Criminal Law

Rudovsky - Spring 2019

# The Criminal Justice System, The Process of Proof, and Punishment

## Introduction

### The Sweep of Criminal Law in America

* Overview:
  + America has the largest penal system in the world with staggeringly high percentages of people incarcerated.
  + Over 2.3 million people are incarcerated in the US and the US has about 25% of the world’s incarcerated people despite having only about 5% of the world’s population. There are about another 2 million people on parole These numbers are exceptionally high, especially for a democracy.
  + There is both over enforcement and under enforcement. Some argue that minority communities are affected worse by under enforcement as communities are not protected from repeated violations of their rights. Criminals know that there are some crimes which they will not be arrested for and victims have their rights systematically violated by offenders who know the police will not come after them (Specifically domestic violence in minority communities is not prosecuted often)
* Social and Racial Concentration:
  + Black people make up about half of the population of incarcerated people despite being 13% of the population.
  + More than 20% of black men born since 1960 have been incarcerated for at least a year on a felony conviction.
  + Minorities receive harsher prison sentences than whites for the same crime.
  + David Garland writes that the US has mass imprisonment, which means that the US penal system has a heavy concentration on specific groups (i.e. minorities)
* Causes:
  + Despite crime rates dropping during the 1990’s incarceration rates are still high. One of theories is that legislators want incarceration to increase because they see it as the proper solution to a crime (i.e. Mandatory minimum sentencing for certain crimes guarantees jail time for some offenses)
  + US gives to primary to convictions over rehab for drug and alcohol offenses

### The Structure of Criminal Justice the Relevant Institutional Actors

* Heavy volumes of cases and limited resources (personnel) create a system of mass production in the US penal system. The justice system is supposed to provide individualized responses to crime, but these two factors create a system where sentences are churned out factory style, often unfair to the perpetrator.
* Police officers often have discretion which crimes they will arrest people for and which groups of people they will target. Similarly, the DA’s office chooses who to prosecute and for what sentence. This creates a high degree of subjectiveness in a process that not should have any.
* The election of judges, DA’s, and other positions imbue the US penal system with the issue that these people will take voter reactions into consideration when making decisions leaving the system susceptible to short term emotionalism and issues of politics.
* Multiple Jurisdictions:
  + Criminal justice authority is dispersed throughout different levels. There are state forces (state troopers), many cities have independent police agencies with specialized missions (transit police, housing police), and most cities and states have independent prosecuting attorneys with specialized mandates (a city department for municipal code enforcement, a state attorney general’s office). Alongside all of this there’s is the independent engine of federal law enforcement. In this system there are multiple levels as well with multiple agencies, such as the DEA and SEC.
  + The criminal justice system is extremely decentralized. Some people describe the overlapping authorities of the police as chaotic and irrational.
* Police:
  + Decide who gets arrested. Crimes are, to an extent, defined by the police officer. He has discretion to either arrest or warn people violation laws.
* Prosecutors:
  + The decision to send a case to trial based on sufficient evidence is made by the prosecutor.
  + Needs all of his decisions to take a case to trial approved by a judge or grand jury, which they almost always are due to the low level of proof required
  + Has enormous power. Can either take a case to trial or drop a case, can ask for harsh or less harsh punishments.
* Defense Counsel: Only about 20% of defendants can afford their own attorneys
  + Non-indigent defendants: When people can afford to pay their own attorneys, often in massive lump sum payments of thousands of dollars at a time. Attorney is paid regardless of whether the defendant accepts a guilty plea right away or goes to a lengthy trial.
  + Indigent defendants: Court picks the attorney for the defendant who then accepts or proceeds without counsel. This appointed counsel system means the court appoints the counsel from a private firm who usually gets paid but not beyond a pre-determined maximum. In contract system a lawyer or group of lawyers accepts payment from the government in exchange for representing clients. In defender systems the city has set up an office to deal with cases with counsel on payroll who then are not under constraints of the other systems to get cases over with quickly.
* Judges:
  + Most judges are elected by popular elections, some are appointed
* Corrections:
  + Goal of the system is no longer to correct, more to restrain and restrict

## Presentation of Evidence

* **The Order of Proof**:
  + First, the prosecution calls witnesses in an effort to prove the elements of the offense charged. Case may fail if they fail to meet the burden of proof.
  + If the prosecution does not fail, then the defense calls witnesses to refute the prosecution’s case in chief to establish some **affirmative defense**. Defense can recall or call new witnesses for purpose of rebuttal. Defense is afforded a chance to answer by **rejoinder** any matters introduced in the prosecutor’s rebuttal.
  + Witnesses are first examined by the party that called them (direct examination) and afterward by the opposing party (cross examination). Further questioning is re-direct and re-cross.
* **Relevance**: Evidence is relevant for the purposes of the rules of evidence **only if it is both probative and material**. Evidence is probative only if it tends to establish the proposition for which it is offered or – to be precise – the proposition is more likely to be true given the evidence than it would be without the evidence. Probative is generally enough to be admissible, but if the evidence is not material is could be excluded.
  + Irrelevant evidence is never admissible
  + Relevant evidence is generally admissible
* **Exclusionary Rule: Privilege**
  + Sometimes relevant evidence cannot be admissible. Rules relating to privilege allow people to withhold certain types of testimony in order to protect certain interests.
  + One of the most important privileges is the privilege against self-incrimination (5th Amendment)
* **Exclusionary Rule: Prejudice**
  + Evidence must be excluded when its probative value is outweighed by its prejudicial effect. **Evidence is prejudicial when it will affect the result in an improper way**. Thus, prejudice is involved if the jury is likely to overestimate the probative value of the evidence or if the evidence will arouse undue hostility toward one of the parties
    - Prejudice is read narrowly because theoretically everything is prejudicial.
    - The defendant should not have to prove his character when he is on trial, he only has to try and prove his character and defend past transgressions as well as it would use of valuable court resources (See *Zackowitz*)

### Federal Rules of Evidence Rule 401

Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence AND (b) the fact is of consequence in determining the action

### Federal Rules of Evidence Rule 402

Relevant evidence is admissible unless [otherwise provided]. Irrelevant evidence is not permissible.

### *People v. Zackowitz* (1930 NY)

* Background: Case where prosecutor brought up prejudicial evidence of defendant character
* Facts: Zackowitz and his wife were walking down a street when four men, one of which was the victim Frank Coppola, made insulting remarks to Zackowitz’s wife that caused her to cry. Upon finding out what the four men said Zackowitz returned to where his wife was berated, and a fight broke out. Zackowitz shot and Coppola. Zackowitz admitted to the crime, the issue here is the degree of murder he will be charged with. This hinged on whether the murder was premeditated or done in the heat of the moment. Prosecution brought up facts about Zackowitz’s character, calling him of murderous disposition in an attempt to get him convicted of the highest degree of murder by making premeditated seem more likely.
* Rule: **Cannot bring up aspects of a defendant’s character unless the defendant brings them up first. It’s impermissible to bring up prior convictions. One should be on trial for the crime they committed, not previous offenses.** Holding: Zackowitz never brought up his character so when the prosecution did, they imbued the jury with prejudice and therefore could not appropriately make determinations about Zackowitz’s state of mind without being prejudice.
* Related Hypotheticals from Class
  + Poor person from PA, prosecutor states that the person is more likely to steal because he is poor.
    - Is this argument allowed? **No**, it’s prejudicial despite being relevant.
  + Person is a gambling addict who owes a lot of money. Money is embezzled. Prosecutor tries to use gambling tendencies show he was the thief.
    - Is it allowed? *No*, it’s prejudicial despite being relevant.

### Federal Rules of Evidence Rule 403

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or no needlessly presenting cumulative defense.

### Federal Rules of Evidence Rule 404

Crimes, Wrongs, or Other Acts… Evidence of a crime wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character … This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

* Exceptions to the Rule of Prejudice:
  + The rule against admitting other-crimes evidence is subject to a number of exceptions. (i.e. Evidence that the defendant stole the pistol used in the murder could be admissible to identify the defendant as the killer). Also, can be used to show motive (i.e. if the victim was a witness to a previous crime committed by the defendant, this could show motive for murder)
  + If the defendant chooses to testify in his own defense, then the prosecution can bring up prior crimes that he committed
  + Sex Offense Cases: Evidence of prior crimes is allowed with sex offenses - Fed. Rule of Evidence 413(a)
  + The same goes for child molestation cases, previous criminal acts are admissible as evidence – Fed. Rule of Evidence 414(a)
  + However, these two exceptions must still pass 403, which means they must be more probative than prejudicial.

## Burden of Proof

### MPC Section 1.12 – Proof Beyond a Reasonable Doubt; Affirmative Defenses; Burden of Proving Fact When Not an Element of an Offense; Presumptions

* (1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed
* (2) Subsection (1) of this Section does not:
  + Require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
  + Apply to any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence
* (3) A ground of defense is affirmative, within the meaning of Subsection (2)(a) of this Section, when
  + It arises under a section of the Code which so provides; or
  + It relates to an offense defined by a statute other than the Code and statute so provides; or
  + It involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence
* (4) When the application of the Code depends upon the finding of a fact which is not an element of an offense, unless the Code otherwise provides
  + The burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made; and
  + The fact must be proved to the satisfaction of the court or jury, as the case may be
* (5) When the Code establishes a presumption with respect to any fact which is an element of an offense, it has the following consequences
  + When there is evidence of the facts which give rise to the presumption, the issue of the existence of the presumed fact must be submitted to the jury, unless the court is satisfied that the evidence as a whole clearly negatives the presumed fact; and
  + When the issue of the existence of the presumed fact is submitted to the jury, the court shall charge that while the presumed fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the jury may regard the facts giving rise to the presumption as sufficient evidence of the presumed fact
* (6) Presumption not established by the Code or inconsistent with it has the consequences otherwise accorded it by law.

### *In Re Winship* (1970 SCOTUS)

* Facts: Defendant, a minor, was charged with committing acts, that if performed by an adult would constitute larceny. Defendant was found by a preponderance of the evidence to be guilty
* Holding: **Must use beyond a reasonable doubt standard when pursing a criminal case**. Social disutility, it is incredibly important to not convict an innocent man, it is more important than letting a guilty man walk free
* Notes:
  + McCullough v. State: Judge gave instruction on a scale of 1-10m to determine guilt. Supreme Court overruled stating that **beyond a reasonable doubt is supposed to be qualitative**. Making it quantitative could lower or increase the burden of proof

### *United States v. Dougherty* (1972 DC Circuit)

* Facts: Appellants broke into Dow Chemical plant. Appellants claim the lower level judge did not instruct the jury on jury nullification and claim the jury should have known that they can throw out the case regardless of the law
* Holding: Court has **no obligation to instruct jury on jury nullification**. Doing so would be too burdensome on the courts and runs the **risk of jurors taking the law into their own hands**.
* Concurrence/Dissent (Bazelon): If we want the jurors to know of the power of jury nullification it should be instructed to them. Jury nullification is a necessary counter to case-hardened judges and arbitrary prosecutors
* Notes
  + Many examples of pros and cons to jury nullification in the notes following Dougherty
  + Judges can get rid of jurors if it can be unambiguously proven that they intended to give a certain verdict regardless of the evidence and trial (US v. Thomas, juror should not have been thrown out because his intentions were unclear)
  + FIJA (organization that spreads awareness of jury nullification) often gets charged with jury tampering and other charges for trying to spread the idea of jury nullification. This contradicts the idea in Daugherty, that courts should instruct juries on jury nullification rather they should get info about jury nullification from other sources.

## Punishment

### MPC §1.02. Purposes; Principles of Construction (Attempting to Codify Why We Punish)

* (1) The general purposes of the provision governing the definition of offenses are:
  + To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
  + To subject to public control persons whose conduct indicates that they are disposed to commit crimes;
  + To safeguard conduct that is without fault from condemnation as criminal;
  + To give fair warning of the nature of the conduct declared to constitute an offense
  + To differentiate on reasonable grounds between serious and minor offenses
* (2) The general purposes of the provisions governing the sentencing and treatment of offenders are:
  + To prevent the commission of offenses;
    - To promote the correction and rehabilitation of offenders;
  + To safeguard offenders against excessive, disproportionate or arbitrary punishment;
  + To give fair warning of the nature of the sentences that may be imposed on conviction of an offense
  + To differentiate among offenders with a view to a just individualization in their treatment;
  + To define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders
  + To advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders
  + To integrate responsibility for the administrative of the correctional system in a State Department of Correction
* (3) The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purpose stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

### Richard A. Wright, Prisons: Prisoners, Encyclopedia of Crime and Justice

* Punishment can be a fine, probation, imprisonment, death penalty, etc.
* The conviction itself is a form of punishment, it is an impediment to attaining jobs afterwards, can make future sentences worse, etc.
* Some jurisdictions have intermediate sanctions that are worse than probation, but not as bad as imprisonment (i.e. home detention, mandatory community service)
* Maximum security prisons are the most extreme type of prison. Although, all prisons breed a feeling of hopelessness within their inmates. Many gangs form in prison and those gangs are let loose on the streets when those prisoners are paroled. Many just hope to survive prison
* The general idea is that violence within prisons is underreported
* Prisons are incredibly overcrowded with many operating above their maximum capacity
* Suicide rates are higher in prison
* Incarceration without imprisonment: These are not technically prisons, so they are not held to the same safeguards that prisons are

### Civil Sanctions

* These types of sanctions do not have the same constitutional protections as imprisonment
* Involuntary commitment of the mentally ill is generally seen as a civil matter. They have a right to treatment and when they are treated, they must be released. However, if they are never fully cured, they could be confined for life.
* Registering of sex offenders is another type of civil sanction. Some states impose no limits on the public disclosure of information of ex-offenders. THEORIES OF PUNISHMENT (89-108, 113-116, 118-119, 122-124, 128-132)

### Theories of Punishment

* In General:
  + Punishment is intended to be unpleasant (unlike paying taxes, military service during wartime)
  + Why we punish generally falls into two categories, utilitarian and retributive
* **Utilitarian** – Consequentialist school of ethics prescribing actions that maximize social utility - essentially a cost-benefit analysis from the punishment (i.e. deterrence). Punishment should serve some additional purpose
  + Some of these additional purposes are deterrence, incapacitation of dangerous people, rehabilitation
  + Specific Deterrence: Deterring the specific person who committed the crime
  + General Deterrence: Deterring the general population from committing the crime
  + “The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, everything that tends to subtract from the happiness: in other words to exclude mischief. But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only be admitted in as far as it promise to exclude some greater evil - Jeremy Bentham"
  + Issues with Utilitarian View: Can require extremely severe punishments that would be disproportionate to a defendant’s blameworthiness, merely because those punishments produce other beneficial consequence for society. Conversely, it can produce too lenient of a sentence for a harsh crime if the perpetrator is not likely to commit the crime again.
* Retribution - “A retributivist punishes because, and only because, the offender deserves it" Many types of retributive punishments, but all focus on the idea that the punishment must be justified by the seriousness of the offense committed
  + **Positive Retributivism**: Society must punish the blameworthy with equivalent severity to the seriousness of the crime
  + **Negative Retributivism**: The seriousness of the crime sets the upper limit of the punishment, but it is not mandated that the perpetrator get that maximum punishment
  + Issues with Retribution: Can call for punishments that do much more harm than good (i.e. requiring a perpetrator to go to jail which forces his children into foster care). It can also give out a just penalty to an offender, but that punishment might not deter him from performing the crime again.
* Cousins of Retribution
  + **Retaliation and Vengeance**: Punishment stamps the perpetrator with a mark of indignation for life. Follows the idea that one can hate the perpetrator
* Mixed Theories – Punishments purpose is utilitarian: to reduce crime and thus protect the rights of all to be secure in their persons and property. But that purpose must be pursued within retribution [just deserts] limits. Thus a person can legitimately be punished only if he committed a crime, only in proportion to that crime, and only if doing so would produce a world with less crime" This approach bars disproportionate punishment, even if a cost-benefit calculus supports it, but it also bars punishment that is perfectly proportionate to an offender’s blame if that punishment would not be socially beneficial under all circumstances

