collective benefit; they guards against unfair advantage for freeriders; if somebody cheats, punishment evens the score.

5. Jeffrey G. Murphy & Jean Hampton: **victim vindication retribution** wrongdoers implictly place their own value above their victims'; "retributive punishment is the defeat of the wrongdoer at the hands of the victim."[5]

1.2.3 Justifying Punishment

1.2.3.1 Retributive and Utilitarian Justifications for Punishment: *The Queen v. Dudley and Stephens*

1. Dudley, Stephens, Brooks, and Parker were castaways on a boat 1600 miles from the Cape of Good Hope. They quickly ran out of food and water. After twenty days, Dudley and Stephens decided to kill and eat Parker (with Brooks dissenting). All of them ate Parker's body for four days, at which point they were rescued and brought to trial for murder.

2. The case highlights the differences between retributive and utilitarian theories of justice. Parker was weak and unlikely to have survived the last four days before rescue arrived. Dudley and Stephens likely wouldn't have survived, either. Moreover, Dudley and Stephens had family responsibilities, while Parker was a drifter.

[3] Casebook p. 39
[4] Casebook p. 42.
[5] Casebook p. 46.

3. A retributive response would hold that Dudley and Stephens are morally culpable and should be found guilty regardless of the mitigating factors.

4. A utilitarian response would find them not guilty on the recognition of a net benefit for all parties involved (except Parker, but he would've been dead).

1.2.3.2 Sentencing: *People v. Du*

1. The defendant, Soon Ja Du, a 51-year-old woman, owned a liquor store in LA. A 15-year-old girl, Latasha Harlins, in the store put a bottle of orange juice in her backpack. It's not clear whether she intended to pay. A fight ensued, in which Du was injured. As Harlins was leaving, Du pulled out a gun (which had been previously stolen, modified to fire on a hair trigger, and then recovered) and shot Harlins in the back of the head.

2. Du testified that she did not intend to kill Harlins. The jury rejected this defense, convicting her of voluntary manslaughter.

3. Du's probation officer concluded "would be most unlikely to repeat this or any other crime." The sentencing court sentenced Du to ten years, but suspended the sentence and placed her on probation. The probation officer wrote, "it is my opinion that justice is never served when public opinion, prejudice, revenge or unwarranted sympathy are considered by a sentencing court in resolving a case." She tested Du's case against seven goals of sentencing:

   (a) Protect society.
   (b) Punish the defendant.
   (c) Encourage the defendant to lead a law-abiding life.
   (d) Deter others.
   (e) Incapacitation.
   (f) Secure restitution for the victim.
   (g) Seek uniformity in sentencing.

4. None of these reasons was sufficient to justify prison time. The only somewhat convincing motivation for prison time is the strong presumption against probation when guns are involved. But this was an unusual case, she concluded, "which overcomes the statutory presumption against probation."

1.3 Proportionality of Punishment

1.3.1 General Principles

1. Kant: The "right of retaliation" (*jus talionis*) is "the only principle which in regulating a public court...can definitely assign both the quality and

the quantity of a just penalty."[6] Murderers must be punished with death.

2. Bentham: punishment has four goals:
   (a) General deterrence.
   (b) Encourage criminals to choose the lesser of two offenses.
   (c) Encourage criminals to do no more mischief than necessary.
   (d) Punish cheaply.
3. ...and five rules:
   (a) To effectively deter, the value of the punishment must be greater than the value of the offense.
   (b) The greater the mischief, the greater the punishment.
   (c) Punishment must be sufficient to induce criminals to choose the lesser of two crimes.
   (d) Punishment must be adapted to each offense.
   (e) Punishment should not be greater than necessary.

1.3.2 Constitutional Principles

1.3.2.1 Proportionality and Capital Punishment: *Coker v. Georgia*

1. The defendant escaped from prison, where he was serving time for multiple violent felonies. He broke into the Carvers' house, tied up Mr. Carver, and kidnapped and raped Mrs. Carver.
2. The Supreme Court held that the Georgia jury's death sentence violated the Eight Amendment, because rape is a crime "not involving the taking of life." In their dissent, Justices Burger and Rehnquist argued that the Eight Amendment does not prohibit states from taking prior behavior into account. While the death penalty may be disproportionate to the current crime, it can act as an effective deterrent.
3. A related case, *Kennedy v. Louisiana*, involved the rape of a child. The court narrowly upheld that the death penalty was "grossly disproportionate" for rape, but Justice Alito issued a scathing dissent questioning the argument that every murder is more "morally depraved" than every rape.

1.3.2.2 Proportionality and Recidivism: *Ewing v. California*

1. Ewing stole three golf clubs from a pro shop. With multiple prior felony convictions, California's three strikes law required a minimum sentence of 25 years, which Ewing argued violated the Eighth Amendment. The Supreme Court's opinion, written by Justice O'Connor, relies on Justice Kennedy's opinion in *Harmelin v. Michigan*, where he laid out a set of principles for determining proportionality:

[6] Casebook p. 70.

(a) The primacy of the legislature.

(b) The variety of legitimate penological schemes.

(c) Federalism.

(d) Objectivity.

(e) **The Eighth Amendment does not require strict proportionality. It only forbids "grossly disproportionate" sentences.**

2. The court upheld Ewing's 25-year sentence, arguing that "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons..."[7]

3. Justice Scalia concurred, but argued that the justification for the sentence has nothing to do with proportionality and everything to do with the idea that "punishment should reasonably pursue the multiple purposes of the criminal law" (incapacitation, deterrence, retribution, rehabilitation).

4. Justice Breyer, dissenting, compared two prior cases, *Rummel* and *Solem*, which both involved major prison sentences for recidivist felons who committed relatively small crimes. In *Solem*, the court found the sentence to be too long, and upheld the sentence in *Rummel*. *Ewing* falls in the "twilight zone" between the two. Given that ambiguity, 25 years to life is grossly disproportionate to the crime of shoplifting golf clubs.

1.4 Statutory Interpretation

1.4.1 The Legality Principle

1. *Nullem crimen sine lege*: "no crime without law." A person cannot be convicted and punished unless her conduct was defined as criminal.

2. Three corollaries:

   (a) Statutes should be understandable to ordinary people.

   (b) Statutes should not delegate policy matters on an ad hoc basis.

   (c) *Lenity doctrine*: ambiguous statutes should be interpreted in favor of the accused.

1.4.2 Crime without Law: *Commonwealth v. Mochan*

1. The defendant repeatedly made lewd phone calls to a married woman.

2. His conduct was not prohibited by statute, and no precedential case dealt with the same question.

[7] Casebook p. 85.

3. The trial judge found the defendant guilty of "intending to debauch and corrupt, and further devising and intending to harass, embarrass, and villify."[8].

4. The appellate court held that solicitation of adultery on its own is not indictable, but it affirmed the conviction on the grounds that the defendant's acts "injuriously affected public morality."

5. The dissent raised an **institutional competency** issue, arguing that the courts should not preempt the legislature's role in defining new crimes.

1.4.3 Statutory Interpretation: *Keeler v. Superior Court*

1. Is an unborn fetus a "human being" under the California statutory definition of murder?

2. A man punched his pregnant ex-wife in the stomach, causing the death of her fetus. He was charged with murder.

3. The Supreme Court of California examined common law definitions of murder and concluded that it was intended to protect people who had been "born alive" but that it did not protect unborn fetuses.

4. The prosecution argued that medical advances had shifted the definition of a "viable" fetus such that an unborn fetus could be considered a "human being." The court held, however, that such a ruling "would indeed be to rewrite the statute under the guise of construing it."[9]

5. The dissent argued a different interpretation of common law in which a "quickened" fetus could be considered a human being.

6. Soon after this case, the state legislature amended the California murder statute to apply to fetuses.

1.4.4 Vagueness and Indefiniteness: *In re Banks*

1. The defendant was charged under a peeping tom statute that prohibited "secretly peeping into room occupied by female person."

2. The defendant argued the statute was unconstitutional because, if read literally, it would outlaw a wide range of obviously lawful conduct (e.g., looking through a keyhole in your child's bedroom door to make sure she had fallen asleep).

3. The court reasoned that statutes can be found unconstitutional if they are so indefinite as to fail to give fair notice and fail to "define a reasonably ascertainable standard of guilt."[10] In this case, however, the meaning of "secretly" is well enough defined to describe invasion of privacy.

[8] Casebook p. 92–93
[9] Casebook p. 99.
[10] Casebook p. 105.

1.4.5 Vagueness and Discretion: *City of Chicago v. Morales*

1. The Chicago city council enacted an ordinance prohibiting "criminal street gang members" from "loitering."

2. Justice Stevens:

3. "...the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of 'loitering,' but rather about what loitering is covered by the ordinance and what is not."[11] Under the new statute, ordinary people "might unwittingly engage in forbidden loitering," and law enforcement has too much discretion.

4. Justice O'Connor, concurring, suggests specific language the legislature might have adopted.

5. Justice Scalia, dissenting, argues that legislatures are free to regulate against harmless conduct without violating the constitution.

1.4.6 Language: *Muscarello v. United States*

1. The question was whether the term "carry" in a firearm statute included carrying in a car, or whether it was restricted to carrying on the person. Justice Breyer traced the definition of the word in a range of contexts, including a brief empirical reading of news stories, to argue that it includes carrying in a car. Justice Ginsburg dissented with her own range of examples pointing in the opposite direction, and argued that the lenity principle should resolve the ambiguity in favor of the defendant.

2 Elements of a Crime

1. Every crime has two elements: *actus reus* and *mens rea*.

2. Every crime also has attendant circumstances.

2.1 Actus Reus

1. Literally, "guilty act." There is no universally accepted definition. In murder, for instance, some would consider it to be the pulling of the trigger. Others would consider it to be the death itself. The most common definition would consider it to be both.

2. "Omissions are not accidents."—Marianne Moore.

3. What constitutes an act? When does the act begin? See Model Penal Code 2.01.

[11] Casebook p. 115.

4. If someone holds a gun to your head and tells you to act, your act is voluntary. An act is something you do willfully.

5. Thought crimes are not punishable (*Minority Report*, *Firestarter*).

6. The **harm principle**: we punish acts that are socially and individually harmful.

2.1.1 Voluntary vs. Involuntary Action: *Martin v. State*

1. Police officers took a drunk man from his home and onto a public highway, where they then arrested him for public drunkenness. The court held that public drunkenness cannot be established when the accused was involuntarily carried to a public place.

2.1.2 Proving Involuntary Action: *State v. Utter*

1. Defendant was drunk and stabbed his son. He had no memory of the stabbing. He argued that his service in the army had caused him to develop a "conditioned response" which makes him react violently and involuntarily to people approaching unexpectedly from behind.

2. The court reasoned that an "act" requires voluntary action—that is, "act" is synonymous with "voluntary act." An involuntary or unconscious act cannot induce guilt—that is, it is not an "act" at all.

3. The court found that the defendant's theory of conditioned response should have been presented to a jury *if there was substantial evidence to support it.* However, because the jury could not possibly know or infer what had happened in the room at the time of the stabbing, the question should not be sent to the jury.

2.1.3 Legal Duty: *People v. Beardsley*

1. While his wife was away, the defendant was drinking heavily at his house with another woman. The woman took several tablets of morphine and became unresponsive. The defendant put her in a basement room in his house (which another man was renting). The woman died that evening.

2. The issue is whether the defendant had a legal duty to protect the woman. If he omitted to perform his duty, he would be criminally liable for manslaughter. The prosecution argued that the defendant was in the role of the woman's guardian. The court reasoned, however, that if the defendant had been drinking with a man and that man attempted suicide, the defendant would not have had a duty to protect him—so it should make no difference that he was with a woman.

3. The lower courts convicted the defendant of manslaughter, but the Michigan Supreme Court here reversed.

4. Criminal law is reluctant to create positive responsibilities, but there are a few common law relationships where such responsibilities exist:
   (a) Parent-child.
   (b) Spouse-spouse.
   (c) Master-servant.

2.1.4 Failure to Act: *Barber v. Superior Court*

1. A patient suffered cardiac arrest after surgery. Doctors managed to save him, but he suffered significant brain damage. He remained in a vegetative state on life support with little chance of recovery. His family decided to remove him from life support, and he died a few days later.
2. The question is whether his doctors had a duty to keep him alive—since omitting to perform that duty would make them liable for murder. **"There is no criminal liability for failure to act unless there is a legal duty to act."**
3. The court reasoned first that removing the man from life support constituted an omission, not a positive act.
4. The court held that the decision of whether to continue treatment was left to the family. Therefore, the doctors did not unlawfully fail to perform a legal duty.

2.1.5 Equal Protection: *Lawrence v. Texas*

1. The issue was whether a Texas law criminalizing sodomy violates the Fourteenth Amendment's Due Process Clause and equal protection guarantee.
2. Justice Kennedy:
   (a) The statute violates individuals' rights to privacy and liberty.
   (b) The Supreme Court had previously ruled on a similar Georgia statute outlawing sodomy in *Bowers v. Hardwick*: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."
   (c) The equal protection guarantee ensures that homosexuals are entitled to the same privacy protections as heterosexuals.
   (d) The Constitution limits states' power to outlaw social harms.

2.2 *Mens Rea*

1. "Guilty mind."

2. *United States v. Cordoba-Hincapie* gave a brief history of the evolution from ancient English strict liability to the modern requirement of a guilty state of mind.

3. There are two usages of *mens rea*:

   (a) **Culpability**: a morally culpable state of mind in general.

   (b) **Elemental**: the mental state specified in the definition of the crime.

2.2.1 General Culpability: *Regina v. Cunningham*

1. The defendant stole a coin-operated gas meter from the basement of his mother-in-law's house, causing noxious gas to escape and partially asphyxiate his neighbor.

2. The issue was whether his action was malicious. A lower court convicted the defendant on the definition of malice as "wickedness," i.e., a generally culpable state of mind. This court defined malice as (1) an **intention** to do the specific harm, or (2) **recklessness** (i.e., he foresaw that the harm might occur, but did it anyway). In this case, there was no malice directed at Mrs. Wade. The court overturned the conviction.