## Sentencing

* Overview:
  + In response to aggravation with judge discretion in regard to sentencing, there have been several reforms including mandatory minimums and three strikes in and you’re out
  + This essentially takes the power of discretion away from the judge and gives it to the prosecutor
* Mandatory Minimums:
* Sentences that judges have to give out if a crime is committed (Ex. The Fighter case). Very common in drug related crimes.
* The original goal was eliminating discrimination on the basis of race, however racial disparities have increased with the proliferation of mandatory minimums

### *United States v. Vazquez* (2010 NY)

Vazquez was a part but not a huge part of his brother’s drug dealing empire. When Vazquez was caught, he cooperated with law enforcement and gave them names. Most people agree that what Vazquez was doing was not worthy of the 5 year mandatory minimum, but the US attorney’s office wouldn’t budge on the number and Vazquez is convicted and sentenced the mandatory minimum, which adversely affects him, his 3 year old daughter, and the rest of his family. The mandatory minimum treats all people the same from low-level people in drug empires to the drug lords themselves, if they are found with a certain amount of drugs on them then they are going to get the mandatory minimum most likely, even though it is unjust on occasions for people who are not as involved as they higher up people in the drug empire

### Three Strikes

* If a person commits several offenses and is convicted of those crimes, then in some jurisdictions the three-strike policy gives the perpetrator 25 to life
* Punishes repeat offenders and gets them off the street.
* Clearly prior imprisonment has neither deterred nor rehabilitated these types of offenders, so the three-strike policy puts them away likely for good
* Is it grossly disproportionate? If it is the third offense, a person can get 25 to life for stealing a candy bar. It that just?

### *Ewing v. California* (2003)

* Facts: Ewing was convicted of several serious felonies in his past. Ranging from burglary to possession of drug paraphernalia, Ewing previously spent time in prison and on parole for several serious offenses. Ewing then was convicted of larceny again when he stole golf clubs. Due to California’s three strike rule, Ewing was sentenced to 25 to life.
* Question: Does the three-strike rule violate the constitution’s 8th amendment?
* Holding: No. Since traditional forms of deterrence have not worked for a career criminal like Ewing, 25 to life is not cruel and unusual, even though he only stole golf clubs. The 8th amendment protects against grossly unfair punishments. For repeat offenders of serious crimes like Ewing, 25 to life is not cruel and unusual. The 8th amendment does not require strict proportionality between crime and sentence.
* Dissent (Breyer and others): 25 to life is grossly disproportional for stealing golf clubs

### *Graham V Florida* (2010)

* Facts: Graham, a minor, was arrested for breaking into a home while on probation for another robbery. He was sentenced to life in prison without the possibility of parole.
* Question: Is life in prison to a minor for a non-homicidal offense constitutional?
* Holding: No, **it violates the 8th Amendment by being a grossly disproportionate sentence**. Imprisonment for life without parole is similar to the death sentence. Especially since this is a non-homicidal case, LWOP for a minor is grossly disproportionate.
* Concurrence (Roberts): Judges must use discretion when handling cases and consider the fact the defendant is a juvenile who are less culpable than adults.
* Dissent (Thomas): Decision that LWOP in this case is unconstitutional is should not be up to the decision of the courts.

# Elements of a Crime

* Concept of Culpability - This is endorsed fully by the MPC and by the common law (generally) that in order to be held criminally liable, you need the guilty mind (mens rea) and an action on the guilty mind (actus reus). That is, we don’t punish people for evil thoughts

## Actus Reus

* There is a difference between voluntary and blameworthy acts - Actus Reus is only one component for criminal liability; it is **necessary but not sufficient**
* Components of Actus Reus - It generally includes three ingredients of a crime:
  1. A voluntary act;
  2. that causes;
  3. a social harm
     + Both “voluntary acts” and “social harms” are the terms of art that require special attention
* MPC 2.01
  + (1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable
  + (2) The following are not voluntary acts within the meaning of this Section:
    - (a) a reflex or convulsion;
    - (b) a bodily movement during unconsciousness or sleep;
    - (c) conduct during hypnosis or resulting from hypnotic suggestion;
    - (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual
  + (3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
    - (a) the omission is expressly made sufficient by the law defining the offense; or
    - (b) a duty to perform the omitted act is otherwise imposed by law
  + (4) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession
* Voluntariness Requirement:
  + Narrow Meaning: A movement of the body which follows our volition
    - Put in another way – a voluntary act is one that involves use off the human mind (thinking notion of free will) and an involuntary act involves the use of the human brain (mechanical functioning of the brain)
    - However, something is not voluntary just because the person is unaware what they are doing…the law treats habitual acts as falling on the voluntary side of the continuum, even if the ultimate action related is involuntary (i.e. habit of smoking and you light up without thinking so often you burn down a house)
  + Broad Meaning: The defendant possessed sufficient free choice to be blamed for his conduct
  + MPC definition of Voluntary: “bodily movement whether voluntary or involuntary.” But what level of involuntary movement is considered appropriate?
  + Do All Elements Have to be Voluntary? Under the MPC, it seems that only one element of the crime must be voluntary. So going back to Martin perhaps all they needed was the voluntary act of drunkenness to convict
    - Would we get better deterrence in Martin’s case if we only require the voluntary act of drunkenness and just found people culpable if they voluntarily or involuntarily ended up in the street
      * But does this unfairly restrict the lawful liberty to drink?
  + Rationale: Why should a person whose involuntary act causes harm to anther escape punishment? One frequent explanation is that the law cannot deter involuntary movement. It would make no sense for the utilitarian to support punishment for involuntary acts. But it would make sense if the utilitarian could prove the punishing involuntary behavior would incentive people to adjudge behavior in the first place. The criminal justice system is another mechanism for social control
    - The voluntary act requirement is far more closely linked to retributivism's respect for human autonomy
    - The theory is one that is premised on the view that ‘the critical distinction between criminal law and other systems of confinement is that the criminal sanction carries with it something more – stigmatization of moral blameworthiness
* Omissions
  + General Principle – Very Few Affirmative Duties. Not every moral obligation to act creates a concomitant legal duty. Subject to a few limited exceptions, a person has no criminal law duty to act to prevent harm to another; even if she can do so at no risk to herself, and even if the person imperiled may lose her life in the absence of assistance
    - The utilitarian view would obviously find the law severely deficient in this respect
  + Common Law - Liability for a criminal offense may be predicated on an omission, rather than on a voluntary act. Such cases involve what may by termed “commission by omission” liability
    - **When a common law duty to act exists, and assuming that she was physically capable of performing that act, a defendant’s omission of the duty to act serves as a legal substitute for a voluntary act**
    - When is there a Duty to Act?
      * **Status Relationships** - A person will have a common law duty to act IF they have a special status in relation to the other. Examples include parents to their minor children, married couples to one another, employers to employees, inviters to invitees
      * **Contractual Obligation** - A duty to act may be created by implied or express contract. For example, one who breaches an agreement to house, feed, and provide medical care to an infirm stranger...
      * **Creation of a Risk** - A person who wrongfully harms another or another’s property, or who wrongfully places a person or her property in jeopardy of harm, has a common law duty to aid the injured or endangered party.
        + Culpable Injuries Caused – If D negligently injuries V, D has a common law duty to render aid to V. If D fails to do so, and V dies as a the result of the omission, D may be held criminally liable for V’s death.
        + Non Culpable Injuries Caused – Although there is considerably less case law in this respect, a duty to act arguably arises from non-culpable risk-creation as well. For example, a few courts have held that one who accidentally starts a house fire can be held liable for arson if she fails to extinguish the fire or seek proper help. There is also some authority for the proposition that even one justifiably shoots an aggressor in self-defense, seriously wounding them, may have a subsequent duty to obtain medical aid for the wounded once they no longer pose a threat
      * **Voluntary Assistance** - Once you start to commence aiding someone then you have the duty to continue to provide aid. Moreover, you’re under the duty to render as helpful aid you can
      * **Statutory Duties** & Bad Samaritan Laws - Statutes can create affirmative duties. For example, having a drivers license creates a duty to stop a care at the scene of a car accident you’re in
        + Bad Samaritan laws are those that make it a misdemeanor for a person not to render aid to a stranger in peril. Very few states adopt this standard, but they exist. Critics assert that either nobody can be fairly prosecuted under them when multiple people are available for rescue, or it just gives the prosecutor too much arbitrary power
  + MPC Approach - The MPC does not differ significantly from the common law regarding omissions. Liability based on omission is permitted in two circumstances: 1) if the law defining the offense provides for it; or 2) if the duty to act is “otherwise imposed by law.” The latter category incorporates duties arising under civil law (i.e. torts and contract)
* Public Policy Rationale
  + Purpose of Actus Reus:
    - Criminal law shouldn’t punish thoughts alone (although some crimes such as conspiracy involve planning)
    - Criminal law can’t deter involuntary actions (Newton) or involuntary conditions (Jones v. LA)
    - Involuntary actors should get treatment, not criminal stigma(Robinson)
      * Blurry line between “voluntary” and “involuntary” (compare Martin to Low, see Powell and Moore)
  + Purpose of no Affirmative Duty to Act:
    - Individual autonomy (law doesn’t want to compel people to act a certain way)
    - Immoral actions are not always equate to criminal
    - Risks possible harm to self or others in some cases
    - May lead to over-deterrence (ie. people act too often even in cases not requiring assistance)
    - Bystander Effect - People people generally don’t act b/c don’t want to risk failure, people fear risking injury, and free-rider problem (figure someone else will act) (ex: New Bedford and Kitty Genovese cases)
  + Rotten Social Background (RSB) theory
    - Should coming from an underprivileged, poverty background affect actus reus determinations b/c the alleged criminal might not have known any better. On the one hand, seems fairer, but may be too ambiguous, exploitable, paternalistic, categorical, and broader social issue outside criminal law

### Martin v State (1944 AL)

* Facts: D was convicted of being drunk on a public highway. Officers arrested him at home and brought him to the highway where his drunken shouts and profane language caused him to be in violation of a statute preventing drunk people from appearing drunk in a public place
* Rule: **Criminal liability may only be imposed when the unlawful conduct is committed voluntarily**
* Holding: Conviction is reversed
  + Criminal liability always requires element actus reus, that is, the commission of some voluntary act that is prohibited by law
  + Culpability cannot be established (because) proof that the accused, while in an intoxicated condition was involuntarily and forcibly carried to that place by the arresting officer
* Lecture Analysis: The statute requires someone to be drunk AND on a public highway. Martin unquestionably voluntarily got drunk, but involuntary was brought on a highway. If we hold to the MPC, then perhaps we only need one act
  + But this case is interesting because it brings up for debate whether you need voluntary act to convict or all of them
* Notes: When is an Act Voluntary or Involuntary?
  + *People v Lowe*: Man was arrested and brought to jail. He also had drugs in his socks. When the police found out, he was charged with violating a statue concerned with “knowingly brining a controlled substances into jail.” CA Supreme Court upheld the conviction distinguishing from Martin by holding that the man had a **voluntary opportunity to relinquish** the drugs prior to entering the premises
  + *State v Eaton*: Same facts as Lowe, but here the court said that the so-called “voluntary act” of relinquishing the drugs isn’t really a true choice. “The defendant had **no available choice** other than to surrender evidence that would convict him of another crime, and therefore failing to read a voluntariness requirement into the statute would produce absurd results”
  + *Jones v City of LA*: Homeless men convicted of violating ordinances by sleeping on sidewalks. Arguing that there were not enough homeless shelters, the homeless had **no choice** but to sleep on the sidewalks, the court agreed that the criminal act was not voluntary

### People v Newton – The Scope of Involuntary Movement Sufficient for Actus Reus

* Facts: D was pulled over by police officers. There was an altercation and one of the officers was shot after D was shot. D argues that his gun-shot wound produced and unconscious/reflexive shot reaction that caused him to shoot the police officer. Expert witness testified that D's recollections were “compatible” with the gunshot he had received and that it was common for a person to go into a reflex shock condition causing loss of consciousness for short periods of time following a gunshot wound that penetrates the abdominal cavity. The trial judge refused to instruct the jury on the subject of unconsciousness as a defense to D's offense and D is convicted
* Issue: Was it improper not to instruct jury that non self-inflicted unconsciousness is a complete defense?
* Rule: **Involuntary movement not self-inflicted or self-knowledgeable (e.g. Non self-induced unconsciousness) cannot be the basis for actus reus**
* Holding: Conviction reversed
  + Although the evidence surrounding the events is confusing and conflicting, some of it supports the inference that D had been shot in the abdomen before he fired any shots himself
    - Where evidence of involuntary unconsciousness has been produced in a homicide prosecution, the refusal by the trial court to provide a requested instruction on the subject is prejudicial error
  + Unconsciousness does not just mean a coma or inability of locomotion. Rather, it can exist where the subject physically acts in fact, but is not, at the time conscious of acting. When evidence of involuntary unconsciousness has been produced in a homicide prosecution, the refusal of a requested instruction of the subject is a prejudicial error.

### Voluntariness Hypotheticals

* Hypothetical 1: Going back to Newton, instead of the defense being a physiological reflex to his gunshot wound, suppose because Newton’s been harassed for years by the police, he has a psychological aversion to the police akin to PTSD. If he’s touched by police, he acts almost unconsciously, without almost disregard – not a product of free will. Is this a complete defense like in the actual case?
  + **Maybe not** – the social condition might be really really hard to resist, but a tough temptation is different from complete lack of free will. Hard to say there’s no free will here
* Hypothetical 2: Man driving voluntarily has an epileptic seizure and gets into a fatal car accident – didn’t intend to kill anyone, but he had a history of epilepsy and didn’t take his pills. State charges with manslaughter. Convict?
  + **Maybe** – driving with knowledge and foreseeability that this involuntary reflex could occur without taking meds might be enough for gross recklessness.
* Hypothetical 3: Same facts of Hypo 2, but instead of epilepsy it’s heart disease and you know you’ve got a history of heart attacks and you haven’t been taking your pills. You have a massive heart attack and get in a fatal car accident. Manslaughter?
  + **Probably not** – Not as foreseeable, there’s a higher foreseeability of seizure. Heart attacks don’t happen as often

### *Robinson v California* (1962)

* Facts: D was convicted under a statue that made it a criminal offense to be addicted to narcotics. The man displayed tissue scaring and needlemarks consistent with narcotics use. At trial, the judge instructed the jury that it could convict *Robinson* if it either found that he used drugs in California or found he was addicted to drugs
* Issue: Is a Pattern of Behavior a Voluntary Act or is imprisoning someone on this basis unconstitutional?
* Rule: A criminal statute that creates a form of continuous criminal liability **that fails to require an act to be performed within the jurisdiction and instead imposes a crime for a status (e.g. disease) is unconstitutional**
* Holding: State law can't impose criminal liability for drug addition, it violates 8A protection against cruel and unusual punishment
  + The trial judge instructed the jury that even if it found *Robinson* had not used drugs, it could still find him in violation of the statute if it found *Robinson* was addicted to drugs. Thus he is punished not for some act, but because of his status
  + It is unlikely that any state at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease – yet this statue seems to imply such a change could occur
* Concurrence - Drug addiction merely shows his desire to use drugs, and the mere desire to commit a crime is not a criminal act
* Dissent - The conviction was not based solely on his status as a drug addict. The same evidence that proves he was an addict also proves that he regularly used drugs
* Lecture Analysis: Why does the Constitution not allow this type of statute? Much like the above Hypo #2, why can we say “if you know you have seizures regularly and you get into a car and then hurt someone, you’ll be punished.” But we CAN’T say “if you’ll do drugs and then get addicted, you’ll get punished?” In general, the court seems hesitant to hold that Due Process permits punishing people’s status.