2.2.2 Transferred Intent: *People v. Conley*

1. In a fight after a high school party, the defendant smashed a wine bottle into the victim's face, causing permanent disability. He intended to hit someone else (who ducked), but the court found that the defendant's words and demeanor nonetheless intended his action to cause permanent disability.

2. The common law definition of intent includes both the actor's conscious goal and the results that are "virtually certain to occur"[12]—similar to substantial certainty in intentional torts.

3. A person "intends the natural and probable consequences of his actions." The Fourteenth Amendment prevents courts from presuming this, but juries can use common sense to recognize it.

4. **Transferred intent** allows transfer from one victim to another. Transfer between different types of harms is less clear cut. Courts often apply it, but not always.

2.2.3 Specific and General Intent

1. There is dispute about the meaning of "general intent" and "specific intent." Some versions include:

[12] Casebook p. 155.

(a) General: the definition of the crime sets out no specific mental state, so the prosecutor needs only to prove a generally culpable state of mind. Specific: the definition of a crime explicitly sets out a mental state.

(b) General: reserved for crimes that permit conviction on the basis of a less culpable mental state (e.g., negligence or recklessness). Specific: denotes an offense that includes a definition of intent or knowledge.

(c) **The most common version**—general: any mental state related to the act that constitutes the social harm. Specific: an additional "special mental element": (1) intent to commit a future act (e.g., intent to sell), (2) special motive (e.g., offensive contact intended to cause humiliation), or (3) knowledge of attendant circumstances (e.g., sale of obscene material to a minor).

2.2.4 Common Law Specific Intent Crimes: BAFFLEPACK

1. At common law, there are ten specific intent crimes (BAFFLEPACK):

   (a) Burglary.

   (b) Assault.

   (c) False pretenses.

   (d) Forgery.

   (e) Larceny.

   (f) Embezzlement.

   (g) Premeditated murder.

   (h) Attempt.

   (i) Conspiracy/solicitation.

   (j) Kidnapping for ransom.

2.2.5 MPC 2.02: General Requirements of Culpability

1. The MPC requires "elemental" culpability—i.e., the specific state of mind required in the definition of the crime, rather than a generally morally culpable state of mind.

2. The MPC abandons the elemental-culpable distinction. Most jurisdictions have adopted it in whole or in part.

3. There are four levels of culpability:[13]

   (a) **Purpose**: An actor intends to perform a specific action or to cause a specific result.

[13] MPC 2.02(2).

(b) **Knowledge**: An actor is aware of factual circumstances that establish criminal culpability, and if the element involves a result of his conduct, he is practically certain that the result will occur.

(c) **Recklessness**: An actor creates and recognizes a substantial, unjustifiable risk and acts anyway. The jury should decide whether the risk is substantial and unjustifiable and whether *disregard of the risk* deserves condemnation.

(d) **Negligence**: An actor inadvertently creates a substantial, unjustifiable risk of which he should have been aware. The jury should decide whether the risk is substantial and unjustifiable and whether the defendant's *failure to perceive the risk* deserves condemnation.

4. If a law does not specify a culpable state of mind (i.e., no *mens rea*, culpability is established if the person acted purposefully, knowingly, or recklessly. Negligence is excluded unless the law specifically prescribes it (although many jurisdictions do not exclude negligence).

2.2.6 Knowledge of Attendant Circumstances

1. Willful blindness: suspecting the truth but not investigating it.

2. MPC 2.02(7): where "knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is aware of a high probability of its existence."

2.2.7 Defining Knowledge: *State v. Nations*

1. The defendant, Sandra Nations, operated a bar where a sixteen-year-old girl was dancing for money. A Missouri child welfare statute imposed criminal liability on anyone who knowingly aided such activity.

2. The Model Penal Code in 2.02(7) holds that "knowledge" of a particular element of a crime is established when the actor is aware of a "high probability of its existence"—i.e., willful blindness towards a fact constitutes knowledge of that fact.

3. The Missouri statute, however, did not adopt this definition of "knowledge." The court thus found the defendant to be reckless, but not knowing, and held in favor of the defendant.

2.2.8 Strict Liability

1. Strict liability crimes assign guilt without requiring *mens rea*.

2.2.8.1 Public Welfare Offenses: *United States v. Cordoba-Hincapie*

1. One category of strict liability crimes are "public-welfare offenses"—e.g., liquor laws, anti-narcotics laws, motor vehicle regulations.

2. Public-welfare laws are meant to regulate administrative offenses unrelated to questions of personal guilt.

3. *Mens rea* is probably required if the punishment of the wrongdoer far outweighs regulation of the social order.

4. *Mens rea* is probably not required if the punishment is light (e.g., small fine and no prison time).

5. Even when a statute is silent on the *mens rea* requirement, it can still sometimes be interpreted as requiring a minimal level of *mens rea*. See *Staples* below.

6. With strict liability offenses, there is no basis for acquittal on the grounds of mistakes of fact or law. (It doesn't matter what you intended to do—for strict liability offenses, it only matters that you did it.)

2.2.8.2 Inferring *Mens Rea*: *Staples v. United States*

1. BATF agents found the defendant in possession of an unregistered semi-automatic AR-15 rifle that had been modified to shoot as an automatic weapon. Under the National Firearms Act, this gun was classified as a machine gun and was required to be registered. The defendant argued that he didn't know the gun had been modified, and therefore he should be shielded from criminal liability for failing to register it. The District Court and the Court of Appeals rejected his argument.

2. Justice Thomas:

   (a) The relevant statute is silent concerning the *mens rea* requirement.

   (b) Common law holds that *mens rea* should be required here, despite the statute's silence, unless it's clear that Congress intended to remove the *mens rea* requirement.

   (c) The prosecution argues that Congress intended this statute to address "public welfare" offense, and thus impose strict criminal liability.

   (d) This interpretation of Congress's silence (says Thomas) has typically been applied to situations where the regulated offense poses a very clear threat to public safety (e.g., hand grenades in *Freed* or narcotics in *Balint*). In contrast, possession of items with no public safety threat has not been held to be a strict liability crime (e.g., food stamps in *Liparota*.

(e) Gun ownership is generally an innocent activity (half of American households own a gun), unlike possessing a hand grenade or selling hard drugs.

(f) The severe penalty here (10 years) negates the public welfare rationale. Generally, *mens rea* should be required as part of statutes defining felony offenses.

(g) If Congress wanted to impose severe criminal penalties on gun owners who unknowingly possessed certain offending weapons (like machine guns), it would have said so explicitly.

3. Justice Stevens, dissenting:

   (a) This statute is not based on a common law crime. We cannot rely on common law to fill Congress's omissions. Rather, we should assume Congress's omissions are intentional.

   (b) Machine guns are "dangerous [and] deleterious devices." This is clearly a public welfare statute.

2.2.8.3 Legislative Silence as Strict Liability: *Garnett v. State*

1. The adult defendant had sex with someone he did not know was below the age of consent. The statutory rape language did not specify a *mens rea* component. The trial court convicted him of statutory rape.

2. The appellate court noted that in statutes that do not define a *mens rea* component, the MPC generally recognizes strict liability only for offenses that do not give rise to any "legal disability."[14]

3. In this case, however, the court pointed out that the legislature was explicit about *mens rea* in the previous section, so its silence in the section at hand was likely deliberate. Therefore, it likely intended statutory rape to be a strict liability crime. The court upheld the conviction.

4. The dissent argues that the legislative history and structure suggest that there is a *mens rea* component.

2.2.9 Mistake and *Mens Rea*

1. Good faith mistakes do not have to be reasonable to be valid defenses against crimes with *mens rea* components.

2. Why limit the application of the mistake doctrine?

   (a) Utilitarianism: we want people to know the law.

   (b) Retributivism: hard to say; retributivists might actually want a broad application of the mistake doctrine, since unwitting offenders may not be morally culpable.

[14] Casebook p. 189.

3. *Malum in se*: bad in itself—e.g., murder.

4. *Malum prohibitum*: bad because outlawed—e.g., driving without a license.

5. Common law mistake of fact:

   (a) Specific intent crimes (i.e., BAFFLEPACK): mistake of fact, whether reasonable or not, will negate the *mens rea* for a crime.

   (b) General intent crimes (e.g., rape): mistake of fact will *not* negate the *mens rea* unless the mistake was reasonable.

6. MPC mistake of fact:

   (a) Mistake of fact is a defense when it "negatives" a "material element of the offense."[15]

7. Common law mistake of law: ignorance of the law is no excuse, with a few exceptions (which are the same as the MPC mistake of law elements below).

8. MPC mistake of law defense is available when:

   (a) There is a lack of fair notice.

   (b) The actor reasonably relied on an official statement of the law.

   (c) The ignorance negatives a mental element of the offense (e.g.,. in *Cheek* below, if the defendant was unaware of the duty to file and pay taxes, he could not be found guilty of *willful* tax evasion.)

2.2.9.1 Mistake of Fact: *People v. Navarro*

1. The defendant stole four wooden beams from a construction site. He believed in good faith that the owner had abandoned the beams.

2. The trial court instructed the jury that the defendant would not guilty of theft if he *reasonably* believed in good faith that the beams had been abandoned or that he had permission to take them. The jury found the defendant guilty of theft.

3. The appellate court reversed, reasoning that if the defendant believed in good faith that he was allowed to take the beams—regardless of whether that belief was reasonable—he lacked the intent necessary for theft. (A jury could infer that a defendant does not hold such a belief in good faith—but in this case, his belief was genuine.)

[15] MPC 2.04.

2.2.9.2 Mistake of Law: *People v. Merrero*

1. A federal prison guard was charged with possessing an unlicensed loaded pistol at a club. He argued that he interpreted a state statute as exempting "peace officers" from the gun law—but in fact, the statute only exempted state penal corrections officers, not federal officers.

2. The trial court rejected the defendant's argument that his misunderstanding of the law exempted him from criminal liability. He relied on a New York statute that relieves criminal liability if the defendant mistakenly relies on "a statute or other enactment." The prosecution argued (and the court agreed) that misconstruing the meaning of a statute is not enough to establish a defense—drawing on MPC 2.04(3), it argued the statute must actually be "determined to be invalid or erroneous." The appellate court reasoned that allowing defendants to simply interpret the law case-by-case would lead to chaos.

3. The dissent argued that there is no retributivist or utilitarian justification for punishing the defendant in this case. It argued further that the defendant reasonably interpreted the statute exempting "peace officers" and that he had no way of knowing that the courts would later interpret the statute to exclude federal penal officers.

4. According to the dissent, the majority opinion ruled out *any* defense based on mistaken understandings of law. This is a misinterpretation of the reasons for the New York mistake-of-law statute—and the majority opinion's reliance on MPC 2.04(3) is puzzling since the New York legislature specifically rejected that part of the MPC. The dissent believed there should be room for "good-faith mistaken belief founded on a well-grounded interpretation" of official law.

2.2.9.3 Unreasonable Mistake of Law: *Cheek v. United States*

1. The defendant stopped paying taxes in the early 1980s. He had been heavily involved in the anti-tax movement and genuinely believed that the income tax on wages is unconstitutional. Federal criminal tax offenses require specific intent to violate the law—they require *willful* failure to file and pay taxes (otherwise, we'd all be criminals for making mistakes on our tax returns). Cheek argues that he did not *willfully* fail to file or pay.

2. The lower courts rejected Cheek's argument against the validity of jury instructions requiring an "honest and reasonable" belief that he was not required to pay income tax (as did the lower courts in *Navarro*). In the court's opinion, Justice White identifies the precise issue as whether the defendant was aware of his duty to pay taxes, "which cannot be true if the jury credits a good-faith misunderstanding and belief submission." It does not matter if his belief was unreasonable (though, as in *Navarro*, the

jury may infer that the belief was not in good faith). The Supreme Court reversed the Court of Appeals and held that Cheek could make his case to a jury.

3. Justice Blackmun, dissenting, warns that this decision "will encourage taxpayers to cling to frivolous views of the law."

2.3 Causation

1. Causation is the implicit in the concept of *actus reus*. It's the link between the prohibited act and the harmful result.

2. Causation issues typically arise in the context of homicide.

3. The MPC and common law do not differ significantly in their approach to causation. They use different terminology, though. The MPC determines the but-for cause and then evaluates the defendant's culpability. Common law determines the but-for cause and then determines whether that cause is the proximate cause. Both consider intervening causes.

4. MPC causation:

   (a) MPC 2.03(1) finds causation when an act is (1) a but-for cause of the result and (2) the causal relationship satisfies any additional statutory requirements.

   (b) If there are multiple acts that result in the prohibited harm, the MPC subjects each to the but-for test.

5. Common law causation is a two-step process:

   (a) Determine whether an act is the but-for cause of a harm or (2) if it accelerated the harm (*Oxendine*).

   (b) Determine which of the causes is the proximate cause.

6. "Cause-in-fact": a person's actions caused the outcome in question.

7. **"But-for" test**: a defendant's conduct is a cause-in-fact of the outcome in question if the outcome would not have occurred *but for* the defendant's actions.

8. **"Substantial factor" test**: if two independent defendants commit two separate acts, each of which could have caused the prohibited result, neither act is a "but for" cause. This test determines whether the action was nonetheless a "substantial factor" in bringing about the prohibited result. This test is used only in a minority of jurisdictions.

   (a) The MPC does *not* use the substantial factor test.

9. Certain intervening acts can break the causal chain. Murray:

(a) *De minimis* contribution to social harm—where the defendant's action was an insubstantial contribution to the harmful result, in comparison to the intervening event, the defendant is relieved of liability.

(b) Intended consequences doctrine—a voluntary act intended to bring about the harmful result will be considered a proximate cause of the harm, regardless of other intervening events.

(c) Omissions—an omission will rarely, if ever, supersede defendant's earlier, operative wrongful act.