### *Powell* v Texas (1968)

* Facts: D was arrested for public intoxication. However, but D offered the defense that his conduct was caused by disease of chronic alcoholism causing him to drink involuntarily. He was convicted anyways
* Rule: The punishment of conduct that is symptomatic of chronic alcoholism is not in violation of 8A
* Holding: Conviction is upheld
  + In *Robinson*, the state sought to punish a mere status and to regulate an individual’s behavior in their own home. Neither of those issues are present here
  + Here, D is **not punished for being a chronic alcoholic. He is punished for breaking the law** by going out in public while intoxicated
  + Additionally, medical research on chronic alcoholism is too vague and unsettled to as to what the disease entails. Would be too hard to formulate a rule that would relieve individuals of guilt and, furthermore, it would be up to the state courts formulate it
* Dissent: D’s alcoholism is disease that involuntarily made D appear in public
* Lecture Analysis: It’s not clear that alcoholism means you have no control over whether to START drinking, but rather it means once you start you can’t stop. But you can decide not to drink
  + This is probably noticeably different than hard drugs. Plus, this statue prevents public intoxication – D still made a choice to go out in public. Could have just gotten drunk in his house
  + Marshall – a liberal who surprisingly sides with the majority here – does so because if he strikes this statue down it might lead to civil commitment statutes that could be used as racial weapons

### *United States v Moore* (1973 DC)

* Facts: D was convicted of heroin possession. Drawing on *Robinson*, he contends the conviction was improper because he was a heroin addict with a need to use it – therefore it’s punishing his addiction to be convicted for carrying the means of his addiction
* Rule: **An individual who evidences an intense dependence on drugs resulting in loss of self-control may not use his behavior impairment as a defense to criminal culpability**
* Holding: D's conviction is upheld - not a valid defense to criminal liability
  + This case presents the court with an opportunity to rely with the *Robinson* precedent or the *Powell*. They chose *Powell* and argue that the underlying possession can be punished
  + “Appellant could never put the needle in his arm the first and many times without an exercise of will. Appellants illegal acquisition and possession was the direct product of a freely willed illegal act. The drug addition is a disease that Appellant has induced himself through a violation of the law. Every addict makes a choice…”
* Dissent: A drug addict should not be convicted for possession of narcotics that are solely for his on use - some addicts have overwhelming psychological and physiological need for these drugs that negate free will
* Notes: Reconciling *Robinson*, *Powell*, and *Moore*?
  + The cases beg the question: If we hold to *Robinson*, then surely possessing drugs is a function of addition. We can hold to *Powell* and say even addicts exercise free will (as the court in *Moore* seems to agree) but then again alcohol addiction seems substantively less addicting. How to reconcile?
    - Indeterminate Argument – It’s just for enforcement to determine who is a using and who is a true addict, so if we catch you with drugs we have to assume the former. Still can’t prosecute based on needle marks
    - Personal Use – Maybe another argument to reconcile is to say that *Moore* just means that if you can prove the drugs were for personal use then *Robinson* controls. But the court makers pretty clear that it’s not the objective
  + **The court relies on *Powell*. Today, *Robinson* has less control and *Powell* is the important case that emphasizes the states’ continued ability to determine punishments**

### *Jones v U.S.* (1962 DC)

* Facts: Ten month-old baby belonging to D’s friends dies of malnourishment after D failed to provide food and necessities. Mother claimed she had contract with D to care for children, but D denied this. D charged with involuntary manslaughter for failure to perform care for child, but D argued jury instruction required jury to find D had a legal duty.
* Rule: **Imposing criminal liability on a D for omission requires proving D had a legal duty to act**
* Holding: Manslaughter conviction reversed
  + A defendant may be convicted for an omission to act if: (1) the defendant was under a statutory obligation to care for the victim, (2) the defendant was in a sufficiently close relationship with the victim, (3) the defendant contractually agreed to provide care for the victim, or (4) the defendant voluntarily took on the care of the victim, such that the victim was secluded from others who might have helped him
  + Trial judge failed to instruct the jury that Jones could only be convicted if there was proof that she was under a legal duty to feed and provide medical care
  + There was no special status duty for the D. The mother had an affirmative duty to provide for the child, but here there is no obvious duty that makes D’s omission improper, must be remanded to be determined by trier of fact

### *Pope v State* (1970 MD)

* Facts: Pope was convicted of felony child abuse. Norris, a friend of hers, lived with Pope and was young mother of three-month old babe. Norris was also mentally ill and killed her baby in a psychotic episode. Pope was present during the attack – was she under obligation to prevent the attack?
* Rule: **Criminal liability may not be imposed upon an individual for failing to fulfill a moral, instead of a legal, obligation**
* Holding: No, Pope had no legal obligation to intervene
  + Pope’s conduct, during and after the acts of abuse, must be evaluated with regard for the rule that although she may have had a strong moral obligation to help the child, she was under no legal obligation to do so unless she had responsibility for the supervision of the child as contemplated by the child abuse statute. She may not be punished by our system for failing to fulfil a moral obligation

## Mens Rea

* Conceptions
  + Broad Meaning - The "evil mind" or "The vicious will" - essentially refers to the blameworthiness entailed in choosing to commit a criminal wrong. This requirement reflects the common sense view of justice that blame and punishment are inappropriate in the absence of choice. According to this definition, guilt for an offense is not dependent on proof that the actor caused the proscribed harm with any specific mental state, it is not necessary to show that he committed the offense “knowingly” or with any particular frame of mind
    - For example, in *Reginia v Cunningham* D entered the cellar building, where he tore the gas meter from the gas pipes and stole the coins deposited in the meter. As a consequence, gas escaped from the pipes and nearly asphyxiated V.
      * Although he did not intend to endanger anyone’s life, he was charged because the offense was “whosoever shall maliciously cause to be administered to or taken by annoy other person any poison...shall be guilty"
  + Narrow Meaning – Mens rea may also be defined, as a more formal or technical requirement: the particular mental awareness or intention provided for in the definition of an offense that must accompany the act. This is the “elemental” meaning of mens rea. A person may possess mens rea in the culpability sense of the term, and yet lack the requisite elemental mens rea. Analysis here is limited to determining whether a defendant intended, expected, or should have expected his actions would produce the consequences
* Common Law Distinction Between Specific Intent and General Intent
  + General Intent = any offense from which the only mens rea required was a blameworthy state of mind.
  + Specific Intent = was meant to empathize that the definition of the offense expressly required proof of a particular mens rea
    - The problem is that today most penal statutes expressly include a mens rea term, or a particular state of mind is judicially implied, so the line between “general” and “specific intent” is much more difficult to draw.
    - A good distinction: A specific intent is one in which the definition of the crime:
      * Requires proof of an intention by the actor to perform some future act or achieve some further consequence, beyond the conduct or result that constitutes the social harm of the offense; 2) requires proof of some special motive for the conduct; 3) provides that the actor must be aware of a statutory attendant circumstance
      * An offense that does not contain one of these features is termed “general intent”
    - Example: Common law burglary is defined as “breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein.” The actus reus of this offense is complete when the offender breaks and enters another person’s dwelling at night. However, to be guilty of burglary, the actor must intend a further act – commission of a felony inside the dwelling house
      * But that future act is not part of the social harm of the offense; it does not have to occur. Thus, common law burglary is characterized as a specific intent offense.

### MPC Definitions

* **Culpability** - Unless otherwise provided by statute or existing law a person is not guilty of an offense unless they acted purposefully, knowingly, recklessly, or negligently as the law may require **with respect to each material element of the offense**
* **Purposefully** - A person acts purposefully with respect to a material element of a crime if it the conscious object to engage in such conduct and cause such result OR he is aware of attendant circumstances or believes/hopes the exist
* **Knowingly** - A person acts knowingly with respect to an element if practically certain that conduct will cause such result and aware of the nature of the conduct or attendant circumstances
* **Recklessly** - A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that exists or will result from his conduct. The risk must be of such that, based on circumstances known to the actor, its disregard involves a gross deviation from the reasonable person standard of conduct
* **Negligently** - A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation
* Applying the MPC
  + MPC analysis involves 2 steps:
    1. Determine the "material elements" of an offense - MPC §1.13 provides criteria for determining this
    2. Must determine which type of mens rea is required with respect to each material element
       - Assumption that, if legislature has specified a particular type a culpability as sufficient for an individual material element of the crime, it was meant to apply to all material elements unless a contrary purpose appears

### *Regina v Cunningham* (1957 UK)

* Facts: D removed a gas meter to steal money inside which lead to noxious fumes being funneled into his neighbors house which could have killed her. The issue was the D was charged under a statute prohibiting “malicious” conduct of this kind which the district court interpreted to mean “general wickedness”
* Rule: **The term malice in a criminal statute does not mean general wickedness; it means either (1) an actual intention to do the particular kind of harm that was in fact done or (2) reckless disregard of a foreseeable risk that the harm would result**
* Holding: The Court reversed the conviction because "maliciously" was improperly defined by the trial judge. It interpreted "maliciously" to mean foresight to do specific harm rather than general wickedness. Thus, D must have acted maliciously in the gas meter so as to endanger here life
* Lecture Analysis: Doesn’t general wickedness imply foresight to harm and intent? The concept of the overturn here is that the appeals court was concerned about layering culpability – i.e. if you find the stealing of money “generally wicked” then of course you’ll find the release of noxious fumes wicked too. But D’s mental state was clearly not malicious on the level of intent
* Notes: Applying the Mens Rea of MPC to *Cunningham*. Assuming the facts of Cunningham but the mens rea of the MPC, what would each level of culpability look like?:
  + Purpose – I want this person to inhale gas
  + Knowing – There was a very high risk the gas would go through the wall and D hoped by some miracle it wouldn’t but he had
    - (1) Full knowledge of the consequences
    - (2) They were practically certain to occur
  + Reckless – I don’t know that she’ll inhale the gas, but D disregards a substantial and unjustifiable risk. Risk taken with no justification for an action or awareness of it
    - This is where the appeals court in Cunningham seems to place D’s blameworthiness
  + Negligence – Completely unaware the gas will escape or go through the wall, but a reasonable person in D’s shoes would have known
  + Strict Liability – Doesn’t matter

### Negligence

* **Definition** - A person’s conduct is ‘negligent’ if it constitutes a deviation from the standard of care that a reasonable person would have observed in the actor’s situation. Conduct constitutes such a negligent deviation if the actor fails to appreciate that he is taking an unjustifiable risk of causing harm to another. **It is an objective fault**
* **Reasonableness** - The reasonableness of action can depend on 1) the gravity of the harm that foreseeably would result from the defendant’s conduct; 2) the probability of such harm occurring; and 3) the burden – or loss – to the defendant of desisting from the risky conduct (i.e. the ‘worth’ of taking the risk’)
* **Difference between Criminal and Civil Negligence** - Although rare circumstances exist, “civil negligence ordinarily is considered an inappropriate predicate by which to define criminal conduct.” To establish criminal responsibility for negligence, the prosecution must ordinarily show more than mere deviation from the standard of care that would constitute civil negligence
  + The key is usually a gross amount of negligence to qualify for criminal liability
  + **But gross negligence should not be equated to recklessness**
* Should Negligence Ever be Punished? Mens rea means guilty mind and yet the negligent actor is blamed and punished for what “isn’t in his mind, namely, attention to risk that a reasonable person would display.
  + Retort: Utilitarians argue that punishment for negligence primarily focuses on general deterrence. Retributivists offer competing arguments
* *Reginia v Faulkner*
  + Facts: D attempted to steal rum in the hold of a ship lights a match to see where the rum is and accidentally burns down the ship. D convicted of theft and arson (for arson, judge jury instruction that if D guilty of theft then also liable for arson), he argued that the jury instructions were improper. The question – should there be a difference morally between the person who accidentally does something and someone who doesn’t?
  + Holding: Jury were improperly directed to return guilty verdict upon finding that the firing of the ship, though accidental, was caused by an act done in the course of a felonious operation
    - The statute does not include a culpability standard of simple negligence. There’s probably enough here for simple negligence (though maybe not gross negligence), but the offense requires the act be willful and intentional
    - “If while a person is engaged in committing a felony...he accidentally does some collateral act, which if done willfully would be another felony...he is guilty of the later felony...but I am not prepared without more consideration to give my assent to so wide a proposition”
* *State v Hazelwood* (1997 AK)
  + Facts: Famous ExXon Valdez case – huge oil spill when ship negligently runs aground. Charged under a statute where conduct is a misdemeanor when committed negligently. On appeal, it is overturned on statutory interpretation reasoning that the legislators must have meant gross negligence (i.e. something more than just simple civil negligence)
  + Holding: Ruling the simple negligence would be sufficient to impose criminal liability in the statute, the conviction is overturned
    - **Simple negligence is sufficient to provide assurance that criminal penalties will be imposed only when the conduct at issue is something society can reasonably expected to deter**
  + Lecture Commentary
    - Case shows that courts are philosophically trying to work through whether or not, even when a status authorizes negligence for criminality – there should be something more than simple negligence (e.g. whether gross negligence is enough). Here, it determine that it simple negligence is sufficient
* *Santillanes v. New Mexico* (1993 NM)
  + Facts - D accidentally injured his nephew (minor) in an altercation. D convicted of child abuse (judge jury instruction that D guilty of child abuse if D failed civil negligence standard), D argued for a heightened standard of criminal negligence
  + Holding - Ordinary civil negligence is not sufficient to impose criminal liability
    - When moral condemnation attaches to conviction of a crime, the **crime should typically reflect mental state warranting such contempt**
    - Court interprets intended scope to punish only conduct that is morally culpable, thus simple negligence standard is not enough
* *Elonis v United States* (2015)
  + Facts: D was charged under a federal statue making it a crime to transmit in interstate commerce “any communication containing any threat...to injury the person of another.” After D’s wife left him, he began posting certain songs and lyrics that would suggest he was threatening his ex-wife. Although he posted disclaimers that the lyrics were “fictions” he was charged under the statute. He requested a jury instruction requiring the jury to find intent to convict him. He was denied the request.
  + Holding: SCOTUS reversed the conviction. He was improperly convicted under a statute with no intent requirement which the court misinterpreted as allowing mens rea to be satisfied by simple negligence through “reasonable person” standard
    - Reasonable person standard is inconsistent with conventional requirement of criminal law - awareness of some wrongdoing
    - If no mental state is defined in the statue, it doesn't mean that none exists and should not be read as dispensing with criminal intent requirement. Criminal wrongdoing must be conscious, negligence cannot be the default. Instead, the general rule is that a guilty mind is a necessary element in the indictment and proof of every crime