(d) Foreseeability of the Intervening Cause:

i. Responsive (Dependent) Intervening Causes—defendant bears criminal responsibility for the harmful result to a victim who seeks to extricate himself or another from a dangerous situation created by defendant, even where the victim was contributorily negligent.

ii. Coincidental (Independent) Intervening Causes—an act that does not occur in response defendant's conduct may break the causal chain.

(e) Apparent-safety doctrine—once the victim has reached a place of apparent safety, defendant's prior wrongful act is no longer causally operative.

(f) Voluntary human intervention—victim's deliberate, informed intervention may break the causal chain.

10. Why does causation matter in terms of justifications for punishment?

2.3.0.4 Acceleration: *Oxendine v. State*

1. The defendant's girlfriend pushed his six-year-old son into a bathtub, causing severe internal injury. Around 24 hours later, the defendant also hit his son repeatedly. His son died from his injuries soon after. Medical testimony was unable to isolate the mortal blow.

2. The trial court found both defendants guilty of manslaughter. The Supreme Court of Delaware, however, found that the prosecution proved that the defendant had not *accelerated* his son's death, but only aggravated it. The court found the defendant innocent of manslaughter but guilty of assault in the second degree.

2.3.1 Proximate Cause

1. The doctrine of proximate cause determines whether an event that satisfies the but-for standard should be held accountable for the resulting harm.

2. Proximate cause answers the question of who is most culpable for the harm.

3. The MPC does not use the term "proximate cause." Issues related to proximate cause are treated as relating to the actor's culpability. See MPC 2.03(2)(b) and (3)(b).

2.3.1.1 Chain of Causation: *People v. Rideout*

1. The defendant was driving drunk and hit a car. The car's driver and passenger suffered no major injuries, but the car was damaged enough so that the headlights no longer worked. After moving safely to the side of the road, the car's passenger entered the road to inspect the car to see if they could turn on the hazard lights, where he was struck and killed by an oncoming car. The trial court found the defendant guilty for the passenger's death. The question is whether the defendant's drunk driving was the proximate cause of the passenger's death.

2. The appellate court introduces the ideas of intervening and superseding causes. An intervening cause supersedes the original cause if the original actor could not reasonably foresee the second cause, i.e., if it breaks the chain of causation. Dressler divides the second cause into *responsive intervening causes*, which arise directly from the original cause, and *coincidental intervening causes*.

3. The appellate court also introduces the *apparent-safety doctrine*, which holds that the defendant's causation ceases when the victim has reached a place of apparent safety (e.g., far off on the side of the road).

4. The appellate court also introduces the idea of *voluntary human intervention*, which relieves the defendant's liability if the victim voluntarily enters into a dangerous situation (e.g., a road in the night without any lights).

5. The appellate court overrules the trial court, finding that the prosecution failed to establish proximate cause. It remanded the case for a new trial.

6. Later, the Michigan Supreme Court overturned the appellate court's assessment that a jury could not find proximate cause.

2.3.1.2 Superseding Intervening Cause: *Velazquez v. State*

1. The defendant and the victim were drag racing. After the race, the victim spun around his car, raced back to the starting line, and careened over a guardrail, dying instantly.

2. The trial court found that the defendant's participation in the drag race was a cause-in-fact of the victim's death. The appellate court found that the drag race had already ended when the victim decided to spin around and race back to the finish line—an act that superseded the defendant's cause-in-fact.

3 Homicide

1. Homicide is a neutral term. It is not necessarily a crime.

3.1 Common Law vs. Model Penal Code

3.1.1 Common Law

1. Murder
   (a) First-degree: premeditated/deliberated.
   (b) Second-degree:
      i. Intent to kill without premeditation.[16]
      ii. "Depraved heart" killing/implied malice (unintentional–e.g., gross recklessness).
   (c) Both degrees require malice aforethought:
      i. Intent to kill.
      ii. Intent to cause grievous bodily injury.
      iii. Depraved or abandoned heart.
      iv. Intent to commit a felony.
2. Manslaughter
   (a) Voluntary: requires provocation.
   (b) Involuntary: includes negligence and recklessness (unintentional).

3.1.2 Model Penal Code

1. Murder
   (a) With purpose.
   (b) With knowledge.
   (c) With recklessness (unintentional).
2. Manslaughter
   (a) With recklessness (unintentional).
   (b) Under extreme mental or emotional distress.
3. Negligent homicide.

[16] E.g., the case where the victim snapped the defendant in the nose with a towel.

3.2 Intentional Killing

3.2.1 Murder

1. Premiditation is usually the distinction between first- and second-degree murder.
2. The MPC does not distinguish between first- and second-degree. Culpability is evaluated at sentencing.
3. There are four common law definitions of murder:[17]
   (a) Intent to kill.
   (b) Intent to cause grevious bodily harm.
   (c) "Depraved-heart murder" (i.e., extreme recklessness regarding homicidal risk).
   (d) Intent to commit a felony.
4. In 1794, Pennsylvania introduced the idea of degrees.
5. The MPC recognizes three kinds of criminal homicide: murder, manslaughter, and negligent homicide.

3.2.1.1 Premeditation and Deliberation: *State v. Guthrie*

1. What facts establish premeditation and deliberation?
2. The defendant stabbed and killed a coworker after the coworker taunted him and snapped him in the nose with a towel.
3. The trial court found him guilty of first degree murder. The defendant argues that the trial court's instructions to the jury were improper because "the terms wilful, deliberate, and premeditated were equated with a mere intent to kill."
4. The appellate court agreed with the defendant that "premeditation" cannot be synonymous with intent—rather, it must be long enough for the defendant to be "fully conscious of what he intended." Reversed and remanded for a new trial.

3.2.1.2 Proving Premeditation: *Midgett v. State*

1. The defendant repeatedly abused his young son, who died from the injuries. The trial court found him guilty of first degree murder, which required premeditation and deliberation.
2. The defendant argued that there was no premeditation, and the Supreme Court of Arkansas agreed.

[17] Casebook p. 236.

3. The dissent argued that symptoms of malnourishment indicated starvation, but the majority argued that the evidence did not prove starvation.

4. Shortly after this case, the Arkansas legislature amended its criminal code to broaden first degree murder to include "extreme indifference to the value of human life" of people fourteen years old or younger.

3.2.1.3 Circumstantial Evidence of Premeditation: *State v. Forrest*

1. The defendant shot and killed his terminally ill father in the hospital. The trial court convicted him of first degree murder.

2. The defendant argued that there was no premeditation or deliberation, and therefore no evidence to prove first-degree murder.

3. The appellate court upheld the conviction, noting that premeditation must be proved by circumstantial evidence, including provocation from the victim, the defendant's conduct and statements, ill will between the parties, lethal blows after the victim was rendered helpless, and evidence of an especially brutal killing.

4. In this case, the court found that the victim was laying helpless and did nothing to provoke the defendant, and that the defendant had earlier made statements about "putting his father out of his misery." It upheld the jury instructions regarding first degree murder.

5. Premeditation/deliberation: in cold blood.

6. Provocation: in hot blood.

3.2.2 Manslaughter

1. Provocation can mitigate murder to manslaughter. Common law and the MPC diverge on what constitutes provocation.

2. Common law rule of provocation:[18]

   (a) There must have been adequate provocation.