### Recklessness

* **Definition** - Involves conscious risk creation. Most jurisdictions apply a standard that requires proof that the actor disregarded a substantial and unjustifiable risk of which he was aware. According to the prevailing view the line between “criminal negligence” and “recklessness” is not drawn on the basis of the extent of the actor’s deviation from the standard of reasonable care – the deviation is gross or substantial in both cases – but rather is founded on the actor’s state of mind in regard to risk
* **Malice** - Sometimes malice can be used instead of “recklessness” in the common law context -- and often times can mean both intentionally and recklessly causes social harm
* **Contrasted with Negligence**
  + For recklessness, awareness of a risk that is a probability less that substantial certainty is what distinguishes it from negligence. "The risk of which the actor is aware must of course be substantial in order for the recklessness judgement to be made. This risk must also be unjustifiable."
    - Recklessness = Actor was subjectively aware of the danger but acted anyway
    - Negligence = The actor was not subjectively aware, but should have been
  + Thus, for someone to be guilty of recklessness, the actor must be aware that 1) there is a risk; 2) that the risk is substantial; and 3) that the risk is unjustifiable
    - The MPC seems to require all three – and in practice, the justification for the risk is reserved for the jury to determine
  + Question: Must the actor SUBJECTIVELY believe that the risk is substantial or is this an OBJECTIVE standard?
  + Hypo: D’s trained as a superior marksman – and knows he’s pretty good. He fires a rifle at a backyard chair where children are playing for practice. A friend warns him it’s too dangerous, but he is confident in his award winning shooting skills. He shoots and injuries a child. Reckless?
    - Subjectively: Maybe this is negligence because he thought he was good enough
    - Objectively: A jury would probably say this is reckless

### Knowledge

* Contrasted with recklessness
  + Recklessness is to consciously disregard a substantial risk of the conduct causing harm (MPC §2.02(2))
  + Knowledge is awareness that the harm is practically certain
* Awareness of high probability as knowledge
  + Federal standard
    - (1) Where an individual subjectively believes the probability that a fact exists is high AND (2) the individual takes deliberate actions to avoid learning this fact, then this type of awareness is more culpable than recklessness (i.e. on the same level as knowledge)
    - However, there remains questions about whether this requires an affirmative act to avoid learning the truth (i.e. take steps to ensure one doesn't acquire knowledge). If this is the standard, it is unlikely that failure to investigate (e.g. *Jewell*) is any more culpable than recklessness
* *Jewell* (1976) 9th CC
  + Facts - D caught transporting drugs in his car from MX into US, and D claimed he didn’t know drugs were there. Circumstantial evidence that D knew of the compartment but acted w/ willful blindness to confirming it. D convicted of drug trafficking (judge jury instruction that D’s willful blindness sufficient), but D argued requires D must “absolutely, positively” know the drugs were in the compartment
  + Holding - **“Knowingly” includes “willful blindness”** (ie. D’s awareness of the high probability of an illegal act, but purposefully failing to investigate the illegal act’s existence to remain ignorant). Court provides both policy and substantive for rejecting the "willful blindness" defense: Substantive - Deliberate ignorance is equally culpable as positive knowledge; Policy - This would be used as a defense by drug traffickers in order to avoid punishment
  + Dissent (Kennedy): Proper jury instruction must clearly state requirements of culpability: that D is aware of facts indicating high probability, that D does not actually believe there was no controlled substance in the car (subjective standard). The instructions were thus defective; proper instruction based on MPC should use its definition of knowledge, not an alternative to it (i.e. a separate willful blindness standard)
    - Ostrich Instructions can be dangerous because they can sometime imply that true ignorance is not an excuse to criminal culpability – it is an excuse. If D genuinely did not believe the drugs were in the car, despite inferential opportunities, this negates “knowing.” The jury needs to be instructed as such
  + Notes: MPC states that “when knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist”
    - The doctrine was clarified in Global-Tech Appliance v SEB. To be culpable under the willful blindness doctrine,
      * The defendant must 1) subjectively believe that there is a high probability that a fact exists and 2) must take deliberate actions to avoid learning of that fact.
    - Issue with Affirmative Action: Does failing to take an affirmative action to inquire to ‘learn the truth’ sufficient under a willful blindness doctrine. The SCOTUS has not made a determination as to whether requiring affirmative actions under this doctrine is too strict

### Strict Liability (No Mens Rea)

* *Morrissette v. United States* (1952) (SCOTUS)
  + Facts - D convicted of taking and selling military scrap metal in violation of 18 U.S.C. § 641 “converting gov property” law (judge jury instruction that offense is SL b/c law had no culpability requirement), but D argued MOF defense that he honestly believed the government had abandoned the metal and had no intent to convert
  + Rule: **Acts which are bad in themselves, including larceny, require the element of mens rea and any similar strict liability statute will not be construed as eliminating the mens rea element**
  + Holding - Fed laws related to conversion or other wrongful acts that are silent on a required culpability element are not to be interpreted as eliminating the requirement for a culpability element. Even though there are public welfare laws intended to reduce immediate danger posed by certain actions through strict liability, larceny is a crime that has historically required mental element. Thus, this type of offense shouldn't be interpreted as a public welfare one where the statute is silent regarding intent
* *Staples v. United States* (1991) (SCOTUS)
  + Facts - D convicted of owning semi-automatic rifle (D’s gun had defective piece meant to prevent automatic firing) in violation of US National Firearms Act (judge jury instruction that Act makes it SL offense), but D argued MoF defense that he didn’t know it could fire automatically. SCOTUS grants cert to address issue where, absent a clear statement from Congress that there is no mens rea requirement, should federal felony statutes be interpreted the eliminate the mens rea element?
  + Rule: **Absent a clear statement from Congress that there is no mens rea requirement, federal felony statutes should not be interpreted so as to eliminate the element of mens rea**
  + Holding - Fed laws should not be interpreted as strict liability (i.e. eliminating mens rea requirement), UNLESS Congress clearly stated otherwise. Court has been careful not to interpret statutes as eliminating the mens rea requirement where seemingly innocent conduct would be criminalized. Since default rule would thus provide mens rea requirement for illegal possession of firearm, D is not culpable for unknowingly possessing an illegal firearm
  + Dissent - the Act meant for public welfare regulation similar to *Balint*

## Defenses to Culpability

* **MPC 2.04**
  1. MoF or MoL is a defense IF either:
     1. D’s MOF or MOL negates a material element of an offense (see Cordoba-Hincapie)
        + Subjective MoF or MOL negates required culpability of Purposely, Knowingly, or Recklessly
        + Objective MoF or MOL negates required culpability of Negligently (ie. MoF < “gross deviation”)
     2. relevant statute establishes MoF or MOL as defense to required culpability
  2. MoF or MoL for one offense does NOT transfer to another related offense, but could mitigate culpability for it
  3. Additionally, MoL is a defense IF
     1. Relevant statute not “reasonably made available” (NOTE: very low bar)
     2. D acts w/ reasonable reliance on official statement of law (NOT attorney)
  4. MoF or MoL standard is ONLY “more likely than not” NOT “beyond reasonable doubt

### Mistake of Fact

* MPC Approach
  + Mistake of fact is inseparable from mens rea analysis. Thus, it must be determined whether the mistake of fact negates the required level of culpability for the material elements of the offense
* Current Law
  + MPC has had a major impact, yet some elements of the traditional approach from *Prince* continue to dominate
    - Lesser-crime principle - When D knowingly commits smaller crime, he runs risk of committing even greater crime. Thus, MoF not a valid defense in these situations
    - Moral-wrong principle - where committing an act that is morally questionable/wrong, person runs risk of committing crime
* *Prince* (1875) (England)
  + Facts - D convicted of taking unmarried girl under 16yo, but D argued MoF b/c reasonably believed the girl was over 16yo b/c she was 18 and she looked much older than 16
  + Holding - If statute lacks culpability requirement (ie. SL offense), then D’s MoF is not a defense
* *B (a minor) v. Director of Public Prosecutions* (2000) (British House of Lords)
  + Facts - D (15-yo boy) convicted of violating Indecency w/ Child Act after asking 13yo girl to perform oral sex, but D argued evidence showed he honestly believed girl was 14yo (age of consent)
  + Holding - Courts should read in a mens rea requirement into a statutory rape rape unless legislature clearly intended NOT to include one, so mistake of fact is defense to statutory rape. Holds that *Prince* is out of line with the modern trend of criminal law in which a D should be judgd on the facts as he believes them to be
* *Garnett v. State* (1993) (MD CoLR)
  + Facts - D (20yo mentally handicapped man) invited by 13yo girl (minor) to have sex. D convicted of second degree rape (max 20 year sentence) under MD law defining it as sex between victim under 14yo and person more than four years older
  + Holding - Courts should NOT read a mens rea requirement into a statutory rape law unless the legislature clearly intended for one; so MoF is NOT defense to statutory rape. Court thinks its clear that the statute makes no allowance for a mistake-of-age defense, effectively rendering it a strict liability offense
    - This ruling goes in opposite direction than the one modern criminal law is trending towards (in which the traditional insistence on imposing strict liability for mistakes about age is beginning to erode)
  + Dissent - Not requiring state to prove necessary mental state "destroys absolutely the concept of fault" and renders meaningless the presumption of innocence and right to due process

### Mistake of Law

* Definition: A defense that D incorrectly understood how applicable law applies to their conduct
  + Traditional rule is that "ignorance of the law is no excuse" and that MoL is never a valid defense
  + This turns out to be murky and not always the case, increasingly so over the last 50 years
* MPC
  + §2.02(9) - Knowledge/negligence as to whether conducts constitutes an offense is not a requirement of the offense unless the definition/code specifically provides so
    - Some courts have read requirement of statutory awareness into federal statutes (e.g. *Liparota*), while others maintain that only awareness of the conduct is relevant to willfulness/knowledge (e.g. *Overholt*). The former seem to be concerned with criminalizing seemingly innocent conduct
  + §2.04 - Reflects view that punishment in official reliance MoL cases are pointless and unfair. Adopts limited defense for situation in which D reasonably relies on official interpretation (...afterwards determined to be invalid of erroneous)
* MoL Policy Implications
  + Arguments for barring MoL defense
    - Encourages people to know the law and disincentivizes ignorance of the law
    - Imposes duty to act cautiously and inquire about the law’s full extent (responsible citizenry)
  + Criticisms of not recognizing MoL defense
    - May impose liability w/o culpability
    - Muddled w/ MoF - unfair that D required to know law, but not required to know fact in MoF
    - Abundance modern criminal laws, difficult to know them all
    - Proposed 2015 H.R. would reform criminal code to provide broader MoL defense use in federal statute cases where law is silent. Proponents say this is a necessary safeguard against overcriminalization
* Circumstances in which MoL has been recognized as a valid defense
  + Specific intent crimes such as:
    - Property Damage - D reasonably believed the property damaged is his own (Smith)
    - Theft - D takes something he subjectively believed that he was entitled to or owned
    - Entrapment - if someone committed an act b/c governmental rep said it was lawful (Raley)
* *People v. Marrerro* (1987) (NY CoLR)
  + Facts - D (correction officers) convicted of carrying loaded firearm while off-duty in violation of statute, but D argued good faith MoL that he believed the statute exception for “peace officers” applied to correction officers. Thus, D argues that his mistaken belief about his conduct was founded upon an “official statement” of the law contained in the statute, which wsa reasonable in view of the ambiguous wording of the “peace officer” exemption, and that his “reasonable” interpretation of an “official statement” is sufficient to satisfy statutory requirements for MoL defense
  + Holding - MoL, even good faith, is not a defense. Recognizing misinterpretation of a statute would encourage ignorance of the law
  + DISSENT - “Ignorance of law is no excuse” is antiquated and impossible to follow considering the numerous laws now in existence AND D made “mistaken belief” upon an “official statement” of the statute. Rudovsky think dissent gets it right
* *Regina v. Smith* (1974) (England)
  + Facts - D (tenant) convicted of theft for removed wiring he had installed in the wall in violation of statute saying items installed in wall become landlord property, but D argued MoL (thought property was his) so lacked culpability
  + Holding - While MoL is NOT a defense to civil law (i.e. still liable for damage), it is a defense in criminal law because demonstrates lack of culpability
* *Cheek v. United States* (1991) (SCOTUS)
  + Facts - D convicted of failing to file federal income taxes, but D argued MoL b/c he believed taxes were illegal
  + Holding - Whether a good-faith MoL is sufficient to negate intent requirement of willfulness is (i) a question of fact for the jury (ii) and not subject to an objective reasonableness standard. Tax law is complicated and there must be a specific intent to violate that law. The term “willfulness” makes an exception to the rule that mistake of law is not a defense
  + Reasoning - A defendant will satisfy the willfulness requirement if she made a “voluntary, intentional violation of a known legal duty.” This means that the defendant must (1) know about the duty and (2) purposely violate it. Here it is clear there was no innocent mistake and that a known duty was simply ignored out of disagreement
* *Lambert v. California* (1957) (SCOTUS)
  + Facts - D convicted of violating LA statute requiring prior-convicted felons to register, but D argued he had no knowledge of the statute
  + Holding - Due process limitations require that D be shown to know he is violating this law
    - Notice is essential component of due process and is applicable where person is wholly passive and unaware of wrongdoing. Without notice, there is no opportunity to comply and avoid the conduct
  + DISSENT - Many laws are unknown to people to whom the laws apply; Majority draws impossible constitutional line between doing and not doing

# Rape

* Trajectory of Rape Laws
  + Rape laws do not look alike across the states. Some are more traditional and others are more modern
  + The role of the MPC has not been a significant here, states continue to adhere to their own autonomy on the issue of the actus reus of rape
  + While this section traces the progression from the traditional perspective to the modern one, this is not to say that states don’t still hold on to the entirety or pieces of the traditional perspective

## Actus Reus

### Force and Resistance

* Force Requirement
  + The traditional rule is that successful prosecution for forcible rape requires proof that:
    1. The female did not consent
    2. Sexual intercourse was secured by force
  + If there was lack of consent, but no force, a rape conviction could not be upheld
  + Notwithstanding the private threshold of unacceptable behavior, proof of force was and often still is an essential prerequisite for a criminal conviction of rape in many American jurisdictions
    - Growing number of jurisdictions (thought still a minority) now criminalize all forms of non-consensual intercourse
    - Where force is still required, those courts typically insist it must go beyond that incidental/inherent to the sexual act (something more than the sexual act itself)
  + Implicit and Nonphysical Threats
    - Under traditional doctrine, force required had to be the kind that was likely to cause serious bodily injury. Non-physical did not ordinarily constitute force
    - Courts have increasingly criticized notion of force being analogous to a fight, arguing this gives men right to intimidate and exploit fear of victims. They have also pointed out need for statutory reform in order to make room for cases where the element of physical force is lacking
    - Many states have adopted this reasoning by extending the definition of force to cases where consent is obtained by duress, coercion, extortion, or using a position of authority
    - Pennsylvania adopted statute defining "forcible compulsion" as "compulsion by use of physical, intellectual, moral, emotional or psychological force either express or applied"
* Resistance requirement
  + While sometimes formally required in statute, resistance requirement is more often implicit in the elements of force and non-consent
    - Traditionally, a showing of physical resistance "to the utmost" was required to establish required element of force
  + Clear policy issues with strict resistance requirement
    - Resistance can be physically dangerous to the victim. Victims of rape also frequently freeze during sexual assaults
  + Half states still require reasonable resistance, though even here there are exceptions
  + Reasonable apprehension - Requirement that, where lack of resistance out of fear, this fear be reasonably grounded. Potential justification: D should reasonably know that victim is submitting out of fear
* *State v. Rusk* (1981) (MD CoLR)
  + Facts - D met victim at bar, victim gave D a ride home and D asked her to come upstairs. Victim declined, but D took her keys. Victim claimed she felt scared by D’s look so she agreed to go upstairs. Victim entered D’s apartment and did not attempt to leave before they had sex. D denied victim’s story. D convicted of rape, but D argued insufficient evidence of lack of consent
  + Holding - In a charge of rape, the lack of consent may be established by proof of resistance or by proof that the victim failed to resist due to a genuine and reasonably grounded fear (including, but not limited to, a fear of death or serious bodily harm, or a fear so extreme as to preclude resistance, or a fear which would render her incapable of continuing to resist, or a fear that so overpowers her that she does not dare resist). The reasonableness of P's apprehension of fear was solely a question of fact for the jury to determine. There was also the physical element of choking and the response, which might otherwise satisfy the resistance requirement
* *State v. DiPetrillo* (2007)(R.I.)
  + Facts - First degree sexual assault case in the context of an employer-employee relationship. Clear physical resistance. Trial judge found that between the physical actions and implied threats based on D's authority over P, all elements of the offense were satisfied.
  + Holding - Court declines to extend analysis of implied threats used in *Burke* (psychological-pressure-on-vulnerable-victim analysis in police officer case) to the context of an employment relationship. Since trial decision didn't make clear whether physical actions alone were enough to constitute force, case was remanded

### Eliminating the Force Requirement

* Many states now prohibit non-forcible forms of non-consensual sexual acts, which are divided into different degrees
  + Shift in social perspective of rape might be partially responsible for this. Rape no longer viewed exclusively as a crime of violence, but as a violation of autonomy and privacy. Invades personal inner space and abridges right to determine with whom and when to have sexual intimacy. Also viewed as degrading act of sexual domination
* Potential Concerns
  + Does this leave room for a MoF defense? If the attendant circumstances would lead a reasonable person to believe that they had consent, despite no verbal affirmative "yes", should they be culpable?
* *State in the Interests of MTS* (1992) (NJ CoLR)
  + Facts - D in victim’s bed and began having sex before victim told D to stop. Victim claimed that she was asleep when D went into her bed. D denied victim’s story. D convicted of rape, and CoA reversed on finding of no physical force
  + Holding - **A rape charge may be sustained if the victim does not affirmatively express consent verbally or physically based on a reasonable person standard even without evidence of threat or use of force**. A reasonable person would not assume that victim had given affirmative permission to D, thus trial jury finding should be upheld
  + Significance: This case is a demonstration of courts departing from the traditional rape standard requiring resistance by victim (i.e. it isn't rape unless victim fights back). Focus should be on D's behavior and courts must avoid defining “force” in such a way as to make the establishment of a crime turn on the victim’s behavior. Under this type of definition, “force” can exist if the defendant performs sexual penetration without freely-given consent. **Even the force inherent in the sexual act itself, justifies a forcible sexual assault prosecution.**
    - Under this standard, consent is the only factual issue (aside from mens rea) that would distinguish lawful conduct from ahe criminal offense
* *M.C. v. Bulgaria* (1998)(ECHR)
  + Facts - Victim (14yo girl) forced to have sex with D’s (two 20yo boys) and victim did not physically resist because she was too weak but verbally told them to stop several times. Bulgaria prosecutor dropped charges because insufficient evidence of physical resistance
  + Holding - Under the European Convention on Human Rights, a member state must effectively investigate and prosecute any non-consensual sexual act involving the absence of physical resistance by the victim
    - **Non-consent is the primary element of rape, NOT use of force** (consists not only of direct violence, but also placing the victim in position where submission is believed to be only option)
    - Member states should penalize any sexual act committed against non-consenting persons even if they do not shown signs of resistance. Analysis of member states shows that this definition is already widely operational
    - Rudovsky - Extraordinary case because it disregards prosecutor’s discretion to pursue or drop cases

### Absence of Consent

* Modern rape law states that force is implied by non-consent. This is consistent with the shift that took place above in which that inherent in the sexual act itself constitutes as force. Thus consent becomes the critical piece
* Is consent a state of mind (something person feels) or an action (something someone does or says)?
  + Subjective Consent – A female, in her mind, may want intercourse or not want it, but she may fail to manifest her wishes outwardly. There’s no need to manifest it outwardly
  + Objective Consent – Consent may be an expressive or external concept – it exists when permission is given verbally. Consent is absent without an external affirmative ‘yes’
  + Law traditionally required non-consent in both forms (subjective willingness and physical acts of refusal)
  + Nobody defends strict insistence on requirement for physical (as opposed to verbal) resistance anymore, however there still remains questions about what needs to be proved?
    - Affirmative no? Absence of a yes? Body language?
* Issues with Consent
  + Miscalculation - If purely subjective consent approach, potential of miscalculation by the other party arises given rise to mens rea issue
  + Involuntary Objective Consent - A person may say “yes” to sex but the degree to which this is voluntary is debateable in some instances. There may be other forces at work. Should this "yes" be enough notwithstanding the full circumstances?
  + Withdrawn Consent - Most jurisdictions hold post-penetration withdrawal of consent does not convert continuing intercourse into rape – even if threats of force are clear. This presents a clear issue
* Defective consent
  + Maturity - Statutes draw bright line by setting specific age of consent on of concerns for young person's capacity to make a mature decision (Statutory Rape)
    - Reflects social goal of deterring teen pregnancy and the risk of implicit coercion
    - Intellectual disability is another ground for invalidating consent
  + Incapacity - Liability for rape where person in unconscious or severely incapacitated by drugs or alcohol
    - Laws vary widely, though drugging or spiking someone and then have sex them is uniformly considered rape
      * Incapacitation short of unconsciousness or caused by someone other than D is not considered rape under many statutes
    - With Alcohol, general rule is that if person is unable to make reasonable judgement as to the nature/consequences of the conduct, then it is rape
  + Authority and Trust - Outside of context of psychiatrist-patient relationships, criminal law generally does not invalidate consent in adult relationships
  + Fraud
    - The law holds that that **fraud-in-the-inducement does not vitiate consent** under the common law, the law treats the intercourse as consensual
    - BUT, a female’s consent to engage in sexual intercourse is invalid if, as a result of fraud she, is unaware that she has consented to the act of sexual intercourse itself. This is called **fraud-in-factum**
      * Ex: D, a physician, is guilty of rape if he obtains permission from his patient to “insert an instrument” in her vagina while she is under anaesthesia, if the ‘instrument’ used is his penis

## Mens Rea of Rape

### Mistake of Fact

* *Commonwealth v. Sherry* (1982) (MA CoLR)
  + Facts - Victim at party with D’s (co-physicians). D’s took victim by car to one of D’s houses and had sex after the victim had asked to be taken home, but otherwise D didn’t resist. D claims she felt numb and didn’t physically resist. Ds argue that jury should have been instructed to find without a reasonable doubt that they possessed actual knowledge of victim's lack of consent
  + Holding - A rape victim is not required to use physical force to resist and any resistance which demonstrates that her lack of consent is honest and real shall suffice. There is no recognized defense related to honest mistake of fact without considering the reasonableness of the mistake
* *Commonwealth v. Fischer* (1998) (PA CoLR)
  + Facts - On the night of alleged sexual misconduct, D and victim had previous consensual sex. Later, D and victim met again. Victim claims D held her down and attempted to initiate. D claims he stopped when victim said to stop and that victim left after D tried to initiate again; D claims he mistakenly thought victim consented
  + Holding - Mistake of facts on grounds that a victim previously consented to a defendant’s sexual conduct is not enough to deviate from precedent (stating that defense based on reasonable belief of consent must be established by legislature)
* Rape as a Strict Liability Offense
  + Mass. App. Ct. case in which court refused to acknowledge this defense even where belief that victim consented were reasonable. This holding was based on analogy to age based statutory rape cases
  + This may have harmful consequences. If a D genuinely and reasonably believes there is consent, then he is acting without moral culpability. The effect of dispensing with the reasonable mistake of fact doctrine is, effectively, to covert rape – a felony carrying very serious penalty – into a strict liability offense
  + This is the case in states like MA, whereas Alaska's rule is the reverse – prosecution must prove that the defendant KNEW there was no consent
  + Most states still recognize this defense where reasonable, but varies from state to state. Some states (e.g. CA) have become increasingly hesitant to instruct juries unless there is substantial evidence of conduct by female which would reasonably lead to belief of consent

## Potential Statutory Solutions

### Model Penal Code

* §213.0 Definitions
  + Consent: Person's behavior, including words and conduct (action or inaction), that communicate a willingness to engage in a specific act of sexual conduct (see *MTS*; *Bulgaria*)
  + Behavior does not constitute consent when the result of incapacity or duress
  + Consent given expressly by words OR implicitly by conduct based on circumstances
  + Lack of resistance does not establish consent, though may be considered in light of circumstances
  + Consent is revocable at any time
  + NOTE: original version wanted strict “yes” requirement, but voted as too strict and revised
* **§213.1 - Forcible Rape**
  1. Actor is guilty of Aggravated Forcible rape if violates forcible rape statue and in doing so recklessly or knowingly does the following in order to cause the victim to engage in the act:
     + Uses deadly weapon
     + Acts with active participation or assistance of others
     + Causes serious bodily injury
  2. Guilty of forcible rape if knowingly or recklessly does the following in order to cause the victim to engage in the act:
     + Uses physical force, physical restraint, or implied/express threat of physical force, bodily injury, or physical restraint
     + Threatens to inflict bodily injury on someone else or commit any other crime of violence
* **§213.2 - Penetration Without Consent**
  + 4th degree felony to engage in act of sexual penetration where knowingly or recklessly disregards other persons lack of consent
* **§213.3 - Rape or Penetration of Vulnerable Person**
  + Second degree rape of vulnerable person if engages in act of sexual penetration and knowingly/recklessly disregards that the person is:
    - Sleeping, unconscious, or physically unable to communicate
    - Unable to refuse due to mental disorder/disability
    - Unable to appraise conduct due to intoxicating/mind-altering substances the actor administered in order to cause such impairment
  + Third degree sexual penetration of vulnerable person if knowingly/recklessly disregards:
    - Mentally/developmentally disabled or otherwise mentally incapacitated so as not to understand nature of act
    - Disabled to extent that victim posses capacity person no more than 12 years old and that of actor is greater than 16
* **§213.4 Sexual Penetration by Coercion or Exploitation**
  1. By Coercion (third-degree felony)
     + Knowingly/Recklessly obtains consent by threatening to
       - Accuse of crime or get deported
       - Take or withhold action in official capacity (or cause another person to do so), whether public or private
       - Inflict any economic harm that would not benefit the actor
     + Obtains consent while knows or recklessly disregards that:
       - Person is detained in institution where actor holds position of authority
       - Under arrest, supervision, or in-treatment where actor holds position of authority
  2. By Exploitation (fourth degree felony)
     + Engages in act of sexual penetration and knowingly:
       - Is providing professional treatment/counseling/monitoring for emotional/mental issue to non-spousal/partner person, regardless of where it happens or if actor is qualified to provide this
       - Misrepresents medical properties of the act
       - Leads person to believe falsely that actor is personally known to them

## Evidentiary Concerns

* Evidentiary rules may be more important than the way we define rape itself
* Concern between actus rea and mens rea, as well as a pervasive concern that it is “easy” to blame someone for rape, have lead to general prescriptions relating to proof of rape that have waxed and waned over time. It is worth noting that false accusations are very rare. Rape is actually severely under-reported. However, there are still concerns about bias or leaps
  + Corroboration: “Currently, no American state requires corroboration in all forcible rape cases.” This traditionally required corroboration of victim testimony. There are theoretically arguments for corroboration in order to get a conviction – and historically this was the case – but today, defense attorneys can do the work necessary to discredit a plaintiff or suggest to the jury that the situation is murky
  + Special Jury Instruction: It used to be the case that many jurisdictions would require rape jury instructions to include a statement on how easily made rape accusations are and difficult to defend against. These have fallen out of style
  + Cross Examination: Issues of credibility and abusive treatment of victims
    - Credibility - Since availability of mistake of fact defense is limited and the standard of consent is more friendly to the victim, the obvious target of the defense is naturally the victim's credibility. The primary issue in the court room become when women should be believed and appeals to age old gender-bias are often used to sway this issue in D's favor
    - Can a plaintiff’s prior sexual history be included (or what they wore) to suggest a “loose reputation” making consent plausible?
      * Under the rules of evidence, “background circumstances like the complainant’s prior sexual experience are presumptively admissible, whenever the crucial fact (such as consent) is more likely to be true when those circumstances are present than when they are not. By this standard, it was considered plausible that evidence of prior sexual activity might sometimes have at least some probative value”
      * The difficulty with this is that introducing such evidence is likely over- weighted by juries (thus more prejudicial) or has such an effect on the alleged victim, that it’s hard to get it in or doesn’t make sense from a strategy point of view
      * Generally the probative value standard relates to CIVL rather than CRIMINAL cases. It’s harder to get it in on the criminal side
    - *State v. DeLawder* (1975)
      * Court denies admission of evidence purporting to show victim had engaged in acts with other men and that victim fabricated story out of fear of telling her mother
      * Holding: A defendant has a Sixth Amendment constitutional right to engage in cross-examination of an accuser and to introduce evidence so as to establish bias, prejudice, or ulterior motive in an attempt to diminish the accuser’s credibility.
* Shield Laws:
  + Just about every state has rape shield laws to limit the admissibility of evidence related to the plaintiff’s prior sexual behavior
  + **The exception is that “some state statutes admit evidence of sexual history only when it involves prior incidents with the defendant.”**
* Rule of Evidence 412. Any evidence of plaintiff’s sexual behavior is not allowed, EXCEPT:
  + To allow evidence to show someone other than the defendant raped the victim
  + Evidence of prior sexual behavior of the victim with the defendant to prove consent
    - *Not all states allow this*
  + Evidence whose exclusion would violate the defendant’s constitutional right to a fair trial
    - Example Hypo: Young woman was dating on and off the defendant. Sexual assault allegation. A week before trial, the defense attorney gets her journal diary where she says “I feel like Nate is such a player – he was trying to get with me and Holly while he had a girlfriend…maybe that’s why I jumped on him…I don’t feel too guilty for him”
      * Prosecutor says this is inadmissible…previous sex acts of plaintiff are not allowed
      * Defendant would probably argue that while this is prejudicial, it’s so relevant that not to include would be mean D doesn’t get a fair trial
* Rule of Evidence 413. A defendants (but not plaintiffs) prior sexual misconduct can be admitted.