   (b) The killing must have been in the heat of passion.

   (c) There must not have been a cooling off period.

   (d) There must have been a causal connection between the provocation, the passion, and the fatal act.

   (e) (The sorts of provocations that courts have allowed as defenses at common law are the sort of actions that have offended traditional notions of a man's honor—e.g., catching a wife in the act with another man.)

[18] Casebook p. 267.

3. The MPC replaces the provocation defense with an "emotional disturbance" test.[19] Under the MPC, homicide constitutes manslaughter when:

   (a) The homicide is committed "under the influence of extreme mental or emotional disturbance."

   (b) There is a reasonable explanation or excuse for the mental or emotional disturbance under the circumstances as the defendant believed them to be. In other words, the excuse is reasonable if a reasonable person in the defendant's situation would have been disturbed.

   (c) (The cooling off period is not an issue under the MPC definition.)

4. For a critique of the MPC's rules of provocation in terms of gender discrimination, see Victoria Nourse, "Passion's Progress."

5. Words are usually not enough to constitute provocation. Words can be sufficient if they accompany a threat of intent and ability to cause bodily harm.[20] Some jurisdictions allow "informative words" (e.g, "your husband is having an affair with ...") to constitute provocation.

3.2.2.1 Verbal Provocation: *Girouard v. State*

1. Are words enough to satisfy the provocation requirement for reducing murder to manslaughter?

2. The defendant stabbed and killed his wife after she taunted him relentlessly. The trial court, in a bench trial, convicted him of second degree murder.

3. The defendant argued on appeal that the rule of provocation should be expanded to include verbal provocation. The appellate court relied on the rule that for provocation to mitigate a charge of murder, it must be "calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion to reason." The standard is objective.

4. The court found that words can constitute adequate provocation if they accompany intent and ability to cause bodily harm. That was not the case in this scenario, however. The court upheld the second degree murder conviction.

3.2.2.2 Emotional Disturbance: *People v. Casassa*

1. The defendant stabbed and killed his neighbor out of jealousy. The trial court found him guilty of second degree murder.

[19] MPC 210.3(1)(b) at Casebook p. 1000.
[20] Casebook pp. 267–68.

2. The defendant argued he was acting under "extreme emotional disturbance," which would reduce the charge to manslaughter.

3. The appellate court reasoned that the emotional disturbance must meet an objectively reasonable standard. In this case, the disturbance was a result of the defendant's unique mental state—i.e., a reasonable person would not have been so emotionally disturbed under the circumstances.

3.2.3 Unintentional Killing

1. **Implied malice** is required to prove murder from an unintentional killing.

2. At common law, implied malice requires a **"depraved heart"**—i.e., it involves acting with a conscious disregard for human life and conduct involving a high probability of death (see *Knoller* below).

3. The MPC does not use the depraved heart standard. Under the MPC, ordinary recklessness proves manslaughter. It proves murder when the actor's "conscious disregard for the risk, under the circumstances, manifests extreme indifference to the value of human life"[21]—i.e., when the actor behaves with **gross recklessness**.

4. At common law, intent to cause grievous bodily injury is sufficient to establish "malice aforethought." The MPC does not adopt this approach—instead, it handles such cases under the standard of extreme recklessness.[22]

3.2.3.1 Implied Malice: *People v. Knoller*

1. Defendants came into possession of two large, aggressive Presa Canario dogs. They'd been warned repeatedly about the dogs' dangerously aggressive behavior. The dogs killed a woman in the hallway of the defendants' apartment building.

2. The trial court took the position that a murder charge required conduct involving "a high probability of resulting in the death of another." The jury found the defendants guilty.

3. The appellate court granted defendants' motion for a new trial on the grounds that Knoller did not know that her conduct involved a high probability of death. The appellate court reversed the order for a new trial, holding that the standard for second-degree murder should be "conscious disregard of the risk of serious bodily injury to another," rather than a high probability of death.

4. The Supreme Court of California focused on the issue of implied malice as an element of murder. It uses two definitions of implied malice: (1)

[21] Casebook p. 303.
[22] Casebook p. 304.

the *Thomas* test: "wanton disregard for human life, and (2) the *Phillips* test: "conscious disregard for human life." The tests articulate the same standard, but the court prefers the second for clarity.

5. The Supreme Court reversed the appellate court, holding that **implied malice requires awareness of a risk of death, not just serious bodily harm**. It also held that the trial court erred in its interpretation of the test. The trial court held the awareness of a high probability of death to be a subjective perception, but it's actually an objective standard. The subjective component is that the defendant must have acted with "conscious disregard for human life." (Not all jurisdictions require conscious disregard to establish implied malice.)

3.2.3.2 Proving Negligence: *State v. Hernandez*

1. The defendant killed a woman while he was driving drunk. The trial court convicted him of involuntary manslaughter. The issue on appeal is whether stickers and pins inside the car with "drinking slogans"—"The more I drink the better I look," etc.—were admissible evidence to help establish the elements of involuntary manslaughter, which the relevant Missouri statute (deriving from the MPC) defines as (1) criminal negligence and (2) resulting death. Criminal negligence is the culpable failure to perceive a substantial and unjustifiable risk.

2. The government introduced the slogans as evidence that the defendant was aware of the risk of driving drunk. But this was a prosecutorial error, because the statute only criminalizes negligence, and if the defendant was aware of the risk, he could not have acted negligently (though he may have acted recklessly). Therefore, the evidence was inadmissible in th state's attempt to prove the elements of involuntary manslaughter. (The prosecution probably could have proved second-degree murder based on recklessness.)

3. The appellate court held that the slogans served only to illustrate the defendant's character. Reputation and character testimony were inadmissible here, and so the appellate court reversed the conviction.

4. The dissent argued that at least three of the slogans indicated that alcohol can impair perception, and that the defendant therefore should have been aware of the substantial risks involved with drinking and driving. It also suggested that the defendant's intoxication might have prevented him from perceiving the risk.

3.2.3.3 Omission: *State v. Williams*

1. The defendants' infant child died when they failed to seek medical attention for a tooth infection that became a gangrenous abscess.

2. **At common law, involuntary manslaughter required gross negligence, not just ordinary negligence.** Washington State law, however, only requires ordinary negligence.

3. The trial court found the defendants guilty of involuntary manslaughter. The appellate court affirmed.

4. At common law, the defendants likely would not have been convicted of manslaughter.

5. The appellate court found negligence.

6. Washington redrafted its code in 1975. Today, "[c]riminal homicide convictions on the basis of ordinary negligence are nearly non-existent."

7. Is it appropriate to punish negligent homicide?

   (a) The utilitarian argument against punishment is that negligent actors cannot be deterred. The MPC drafters rejected this argument, arguing that the threat of deterrence encourages people to act with greater care.