# Homicide

* General Principles
* Two questions that apply to any category of crime:
  1. Criminality - What distinguishes criminal from non-criminal conduct?
  2. Grading - What factors greater or lesser punishment when behavior qualifies a criminal?
* Little doubt about the criminality of homicidal conduct. Instead, the central concern is to determine how much punishment can be imposed (i.e. grading)
  + Happens legislatively by dividing conduct into different names (e.g. murder v. manslaughter) and different degrees
  + Varies by state, which have different statutory schemes and classifications (e.g. PA is different than CA)

## Elements and State Legislative Grading

### Modified PA Statute

* **§2502 - Criminal Homicide**
  + Person is guilty if he intentionally, knowingly, recklessly, or negligently causes the death of another human being
  + Shall be classified as murder, voluntary manslaughter, or involuntary manslaughter
* **§2502 - Murder**
  + Murder of the first degree - A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing
  + Murder of the second degree - A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony. The felony’s that count:
    - The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
  + Murder of the third degree - All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree
* **§2503 - Voluntary manslaughter**
  + A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or that he intended to kill
    - Unreasonable Belief Killing Justifiable: A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title (relating to general principles of justification), but his belief is unreasonable.
* **§2504 - Involuntary Manslaughter**
  + A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.

## Intended Killings

### Criteria of Most Serious Killings (i.e. First-Degree)

* 29 states and Federal system currently use criterion of "premeditation" to identify the most serious categories of murders
  + A majority of those states use *Carroll* approach where this element can be established instantaneously
  + Other states like Arizona use *Guthrie* standard and require murder be preceded length of time which permits reflection
* Types of evidence to establish premeditation as delineated in *Anderson*. Court stated that first degree murders typically involve evidence of all three and at a minimum requires strong evidence of (1) or evidence of (2) in conjunction with (1) or (3)
  1. Planning – Evidence that shows the D planned to take a life before the act will sufficiently prove premeditation and deliberateness
  2. Motive – Facts about the defendant’s prior relationship with the victim might indicate a reason to kill
  3. Manner of the Killing – Evidence that the manner of the killing was so particular and exacting that the D must have intentionally killed according to preconceived design
* Limitations and issues with premeditation as distinguishing feature of most culpable offenses
  + *Anderson* case in which an extremely gruesome child murder was committed in an enraged and violent outburst (i.e. without premeditation) is intuitively more culpable that dispassionate planned killing
  + Mercy killings would also likely fall into category of most serious killings under this standard
  + As a response, MPC along with some states have rejected premeditation as basis for identifying most serious murders
* *Commonwealth v Carroll* (Pa. 1963) - Instantaneous Premeditation
  + Facts: Appeal of a felony murder conviction in the first degree, the argument is that murder was a crime a passion – not enough premeditation here. 1st degree murder, arguing it’s 3rd degree. D argues that his mental disorders, as well as the previous context of the relationship, got him to the point where he didn’t think – he just acted instinctively
  + Issue: How much premeditation is required for 1st degree murder? What evidence is needed to show that element of premeditation was or was not present?
  + Rule: **Premeditation can happen in an instant. Whether the intention to kill arose within a brief time before the act is immaterial**. It wasn’t planned in the typical way we might think of premeditation, but it can be instantaneous
  + Notes:
    - Court appears to be suggesting that an act that is deliberate is necessarily premeditated. However, premeditation refers quantity of time required to deliberate (the quality of that thinking ahead). Court suggests that the quantity of time can be close to instantaneous before a crime is committed if attendant circumstances indication deliberation
    - “The specific intent to kill which is necessary to constitute in a nonfelony murder, murder in the first degree, may be found from a defendant’s words or conduct or from the attendant circumstances together with all reasonable inference therefrom”… it can happen in an instant"
    - “Society would be almost completely unprotected from criminals if the law permitted a bling or irresistible impulse or inability control one’s self to excuse or justify a murder or to reduce it from first degree to second degree”
* *State v Guthrie* (W. Va. 1995) - Period of Reflection
  + Facts: At issue is a jury instruction for first degree murder and whether the instruction that “it is not necessary that the intention to kill should exist for any particular length of time prior to the actual killing” was a correct interpretation of premeditation
  + Rule: In conflict with *Carrol*, **premeditation can’t be instantaneous or near instantaneous**. Otherwise, if the State prove premeditation by only showing that intention came into existence for the first time at the time of killing, then it effectively eliminates the distinction between the degrees. Thus, there must be some evidence that D considered and weighed his decision to kill in order to establish premeditation
  + Notes:
    - Court emphasizes the requirement for a period between formation of intent and the actual act in order to establish premeditation. Need an opportunity to reflect and contemplate the act to kill
      * Several arguments for this requirement: Makes act more culpable, harder to deter, and smaller likelihood of getting caught. Each of these arguably make crime more serious and justifying a different grade

### Mitigation of Intentional Killings (i.e. Manslaughter)

* Approaches to provocation as a mitigating factor
  + Predominate common law position that there are only a few specific circumstances that can serve as adequate provocation and mitigate from first degree murder downward. If you take the *Giroard* approach, it seems counter-intuitive that words alone can’t provoke people sufficiently, after all people can say truly horrible things. However, it might be the case that there’s a concern this doctrine might be abused and present a pretext for people to justify killings
  + *Mather* holds that provoking circumstances need not conform to any pre-established categories - it’s a jury question based on the facts. While this remains minority view, a number of American jurisdictions follow it
* Excuses, Justifications, and Cooling Off Period as Basis for Provocation Defense
  + Justification
    - Focuses on the wrongfulness of the act in light of the circumstances. Actor is treated as fully responsible agent, but what the actor did is treated as, at a minimum, not entirely wrong
    - Classic example is something like self-defense; I’m protecting my child, I was justified in killing after I found out the abuse has been happening. Wanted to prevent further abuse
    - Not a full defense, but certainly a partial one that mitigates
    - "Implicit claim in partial justification is that it is to some extent morally justified to make punitive return against someone who causes actor serious offence"
  + Excuse
    - Excuse focuses on the culpability of the actor. When we say an actor is excused, we condemn the act but forgive him merely because of his reduced capacity
    - Classic example is the heat of the moment. Anybody would kill immediately if it happened to them. The act was bad, but D wasn’t in full control – he was killing out of understandable fury that is excused
    - "Provocation must be estimated by the probability that the circumstances would affect most men in like fashion...the greater the provocation measured that way, the more ground there is for attributing the intensity of the actor's passions and lack of self-control...to the extraordinary character in the situation he was placed in."
  + Cooling Off Period - Often courts are forced in these mitigation contexts to determining if there was so-called cooling off. If D kills right when he is provoked, that’s one thing. But if D had time to cool off and recollect himself, then provocation can’t properly mitigate. But how much cooling off time disqualifies?
    - If you view provocation as a partial justification, you look at the conduct of the victim, not the killer. Cooling off doesn’t matter, the victim child abuser did something wrong
    - If you view provocation as an excuse, then cooling off period matters. Acting in the heat of the moment counts as excuse only if it’s in the heat of the moment
* *Girouard v. State* (Md. 1991) - Strict, categorical approach
  + Facts: D kills W after being thrown into a mad frenzy based on her means words during an argument. D was convicted of second-degree murder, but argues that it should be mitigated to manslaughter, despite not falling into any of the recognized categories to which mitigation applies, because it lacks the malice essential for a murder conviction
  + Issue: Should the circumstances mitigate murder to manslaughter? Most states only allow mitigation for provoking circumstances like assault, mutual combat, injury/abuse of a close relative, sudden discovery of adultery
  + Rule: Provocation, to be adequate, must be calculated to inflame the passion of a reasonable man and tend to cause him to act for the movement out of passion rather than reason. **Mere words are not alone enough to provoke and therefore mitigate, must be paired with conduct indicating intention to commit harm**
  + Notes:
    - Court takes a categorically strict approach, there’s a dividing line between conduct and words
    - Court says that other jurisdictions overwhelmingly agree with holding that words are not provocation
    - Standard is one of reasonableness, should not focus on peculiar frailties of D
* *Mather v People* (1862) – Broad view
  + Facts: Old case. Does hearing of a spouse’s infidelity mitigate the passionate rage that could result leading to homicide? How far does it mitigate?
  + Rule: Hearing of spousal infidelity is a reasonable reason to mitigate. Prefers to kick whether something can mitigate to a jury rather than make it a determination of law. Determining sufficiency of provocation should assume the disposition of a reasonable person of ordinary temperment

### MPC Approach to Mitigation of Intentional Killings

* In order to mitigate from homicide to manslaughter under the MPC, you therefore need two things:
  1. Extreme Mental or Emotional Disturbance
  2. There is a Reasonable Explanation as to why the defendant acted as he did
* Altogether, around 20 states employ some version of the EED test
  + States vary in the formulation of this test, with some still requiring act of provocation
  + Empirical evidence suggest these defenses are rarely successful under strict adoptions of the MPC approach
* Given that the MPC lays out a subjective and objective element of the doctrine, the question is how and to what degree should we condition on the individual characteristics of the defendant?
  + First Ask – Is a Person in a State of Extreme Emotional Disturbance?
    - Purely subjective, a jury can consider all the personal characteristics that might predispose them to such a state. The jury will have to consider whether they believe the psychiatrist or expert with regard to their state
  + Then Ask – It is reasonable for that person to be in an extreme emotional disturbance state?
    - Mixed subjective, mixed objective test
      1. Immutable factors (like disability, mental deficiency) COUNT, they help define the person’s mind and degree of reasonableness
      2. Social factors (like religion, homophobia) DO NOT COUNT, having a particular emotional belief does not make an action sufficient
    - The question becomes:
      1. What is something looks like an immutable OR social factor
* Limitations
  + Does not recognize moral, ethnic or political beliefs as part of "actor's situation"
  + How do both CL and MPC approaches deal with cultural norms, trauma, mental disorder, age/sex based factors, etc? (pg 486-88)
* *People v. Casassa* (N.Y. 1980)
  + Facts: Victim’s rejection of D cause him prolonged emotional distress (i.e. intense heartbreak) leading him to murder the victim. D argues that at time of offense, he was under influence of extreme emotional disturbance which should mitigate the charge
  + Rule: New York adopts the MPC on this issue and the two part test for mitigation. The court decides that:
    1. Extreme Mental or Emotional Disturbance = Subjective Test. Involves a determination that the particular D did in fact act under extreme emotional disturbance
    2. Reasonable Explanation = Objective Test. Must be a "reasonable" explanation for the actor's disturbance based on the external circumstances as the actor understood them at the time
  + Notes:
    - Court says the purpose of this defense is to show actions were caused by mental infirmity, though less serious than that of insanity, making them less culpable for having committed the offense
    - D argues that given his unique mental state and unusual sensitivity to being rejected, you’ve got to use a subjective test to determine emotional disturbance. And there’s some strength to this position, the MPC says it’s about the “viewpoint of a person in the actor’s situation under the circumstances he believes them to be”
    - The court argues that there’s got to be an objective portion to the emotional disturbance aspect. In this regard, court found that the unusual sensitivity was so peculiar to D that it is unworthy of mitigation under this standard of reasonableness

## Unintentional Killings

### Civil vs. Criminal Liability

* *Commonwealth v. Welansky* (Mass. 1944)
  + Facts: Nightclub fire killing people. Question is whether the proprietor, who wasn’t even present or in management at the time of the fire, engaged in conduct that was wanton or reckless and thus committed involuntary manslaughter. Though conduct did not consist of any affirmative act, could it still constitute as reckless vs merely negligent?
  + Rule: **Reckless can be distinguished from negligence in terms of wilfulness. While result is not intended, the conduct causing such harm must have been intended in light of some awareness of the grave dangers it posed to other (i.e. run the risk). However, if actor is so heedless that he did not realize the grave dangers posed by his conduct, then he cannot escape imputation of recklessness if a reasonable man would have realized this danger**
  + Notes
    - Wanton or reckless conduct amounts to what has been variously described as indifference to or disregard of probable consequences to others
    - These terms express a difference in the degree of risk in the voluntary undertaking - substantial departure from behavior of ordinary man
* **MPC Approach**
  + Creates two crimes - manslaughter and lesser crime of negligent homicide - which are distinguished by awareness of unwarranted risk
  + Manslaughter if actor was "reckless", meaning he "**consciously** disregarded substantial and unjusifiable risk of conduct causing death to another"
  + Killing is negligent only where he **should** have been aware of such risks

### Distinguishing Murder from Manslaughter

* Definitions of Unintended Killings as Murder
  + Common law formulations for which unintentional killings constituted murder have been incorporated into statutes or by reference to terms like malice (See *Malone*), which rely on epithets such as "the dictate of a wicked, depraved, and malignant heart"
  + Many other state statutes use formulations inspired by the MPC approach, in which unintended killings are murder when committed recklessly and under circumstances manifesting extreme indifference to the value of human life. This omits the common-law language of how wicked or depraved the killing is
* *Commonweatlth v. Malone* (Pa. 1946)
  + Facts: Person dies playing Russian Roulette. The man organizing the game thought it was completely safe – he put one bullet in the chamber and in way that would not go off until five shots. But it happened anyway
  + Rule: Common law's grand criterion for distinguishing murder from other killing was malice on the part of the killer. Malice defined as "any evil design in general; the dictate of a wicked...heart". Court holds that when an individual commits acts of gross recklessness which they must reasonably anticipate the death of another is likely, they exhibit this disposition of wickedness. A specific motive isn't always necessary. This case clearly shows a high level of recklessness for which malice is evidenced
* *United States v. Fleming*
  + Facts: Heavily drunk driving D swerving into oncoming traffic to avoid congestion and strikes/kills driver of another vehicle
  + Rule: Malice is distinguishing feature distinguishing murder from manslaughter. To sustain murder conviction, **must simply prove that D intended to operate car with a heart that was without regard for life and safety of others**. Difference between malice and gross negligence is one of degree. Facts of this case show deviation from ordinary standards of regard for human life/safety than that of ordinary vehicular homicides. Thus, murder conviction sustained

## Felony Murder

### Basic Doctrine

* Classic formulation of the felony-murder doctrine
  + Declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony.” Effectively a strict liability approach where intention to kill or foreseeability is not relevant (at least in the U.S.)
  + Many current murder statutes provide that death that results from the commission of specifically listed felony – such as arson, rape, robbery, or burglary – constitutes first-degree murder for which the maximum penalty is death or life imprisonment
    - If a death results from the commission of an unspecified felony, it is a second degree murder
  + The rule is heavily criticized and even banned in many continental countries
* *Reginia v Serne* (England 1887) – **Felony Murder Narrow Rule**
  + Facts: Old case in which a man allegedly sets fire to his house to collect insurance money and accidentally kills his son
  + Rule: The court approaches the rule narrowly. “I think that that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that **any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which causes death should be murder**”
  + Notes:
    - Malice is proven by the commission of the felony itself. However, no clear proof in this case that D actually set fire, so not-guilty verdict
    - Became dominant standard of English common law
* *People v. Stamp* (Cal. 1969) - **Broad Felony Murder Rule**
  + Facts: In the process of D robbing a store, one of the clerks dies of a heart attack due to the stress of the situation. The man was 60 years old, obese, and had a history of heart disease. The question is whether the man’s death was too attenuated to sustain a conviction given his background
  + Rule: Doctrine is not limited to instances where deaths are foreseeable. **Ds are held strictly liable for all killings committed by him or accomplices in the course of a felony as long as the homicide is the direct causal result of the felony and regardless if it were foreseeable or the natural/ordinary result of it**
  + Notes: Extends much further than formulation in *Regina*, which still requires some culpability with respect to the killing (i.e. narrow doctrine does not apply to purely accidental killings)
    - This broad, unqualified felony-murder rule was adopted in the U.S. and is generally accepted in American courts. No proof of mens rea required