   (b) The retributivist argument is that an actor cannot be morally culpable for actions that he does not know he is taking. Stephen Garvey argues that culpability exists in the failure to exercise self-control "over desires that influence the formation and awareness of one's beliefs." Jerome Hall argues that blame is sometimes appropriate in response to negligence, but punishment is not.[23]

3.2.4 Felony Murder

1. At common law, any felony was punishable by death.

2. At common law, any homicide committed while committing (or attempting to commit) one of several enumerated felonies was considered murder. The homicide was a strict liability offense.

3. The MPC does not identify felony murder as a separate offense. Instead, offenses that would have triggered the felony murder rule at common law would likely fall under reckless murder under the MPC. The proliferation of statutory (*malum prohibitem*) felonies led the MPC to enumerate the specific felonies that can constitute the bases for reckless murder.

4. Felony murder can be prosecuted as first-degree murder. Unenumerated felonies can be prosecuted as second-degree murder.

5. The felony murder rule allows prosecutors to prove murder without establishing *mens rea*.

[23] Casebook pp. 312–313.

6. *Mens rea* is not relevant to felony murder. It doesn't matter whether the killing was intentional. It's a throwback to the common law idea of the generally blameworthy state of mind (which is distinct from strict liability).

7. Felony murder can only be invoked for inherently dangerous felonies.

3.2.4.1 *People v. Fuller*

1. The defendant had been breaking into cars in a parking lot when the police noticed him, and a chase ensued. He accidentally killed a driver while involved in a high speed car chase. The Court of Appeal ruled that the trial court had erred in striking the first-degree murder count. The appellate court allowed the prosecution for first degree murder under the felony murder rule—but it notes that if it were "starting from a clean slate," it would not allow the prosecution because the original felony, burglary, was not dangerous to human life.

3.2.4.2 Roth and Sundby, "The Felony-Murder Rule"

1. The US is the only western country that recognizes the felony murder rule.

2. The rule is meant to (1) deter accidental killings during felonies as well as (2) the felonies themselves. On (1), how can you deter an unintentional act? On (2), there is doubt that stricter punishments deter serious crimes, and it makes more sense to punish the intended conduct (e.g., carrying a deadly weapon) rather than the unintendend killing. It may also creative perverse incentives to commit homicide during the commission of a felony.

3. Transferred intent is not a valid justification for the felony murder rule because of the differences in *mens rea* for the felony and for murder.

4. Justifying a murder charge on a retributivist justification is a regression to the primitive "evil mind" theory of common law, and it defies the principle of proportional punishment.

3.2.4.3 Crump and Crump, "In Defense of the Felony Murder Doctrine"

1. "Felony murder reflects a social judgment" that felonies involving killing are more serious than non-lethal felonies.

2. The rule distinguishes crimes that cause death, thereby "reinforcing the reverence for human life."

3. Core disagreement with Roth and Sundby: punishing negligent killings *can* deter future negligence. Also, felons who killed intentionally might testify that the killings were accidental; the felony murder rule denies them this defense.

4. A clear felony murder rule is less confusing to juries, so it leads to more consistent results. Also, by simplifying the questions involved, it makes administration more efficient.

3.2.4.4 Tomkovicz, "The Endurance of the Felony Murder Rule"

1. Restricting the felony murder rule to certain types of felonies enhances its fairness, helping the doctrine survive.

3.2.4.5 Inherently Dangerous Felonies: *People v. Howard*

1. The defendant was driving a stolen car without a rear license plate. A chase ensued when police tried to pull him over. During the chase, the defendant hit and killed another driver. The trial jury convicted the defendant of second-degree murder. The appellate court affirmed, rejecting the defendant's claim that he could not be charged with second-degree murder because of California precedent rejecting the felony murder rule for felonies that are not inherently dangerous.

2. The California Supreme Court looked at the statute defining high-speed chases.[24] It noted that in 1996, the legislature significantly broadened the statutory definition of "willful or wanton disregard for the safety of persons or property" to include any flight from a police officer involving three traffic violations. It concluded that a violation of this statute "is not, in the abstract, inherently dangerous to human life." Therefore, the prosecution cannot rely on the felony murder rule. Reversed.

3. Brown, concurring and dissenting: this interpretation of the statute defies common sense. The conviction should be overturned, but only because the felony murder rule should be removed entirely.

4. Baxter, dissenting: "there is no doubt that the defendant committed exactly the reckless endangerment of human life forbidden by the statute."

3.2.4.6 Felonies that Contribute to Murder: *People v. Smith*

1. Defendant was abusing her child, who accidentally fell, hit her head, and died of respiratory arrest. The trial court applied the felony murder rule to convict her of second-degree murder.

2. The purpose of the felony murder rule is to deter negligent and accidental killings in the commission of felonies. If the felony is an integral part of the homicide, the felony murder rule can serve no additional deterring function, and it prevents the consideration of malice aforethought.

[24] Section 2800.2; Casebook p. 329.

3. *People v. Ireland*: "We therefore hold that a second degree felony murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged."[25]

4. *People v. Wilson*: The felony murder rule cannot be applied to cases where the action would not be felonious but for the assault, and the assault is an integral part of the homicide.

5. *People v. Sears*: If assault is intended against one person but results in the accidental killing of another, the felony murder rule should not apply (because it would carry harsher punishments than if the intended victim was killed, in which case the felony murder rule would not not apply).

6. *People v. Burton*: The felony murder rule can apply if the underlying violent action was committed with an "independent felonious purpose." For instance, in an armed robbery case where an accidental killing results, the rule applies because the underlying purpose was to rob, not to assault.

7. The felony murder rule does not apply in this case. Reversed.

3.2.4.7 Liability for a Non-felon's Actions*State v. Sophophone*

1. The defendant and three accomplices broke into a house. The police arrived and shot one of the accomplices. The defendant was charged, among other things, with felony murder. The trial court convicted him on all counts.

2. Under Kansas state law, aggravated burglary counts as one of the inherently dangerous felonies that triggers the felony murder rule.

3. The defendant argues that he was in custody at the time of his accomplice's death and cannot therefore be held liable.

4. The question is "whether the felony murder rule should apply when the fatal act is performed by a non-felon." There are two approaches:

   (a) **Agency approach** (the majority rule): The rule does not apply when the person who causes the death is a non-felon. The killing was the result of actions contrary to the intentions of the felon.

   (b) **Proximate causation approach**: The rule applies. A felon is responsible for the consequences of the actions he sets in motion.

5. The court holds that the rule does not apply. "...we believe that making one criminally responsible for the lawful acts of a law enforcement officer is not the intent of the felony-murder statute as it is currently written."[26]

[25] Casebook p. 335.
[26] Casebook p. 340.

6. Dissent: nothing in the statute requires the court to adopt the "agency" approach. "This set of events could have very easily resulted in the death of a law enforcement officer, and in my opinion this is exactly the type of case the legislature had in mind when it adopted the felony-murder rule."[27]

7. *Res gestae*: The felony murder rule applies when a killing occurs during the commission (or attempted commission) of a felony. Most courts also apply it in the aftermath, e.g., during a getaway.