### Implications of Felony Murder Doctrine

* Doing Away with Mens Rea Requirement?
  + The felony-murder rule seems to facially apply as to whether a felon kills the victim whether or not it’s done so intentionally, recklessly, negligently, or accidentally, and unforeseeably. Does this mean felony-murder creates a strict liability rule?
    - In a sense it does, some courts candidly suggest that felony-murder rule dispenses with the requirement of malice. But the more common rationale is that the intent to commit the felony – itself a frequently life threatening act – constitutes the implied malice required for common law murder
    - Examples:
      * D1 is robber is guilty of murder if V1 dies from fright caused by robbery
      * D2 is guilty of murder if she accidentally shoots V2 in the chest during commission of a felony, and V2 dies years later from a heart attack during a baseball game (causation not entirely clear though)
      * D3 is guilty of murder if she attempts to steal V3’s watch from V3’s purse and a gun concealed in it discharges, killing V3.
    - Implicitly (and often explicitly by statute) the felony murder rule applies to accomplices in the commission of felonies.
* Does not do away with actus reus requirement - Causation requirement
  + Must be shown that D's conduct caused a person's death
  + Common formulation contains both "but for" and proximate (natural and ordinary result) causation requirements
  + Foreseeability still factors into the proximate cause prong
* Rationale for the Rule - Given criticisms above, consider the following arguments for it:
  + Deterrence: Most common defense of rule is that it intends to deter negligent and accidental killings during the commission of felonies
    - Counterargument: How does one deter an unintended act? The act of committing a felony might be intended, but the result death is unintended
  + Sanctity of Human Life: Some argue that it reaffirms the sanctity of human life, asserting it reflects society’s judgement that the commission of a felony resulting in death is more serious – and therefore deserves greater punishment – than the commission of a felony not resulting in death
    - Counterargument: Even if true, it doesn't follow that a felon who accidentally takes a life should be subject to the severe penalties, including death and life imprisonment, reserved for ordinary murderers. It is unfair to increase a felon’s punishment for the social harm of death that may have been caused unintentionally, non-recklessly, non-negligently
    - Transferred Intent: The argument here is that the felon’s intent to commit a felony is transferred to the homicide via the Transferred Intent Doctrine
      * Counterargument: Misconstrues the transferred intent doctrine. That doctrine provides that an actor’s intention to commit a particular social harm relating to a particular victim may be transferred to a different unintended victim of the SAME social harm. The law does not generally recognize a transference of intent to cause one social harm to a different and greater harm
    - Easing the Prosecutor’s Burden of Proof: Malice Aforethought can be a tough standard to prove. Argument that felony-murder doctrine is there to ease the prosecutor’s burden of proof but dispensing of the requirement that she show that the felon intended to kill or injure the victim grievously or that the felon was aware that her conduct was highly dangerous
      * Counterargument: Doing away with mens rea can be lead to problematic outcomes

### Inherently Dangerous Felony Limitation

* In response to the above critiques, many states limit the felony murder rule to homicides that occurred during the commission of a felony, with the underlying felony being one dangerous to human life
* Two approaches:
  1. **Abstract Approach** – Courts, though only in a few American jurisdiction, consider the felonies in the abstract. That is, to determine whether a felony is inherently dangerous, a court will ignore the facts of the specific case and, instead, consider the elements of the offense in the abstract. This can demand a lot more by setting a high bar for holding an offense inherently dangerous
     + Example: In the abstract approach, the felony offense of “being a felon in possession of a firearm” is not inherently dangerous, whereas use of a firearm by a former felon is inherently dangerous
     + Example: In on case, false imprisonment was held as not inherently dangerous in the abstract because the elements of fraud and deceit do not involve endangering conduct
  2. **Facts of the Case Approach** – Most jurisdictions employ approach that allows a felony to qualify if it is committed in a dangerous way. Thus, it considers the felony as committed in order to make a determination of the danger posed. "[I]f the felonious conduct, under all of the circumstances, made death a foreseeable consequence."
     + Argues that the abstract approach undermines one of the primary purposes of the modern felony murder rule, namely "to deter dangerous conduct by punishing as murder a homicide resulting from dangerous conduct in perpetuation of a felony."
* What is the problem with the inherently dangerous felony rule?
  + The concerns is that the limitation brings felony murder close to the depraved-heart or extreme-recklessness concept of malice. A felony the commission of which is likely to result in death is a crime the commission of which is apt to demonstrate overlap with the mens rea of recklessness/negligence
  + Now, it is theoretically possible to not consciously take a risk as the reckless standard demands and fall under felony murder, but this seems few and far between
* *People v Phillips* (Cal. 1966) - Abstract approach
  + A doctor was convicted of second degree murder for advising homeopathic remedy to a cancer rather than treatment which led to a little girl’s death. He (falsely) represented he could cure her and took money for this treatment. The court reversed because this theft by deception wasn’t inherently dangerous to life. **It held that only those felonies which are (abstractly) inherently dangerous to human life can support a felony murder charge**
* *Hines v. State* (Ga. 2003) - Circumstantial approach
  + Man accidentally shot a friend dead during a hunting accident and was charged with second degree murder because he had committed a felony possession of a firearm as a former convict. **Court rules that a felony is inherently dangerous when it is dangerous "per se" or "by its circumstances create a foreseeable risk of death"**. Court upheld conviction because the charge of illegal felony possession of a firearm was sufficiently dangerous, as it created foreseeable risk of death

### Merger Doctrine Limitation

* A felony murder only applies if the predicate (underlying) felony is independent of, or collateral to, the homicide. If the felony is not independent, then the felony is said to merge with the homicide and thus felony-murder would be inappropriate (unless the independent felony is of the type that can sustain felony murder conviction)
* **Two tests are commonly used 1) whether the felony is "included in fact" in the homicide or 2) whether the felony is independent of homicide (independent purpose test)**
  + Independent purpose rule prevents truly independent felonies from collapsing into the killing itself, allowing D to circumvent felony-murder instructions
* Rationale:
  + The great majority of states acknowledge some need of merger doctrine in order to ensure that felony-murder does not obliterate grading distinctions the legislature seems to have desired
    - Effect of failing to merge would mean that all intentional killings accomplished by means of a deadly weapon could NEVER be mitigated to manslaughter, as killing was committed in commission of felonious assault
* Many grade homicides by stating that if a death occurs during commission of a specifically listed felony, then the death constitutes first-degree felony- murder, whereas a death resulting during the commission of any other felony – not specifically enumerated – constitutes second-degree felony murder
  + For example, aggravated child abuse is specifically listed in Florida’s first degree felony murder statute. Therefore, although the abuse involves assaultive conduct, the merger rule does not apply to this offense in Florida.
* *People v Burton* (Cal. 1971) – Merger Doctrine Independent Purpose
  + Facts: Armed robbery that leads to a conviction for first degree felony murder. D appeals and argues charge be reduced to a lesser degree (reckless homicide) because the underlying felonious conduct was an armed assault which merges with the killing (i.e. no independent felony to support felony murder instruction). Prosecutor argues that the purpose of robbery is theft, not assault and therefore should not merge because of its independent purpose
  + Rule: The court agrees, the two crimes don’t merge into one and D can be charged with robbery and with felony-murder. **Deaths resulting from felonies undertaken for a purpose independent of the homicide support a charge of felony murder**. The purpose of the felony murder is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit in execution of an underlying, independent felony. Allowing robbery charge to merge would allow D to escape legislatively intended grading
  + Cases Distinguished:
    - *Wilson* - Underlying felony supporting felony murder instruction was burglary with intent to assault. Court in this case held because the object of burglary was assault with a deadly weapon, there was no independent felonious purpose thus the underlying felony merges with the killing and prosecution must show malice/deliberation associated with 1st degree murder. However, in *Burton* object of robbery is not assault, but to obtain money/valuables. Thus, there is an independent purpose and felony murder instruction appropriate
* *People v Robertson* (Notes): V tries to steal D’s hubcaps, D shoots attempting to scare him, but accidentally kills him. Can there be felony murder?
  + Ironically arguing defense that killing wasn't intentional, only intended to scare, D establishes there was an independent purpose and avoids merger, opening himself to felony murder. Dissenting judges here recognize that this is clearly a problem as more culpable actors have better legal standing under this doctrine
* *People v. Chun* - Similar facts as *Robertson* where killings were committed with intent to scare. Court overturns *Robertson*, holding that wherever the offense is assaultive in nature (involves immediate threat of injury), it merges with killing and is not basis for felony murder instruction. However, the recklessness in this case was so clear as to establish elements required for traditional murder

### Killing Not in Furtherance of the Felony

* Felony murder rule can only apply when the act of killing is done **in furtherance** of the underlying felony. This is usually clear, but not always. Two types of situations where questions arise:
  1. Lethal acts committed *after* the felony and are arguably unrelated
  2. Lethal acts committed in resistance to the felony
* Two approaches to the latter category - acts committed by non-felons in resistance to underlying crime
  + **The “Proximate Cause” Approach** - A felon is liable for any death that is proximate result of the felony, even if the shooter is not one of the felons. This is a very fact specific approach, it depends on the circumstances
    - Rationale: When a felon’s attempt to commit a foreseeable felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct and inevitable sequence is a result”
      * F1 and F2 hold up a liquor store. F1 fires at X to scare him and X fires back, killing F1 and accidentally killing V. F2 is likely guilty of felony murder under this approach
  + **The “Agency” Approach** - A majority of states take this approach, which provides that the felony does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise
    - **In other words, the felony-murder rule does not apply if an adversary to the crime, rather than the felon, personally commits the homicidal act**
    - Rationale: A person should not be responsible for the actions of others not associated with the conspiracy. A felon who does not shoot anyone (F2) is not responsible for the actions a non-shooter (X)
    - However, if X was the accomplice of F1 and F2, then F2 could get felony murder for F1 and V
* *People v Gillis*: Man is robbing house, is caught, and fleas. 15 minutes later, as the man is fleeing, a trooper spots the car and begins pursuit. In pursuit the man hits another car, killing two people
  + Felony Murder? Yes. **If necessary to complete the commission of a crime, then it is "in furtherance" of the felony**
    - Still raises questions - suppose D had lost the police and stopped to grab something to eat before resuming his drive?
* *People v Cabatero*: A gang is committing robbery. A lookout panics at an approaching car and shoots at it. Angered by the lookouts stupidity, the gang leader shoots the lookout. The gang leader can be charged with murder, but the other robbers?
  + Felony Murder? Yes, **because this act was a part of protecting the underlying illegal operation in which the other members were involved in**. If the victim had killed a police officer approaching, then felony murder would apply because it was in furtherance of the crime (i.e. prevent getting caught)
    - But if a felon does something not related to the furthering the crime, then felony murder doesn’t apply to others
    - Note: This also relies on accomplice liability, which is another issue altogether
* *State v. Canola* (N.J. 1977)
  + Facts - D and others robbed a jewelry store, and one of D’s co-felons and the store owner killed by another of D’s co-felons. D convicted of first-degree murder under FMR, but D argued “agency” theory precluded felony-murder rule
  + Holding - Felony murder rule does not apply to the death of a co-felon under agency approach

## Death Penalty

### Issues, Developments, and Policy Considerations

* Death Penalty is expensive to administer
  + Significantly greater investigative, trial, and appeal costs
  + In NC, it costs over $2 million per execution more than if it were just to impose life sentence
* MPC has withdrawn death penalty (not officially endorsing or opposing it) b/c of the “current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment”
* Still has public support, though lower than its peak
  + Trending downward
  + Subject to little regional variation, but extent to which penalty is carried out widely differ
* Number of states recently moved away
  + 7 states made it illegal, 21 more have proposed its repeal, others have undertaken reviews of the process
* **Primary considerations are related to the animating principles of criminal law and theories of punishment**
  + Deterrence
    - As long as people believe that death penalty is worse than life sentence, it should have a deterrent effect (in theory)
      * Counterargument that it has "brutalization effect" promoting violence to deal with problems and thus increasing murder rate
    - Empirical evidence is inconclusive
      * Raises question of how sure do we need to be of deterrent effect in order to justify using capital punishment?
  + Retribution
    - Kantian defense rests on the principle of equality, the basis for the biblical principle of lex talonis ("an eye for an eye")
      * This is compelled by, and according to Kant is consistent with, the CI
    - Expressive function, though this seems to have an end that falls outside pure retribution
* Error and Bias
  + Is risk of error inherently less acceptable in capital sentencing due to the significance of its implications?
    - Can't simply correct it after innocent person has been executed
    - To what extent to improved forensic technologies alleviate this concern? In reality, this probably doesn't make a significant difference as it is rarely available and subject to error itself
    - Counterargument that concerns about protecting the innocent are given too much weight and the risk must be accepted in order to achieve benefits of the death penalty
  + Argument that disproportionate racial or economic bias that is systemic in the administration of capital punishment
    - Consider poor defendants who can't afford adequate legal representation or black defendants subject to discrimination
* Constitutional Limitations
  + Procedural Due Process under 5th and 14th Amendments
    - SCOTUS, in *McGautha*, rejects argument that life-or-death sentencing decisions needs to follow some explicit criteria in order to comport with due process. Instead, due process is consistent with leaving these decisions to the unguided discretion of judges and juries
  + 8th Amendment protections against cruel and unusual punishment
    - SCOTUS ruled shortly after in *Furman* that capital punishment is it was administered then (1972) was a violation of protection against cruel and unusual punishment. Forced states to quickly adopt new legislation clarifying sentencing criteria (either by re-writing laws to (1) make death penalty mandatory for certain crimes OR (2) standardize guidelines for jury sentencing)
* Guided discretion and mandatory sentencing
  + New statutory schemes adopted in TX, GA, and FL post *Furman* were upheld. These required sentencing authority weigh certain factors, yet did not impose mandatory imposition of death sentence, ultimately leaving decision to jury
  + Court later held mandatory capital sentencing were inconsistent with standards of decency and thus remained unconstitutional. They argued this schemes fail to address concerns from *Furman* of unchecked and unguided jury, especially when they felt sentence was inappropriate. Individualized sentencing, where all possible mitigating factors are considered, is necessary (*Woodson* and *Locket*)
  + *Woodson* and *Lockett* decisions, where mitigating factors to be considered cannot be limited to those specifically enumerated in the statute, seems to conflict with *Furman* decision arguing the need for structure and less arbitrariness in sentencing guidelines. Also concerns about the excessive time needed for this detailed procedural review and how the time it forces D to spend on death row are irreconcilable with goals of punishment
* Limitations
  + Declared unconstitutional under 8th Amendment where disproportional to the offense, such as rape (*Coker*)
  + Capital sentencing for the mentally disabled ruled to be unconstitutional in *Atkins*
    - Criteria for determining when this applies is unclear, as is standard of proof necessary to establish intellecutal disability