8. There must also be causal relationship between the death and the felony. The cause must be proximate.

3.2.4.8 Misdemeanor Manslaughter

1. "An unintended homicide that occurs during the commission of an unlawful act not amounting to a felony constitutes common law involuntary manslaughter."[28]

2. Manslaughter convictions have been upheld in cases where the act is morally culpable but not technically criminal—e.g., someone attempted to commit suicide with a gun, someone attempted to intervene, and the one who intervened was accidentally shot and killed.

4 Rape

4.1 Overview

1. 32% of rapes were reported to law enforcement in 1994 and 1995.[29]

2. 91% of victims were female.[30] (MPC 213.1 defines rape only as male-against-female.)

3. 8% of forcible rapes reported in 1995 turned out to be unfounded.[31]

4. Susan Estrich: rape law exposes the sexism of the law.

5. Two frameworks for understanding the crime of rape: (1) a crime of violence and (2) a crime against sexual autonomy.[32]

[27] Casebook p. 341.
[28] Casebook p. 343
[29] Casebook p. 385.
[30] Casebook p. 386.
[31] Casebook p. 387.
[32] Casebook p. 391.

4.1.1 Annette Gordon Reed, *Celia's Case*

1. A white male landowner bought Celia, a female slave, and treated her as a concubine. She eventually decided to stand up to his advances and ended up killing him by hitting him on the head. She stood trial and was put to death.

4.1.2 C. Vann Woodward, Review of *Scottsboro: A Tragedy of the American South*

1. Two white women falsely accused the nine Scottsboro Boys of rape. All were convicted and sentenced. Eventually, all were exonerated.

4.1.3 NY Times Obituary for Ruth Schut

1. A note on the death of one of the two accusers of the Scottsboro Boys. She later recanted her accusations.

4.2 Forcible Rape

4.2.1 The Force Requirement: *State v. Alston*

1. Alston and Brown were in a semi-abusive relationship. She broke it off. Then, one day, he coerced her to come to a friend's house. She did not forcibly resist his sexual advances. Later that day, she filed a police complaint.

2. The trial court convicted the defendant of second degree rape.

3. The Supreme Court of North Carolina here reasoned that the statutory definition of rape required intercourse to be (1) by force and (2) against the victim's will. The court found no evidence that the victim forcibly resisted. It overturned the conviction.

4. Susan Estrich: The victim was not forced to engage in sex, but did so against her will. "To say that there is no 'force' in such a situation is to create a gulf between power and force, and to define the latter solely in schoolboy terms."[33]

5. Vivian Berger: It's not clear that this was actually a rape. Overprotecting women "risks enfeebling instead of empowering."[34]

4.2.2 *Rusk v. State*

1. The victim met the defendant at bar. She drove him home. She did not want to go into his apartment, but he took her car keys out of her ignition, and she followed him out of fear. They had sex and she did not resist.

[33] Casebook p. 409
[34] Casebook p. 410.

2. The trial court apparently found that there was insufficient evidence for a trier of fact to prove rape. The Court of Special Appeals of Maryland here affirmed.

3. Judge Wilner, dissenting:

   (a) The court inappropriately substituted its judgement for the jury's.

   (b) The court's reasoning requires the victim to either (1) resist, risking physical harm or death, or (2) "be termed a willing partner."[35]

   (c) The defendant's actions demonstrate the requisite threat of force to prove robbery. Why doesn't it prove rape?

   (d) Rape victims who resist are more likely to be injured than those who don't.[36]

4.2.3 *State v. Rusk*

1. The Court of Appeals of Maryland agreed with Judge Wilner's dissent (above). The victim's apprehension of fear "was plainly a question of fact for the jury." Remanded for a new trial.

2. Judge Cole, dissenting: words expressing fear "do not transform a seducer into a rapist." Rape is a crime of violence. The victim "must resist unless the defendant has objectively manifested his intent to use physical force to accomplish is purpose."

4.3 Mens Rea

4.3.1 Mistake of Fact: *People v. Williams*

1. Defendant and victim went to a hotel room. They had sex, but their factual accounts differ significantly. The defendant claimed that it was consensual, but that afterwards the victim said she would claim rape unless he gave her $50. The victim claimed it was forcible rape.

2. The trial court did not instruct the jury on a mistaken belief as to consent. It convicted the defendant of forcible rape and false imprisonment.

3. The Court of Appeal reversed.

4. Here, the Supreme Court of California based its understanding of mistake of fact in rape cases on *People v. Mayberry*. A successful *Mayberry* defense requires (1) a good faith belief in the mistaken fact and that (2) the mistake was reasonable. The jury can only receive instruction on the defense when there is "substantial evidence" to support it.

[35] Casebook p. 414.
[36] Casebook pp. 415–416.

5. The court here found that (1) there was no evidence of equivocal conduct on the part of the victim and (2) that the defendant's argument seeks to prove actual consent, not a reasonable mistake of consent. It reversed the appellate court.

6. Mosk, concurring: first, the majority's interpretation of the *Mayberry* rule is illogical. It would require the defendant to take the position that he was mistaken about consent, and therefore that there was no consent. Second, "equivocal conduct" from the victim is not necessary. Requiring it means that in cases where the facts are in dispute, such as this one, the jury must completely credit the victim's account and discredit the defendant's.

7. Kennard, concurring: there are three fact patterns where force *and* consent are present: (1) where the amount of force is "slight," (2) where the victim consents to the use of force, and (3) where enough time has passed between the threat of force and the act of intercourse so that the defendant could reasonably believed that the victim's participation was not coerced.[37]. The *Mayberry* defense should only be available in these three cases.

4.4 Statutory Rape

4.4.1 *State v. Garnett*

1. See p. 18.

2. Statutory rape law as oppressive: young females are presumed "too innocent and naive to understand the implications and nature of her act." The male is presumed criminally responsible—even in cases where he himself might be young and naive.[38]

3. Early reforms: Victorian feminists urged statutory rape laws to curb the spread of venereal disease and protect young females from sexual abuse.[39]

4. 1970s reforms: statutory rape laws seen as restrictions on sexual autonomy. Most jurisdictions made statutory rape gender neutral. Many have advocated for abolishing it entirely.[40]

5. *Michael M. v. Superior Court of Sonoma County*: US Supreme Court upheld gender-specific statutory rape laws on the basis of deterring teenage pregnancy.

4.4.2 *State v. Limon*

1. Defendant had turned 18 one week before having homosexual intercourse with a 14-year-old. The age gap was less than four years. He was convicted

[37] Casebook p. 460
[38] Casebook p. 478–479.
[39] Casebook p. 477.
[40] Casebook p. 478.

of criminal sodomy and sentenced to 206 months in prison. Under the recent Kansas "Romeo and Juliet" statute, he would have been sentenced to only 13–15 months in prison if the contact had been heterosexual.[41] He argued that the Romeo and Juliet statute violates equal protection because of harsher punishment for homosexuals.

2. The trial court convicted him of criminal sodomy and the appellate court confirmed.

3. The Supreme Court of Kansas considered in detail the possible rationales for the statute. It concluded that there is no rational basis for the law.

4. The court held that the statute violated the equal protection clauses in both the state and federal constitutions. It reversed the conviction and struck the words "and are members of the opposite sex" from the statute.

[41] p. 1 (WestLaw).