### Cases

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** | **Case** | **Holding** | **Vote** |
| 1879 | Wilkerson v. Utah | Firing squad is constitutional | 9-0 |
| 1890 | In re Kemmler | Electrocution is constitutional | 9-0 |
| 1905 | Rooney v. North Dakota | Adoption of private execution versus public execution after sentence does not violate the Ex post facto clause | 9-0 |
| 1915 | Malloy v. South Carolina | Retroactively changing the execution method does not violate the Ex post facto clause | 9-0 |
| 1932 | Powell v. Alabama | Courts are required to ensure that indigent defendants in capital cases who doesn't represent themselves be appointed counsel | 7-2 |
| 1947 | Francis v. Resweber | Re-execution after a failed attempt does not constitute cruel and unusual punishment nor double jeopardy | 5-4 |
| 1968 | Witherspoon v. Illinois | A state may not have unlimited challenge for cause of jurors who might have any objection to the death penalty. (See also Morgan v. Illinois (1992)) | 6-3 |
| 1971 | McGautha v. California | The death penalty can be imposed by a jury without standards to govern its imposition, and a unitary guilt and punishment trial is constitutional. (Overruled in Furman v. Georgia, 1972, and Gregg v. Georgia, 1976) | 6-3 |
| 1972 | **Furman v. Georgia** | Death sentences in these cases were unconstitutional. There were no opinion of the court nor even a plurality—each justice of the five-member majority issued his own concurrence without joining any other. The ruling caused all death sentences pending at the time to be reduced to life imprisonment and made all previous capital punishment statutes void | 5-4 |
| 1976 | **Gregg v. Georgia** | Post-Furman concerns about arbitrary death penalty sentences can be satisfied by statutes providing a clear information and guidance to sentencing authority and providing bifurcated trial in capital cases to decide guilt and punishment. Such statutory changes adopted by GA legislature were sufficient to render sentence constitutional | 7-2 |
| 1976 | Woodson v. North Carolina | Statutes providing mandatory imposition of the death penalty are unconstitutional | 5-4 |
| 1977 | **Coker v. Georgia** | The death penalty is an unconstitutional punishment for rape of an adult woman when the victim is not killed. Violates Eighth Amendment because non-proportional. SCOTUS has subsequently denied death penalty for non-proportionality, including crimes of child rape or felony murder AND crimes committed by juvenile offenders, insane, or mentally disabled (Atkins) | 6-3 |
| 1978 | Lockett v. Ohio | Sentencing authorities must have the discretion to consider every possible mitigating factor, rather than being limited to a specific list of factors | 6-2 |
| 1980 | Beck v. Alabama | Jury must be allowed to consider lesser included offense, not just capital offense or acquittal | 7-2 |
| 1980 | Godfrey v Georgia | Murder must involve a narrow and precise aggravating factor to be punishable by death | 6-3 |
| 1982 | Enmund v. Florida | Death penalty is unconstitutional for a person who is a minor participant in a felony and does not kill, attempt to kill, or intend to kill | 5-4 |
| 1984 | Pulley v. Harris | There is no constitutional requirement for a proportionality review of sentences in comparable cases throughout a state. | 7-2 |
| 1984 | Spaziano v. Florida | It is constitutional for a judge rather than jury to decide aggravating factors. (Overruled by Ring v. Arizona, 2002). | 6-3 |
| 1986 | Ford v. Wainwright | Execution of an insane convict is unconstitutional | 5-4 |
| 1987 | Tison v. Arizona | Death penalty may be imposed on a felony-murder defendant who was a major participant in the underlying felony and exhibits extreme indifference to human life. | 5-4 |
| 1987 | **McCleskey v. Kemp** | Racial disparities not recognized as a constitutional violation of "equal protection of the law" unless intentional racial discrimination against the defendant can be shown. No evidence that this is systemic. Would be forced to extend claim to any variable that might be statistically shown to be a factor in sentencing outcomes. Effectively saying that this is a necessary evil of a discretionary standard | 5-4 |
| 1987 | Sumner v. Shuman | A death sentence cannot be mandatory even for a murder committed by a prisoner already serving a life sentence without the possibility of parole. | 6-3 |
| 1988 | Lowenfield v. Phelps | The aggravating factor making the crime punishable by death may be found in the definition of the crime itself as long it is enough narrow and precise. | 7-2 |
| 1988 | Thompson v. Oklahoma | Executions of offenders age 15 and younger at the time of their crimes is unconstitutional. | 5-3 |
| 1989 | South Carolina v. Gathers | Admission of a victim impact statement at the sentencing phase of a death penalty-trial is unconstitutional. (Overruled in Payne v. Tennessee, 1991) | 5-4 |
| 1989 | Stanford v. Kentucky | The death penalty for crimes committed at age 16 or 17 is constitutional. (Overruled in Roper v. Simmons, 2005) | 5-4 |
| 1989 | Penry v. Lynaugh | Executing persons with mental retardation is constitutional. (Overruled in Atkins v. Virginia, 2002) | 5-4 |
| 1990 | Walton v. Arizona | Judge-finding of aggravating factors is constitutional. The aggravating factor "especially heinous, cruel, or depraved" is not unconstitutionally vague. (First holding overruled in Ring v. Arizona, 2002) | 5-4 |
| 1991 | Payne v. Tennessee | Victim impact statements are admissible during the penalty phase of a capital case. | 6-3 |
| 1992 | Morgan v. Illinois | A defendant may challenge for cause a prospective juror who would automatically vote to impose the death penalty in every capital case. | 6-3 |
| 1993 | Herrera v. Collins | In the absence of other constitutional grounds, federal courts have no power to rule on innocence claims based on newly discovered evidence. | 6-3 |
| 1995 | Schlup v. Delo | A condemned man can bypass the procedural bar on successive federal habeas petitions if he show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent". | 5-4 |
| 1995 | Harris v. Alabama | Alabama scheme allowing the judge to impose a death sentence and making the jury recommendation non-binding even when it calls for life imprisonment is constitutional. | 8-1 |
| 2002 | Ring v. Arizona | A death sentence where the necessary aggravating factors are determined by a judge violates a defendant's constitutional right to a trial by jury, as the jury should determine if there are such factors sufficient to allow the death penalty. | 7-2 |
| 2002 | **Atkins v. Virginia** | The execution of mentally retarded offenders is unconstitutional. | 6-3 |
| 2004 | Schriro v. Summerlin | The Ring v. Arizona decision does not apply retroactively to cases already final on direct review. | 5-4 |
| 2005 | Roper v. Simmons | The death penalty for those who had committed their crimes under 18 years of age is unconstitutional. | 5-4 |
| 2006 | Oregon v. Guzek | States may limit the evidence of innocence a defendant may present at his sentencing hearing to evidence already presented at his trial. | 8-0 |
| 2006 | Hill v. McDonough | Challenging constitutionality of the execution method is a §1983 lawsuit, not an habeas corpus petition, and thus not subject to the procedural bar on successive petitions. | 9-0 |
| 2006 | Kansas v. Marsh | Imposing the death penalty when mitigating and aggravating factors are in equipoise is constitutional. | 5-4 |
| 2008 | Medellin v. Texas | Because the treaty was not self-executing, it was not binding to the states without a statute adopted by Congress | 6-3 |
| 2008 | Baze v. Rees | Kentucky's lethal injection method using sodium thiopental is constitutional | 7-2 |
| 2008 | Kennedy v. Louisiana | The death penalty is unconstitutional for child rape and other non-homicidal crimes against the person. | 5-4 |
| 2009 | Harbison v. Bell | Indigent death row inmates sentenced under state law have a right to federally funded habeas counsel in post-conviction state clemency proceedings, when the state has denied such counsel. | 7-2 |
| 2011 | Leal Garcia v. Texas | Courts cannot stay an execution on the basis of the future possibility that Congress enact a statute to enforce an international law | 5-4 |
| 2014 | Hall v. Florida | IQ tests alone can not be used as a rigid limit for determining intellectual disability. | 5-4 |
| 2015 | Glossip v. Gross | To be unconstitutional, a method of execution must involve any risk of harm which is substantial when compared to a known and available alternative method. The condemned has the burden of proof. Breyer DISSENT death penalty on verge of violating Eighth Amendment | 5-4 |
| 2016 | Hurst v. Florida | Florida law giving to judges the power to decide facts related to sentencing violates the Sixth Amendment in light of Ring, which requires a jury to determine if there are aggravating factors making the crime punishable by death | 8-0 |

# Causation

## General Overview

* Determination of causation is part of the actus reus analysis
  + It links the “voluntary act” of the actus reus and the resulting social harm
  + Actus reus thus has 3 components that must be satisfied: Voluntary Act, Causation, Social Harm
* Issue of causation appears primarily in homicide cases. Occasionally appears in non-homicide cases, but almost always related to homicide
* Causation is Mainly a Retributive Concept
  + There’s no reason why D should not be responsible for V’s death if we can prove that, had X not intervened, D’s bullet surely would have killed V. The act seems just as culpable. From an deterrence/incentive side, it doesn’t make sense to under charge to 'attempted murder'
  + Role of causation finds it primary moral justification in retributive just deserts. Given the stakes of criminal convictions, the principle of causation is an instrument society employs to ensure that criminal responsibility is personal
* As in tort law, causation has two constituent parts that must be satisfied: **But-for causation** and **proximate causation**
  + Criminal law causation is in no way linked to Tort law and its underlying doctrines and standards related causation
    - Different aims. Tort law causation attempts to place liability on the party who's conduct is most culpable for P's harm (apportionment). Criminal law is concerned with the level of culpability necessary to justify punishment (deterrence and retribution)
    - The severe consequences that follow from criminal liability provide a strong argument for a stricter standard of causation than that in tort law
* Most state codes include no explicit rules for determining causation. In these jurisdictions, courts are left to decide based on evolving common law principles
  + MPC §2.03 seeks to articulate an appropriate standard and roughly a dozen states have adopted it

## But-For Causation

* But-For Causation - There can be no criminal responsibility for resulting social harm unless it can be shown that the defendant’s conduct was a cause-in-fact of the prohibited result
  + Ask: But for D’s voluntary acts, would the social harm have occurred when it did?
* But-For Causation Actus Reus Problems
  + In order to convict, you need the full actus reus (act, harm), causation (but for AND proximate cause), and mens rea. Without any component, you can’t convict
  + Causation without Mens Rea – D has an argument with husband V. V is upset and storms out of the house. He walks across the street in a fury and in the process is stroked and killed by X’s car. Did D cause the harm?
    - Probably Not. You have a strong “but-for” and “causation” argument. But even still, D can’t be convicted. He didn’t have the mens rea. This is ‘but-for’ causation without the mens rea
  + Mens Rea without Causation – D shoots at V intending to kill, but misses. Y simultaneously, independently, and accidentally shoots V in the heart. Is D guilty?
    - Probably Not. D may have intended to kill (he can get attempted murder) but D did not cause V’s death. Likewise, Y may have caused the death, but he lacks the requisite mens rea for a first degree murder charge (though depending on how reckless, he might get third degree or manslaughter)

### *State v. Montoya* (2002) NM CoLR

* Facts - Accomplice of D shot and severely wounded. D drove accomplice to secluded area and left him to die. D convicted of murder on theory that D prevented accomplice from getting medical help, but D argued evidence only established accomplice may have survived w/ treatment.
* Holding - D wins appeal. Court rules that D is **liable ONLY if established beyond a reasonable doubt that his conduct is the cause in-fact of victim’s death**

### *State v. Muro* (2005) (Neb CoLR)

* Facts - D came home and found daughter w/ a fractured skull. D waited 4 hours before seeking medical attention. D convicted of causing daughter’s death by failing to seek immediate medical attention
* Holding - D **criminally liable ONLY if established beyond a reasonable doubt that his conduct is the cause in-fact of victim’s death**. Only the possibility of survival existed with earlier treatment, thus no but-for beyond reasonable doubt. D wins on appeal

### *Burrage v U.S.* (2014) (SCOTUS)

* Facts: 20 year mandatory minimum for distributing drugs that lead to death. V dies and cocktail of mixed drugs found in autopsy. Expert testimony that heroin sold by D was a contributing factor in the death, as it was part of the mix of drugs. Possible V could still have died without the heroin
* Holding: SCOTUS holds that there’s no but-for causation because it’s not certain that D's conduct was an independently sufficient cause. Uncertain about precisely how much the chance of death increased as a result of the heroin. **Uncertainty of this type cannot be reconciled with beyond a reasonable doubt standard.**

## Proximate Causation

* Most causation problems present issues related to only proximate causation
* There are two situations where proximate cause is present:
  1. Direct Proximate Cause – When D shoots V and V dies instantly or soon after, it’s pretty clear that the shooting was a direct cause of death. An act that is a direct cause of social harm is also a proximate cause of it (easy and straightforward)
  2. Proximate Intervening Causes – Notwithstanding an intervening cause – an independent force that is another but-for cause – that operates in producing the social harm after the defendant’s voluntary act has been committed, the initial voluntary act is still such that it is sufficiently culpable
* The purpose of the but-for test of causation is to identify the candidates for responsibility for an event. From this pool, which may include other human actors and non-human forces stemming over an extended period of time, the “proximate” cause of the social harm must be selected
  + Examples of these problems: Intervening causes of nature, third parties, etc.
  + When these problems aries, the proximate cause analysis is concerned with two primary questions:
    1. When is the intervening conduct – of a third party, the victim, or a natural force – sufficiently out of the ordinary that it is no longer fair to say that the social harm was caused by the Defendant’s conduct?
       - Even if not unforeseeable or out of the ordinary, what are the exceptions (e.g. autonomy)?
    2. Put differently, under what circumstances should D, who acts with the requisite mens rea, and who commits a voluntary act that is but-for causation of a social harm, be relieved of criminal responsibility because of an intervening proximate cause?
* Omissions as Causes
  + Example: Intruder pushes baby into pool, babysitter refuses to rescue and child drowns. Can it be said that in failing to come to child's aid, the babysitter caused the death?
    - The babysitter's omission was indeed a necessary condition and was thus a but-for cause
    - Does it follow that all bystanders causally contributed? Are these omissions non-culpable in the absence of some duty to act?
  + Courts are uniformly willing to treat an omission as the legal cause of a result in situations where there is a duty to act
* Transferred Intent
  + D shoots at V1 intended to kill him, but bullet misses and ricochets. It strikes and kills V2. Is D guilty of murder regardless of foreseeability?
    - All jurisdictions say D is guilty, reasoning that the intent to kill V1 transfers to his action that ultimately harmed V2
      * Has the same blameworthy mental state and blameworthy result
  + MPC would also convict D in this situation, holding a person is guilty of intentionally causing a certain result even if it accidentally inflicts the harm on a person while intentionally trying to inflict it on another
  + Problems
    - If D succeeds in inflicting harm on intended person while harming another person in the process, is the intent still transferred or is it "used up"
    - If D shoots at V1 intending to kill and V2 kills pedestrian with car while trying to escape, is the intent transferred to this scenario?
* Assisted Suicide
  + Prevailing American law: One who successfully urges or assists another to commit suicide is not guilty of murder at least so long as the V was mentally responsible and was not forced or deceived
  + Most states also reject possibility of negligent homicide or manslaughter, provided that V's action were indeed voluntary
    - Possible exception for negligent/reckless aid? (e.g. V is in state of mind where choice cannot be said to be free or voluntary)
  + MPC permits conviction of criminal homicide for causing individual to take their own life "only if he purposely causes such suicide by force, duress, or deception"
  + However, majority of states define separate statutory offense for assisting in suicide that is a felony that is the punishable equivalent of manslaughter
  + Seems to conflict with foreseeability standard of proximate cause. Surely Dr. Death knew his actions would have the precise effect that they did in causing death
    - Distinction between human action in physical events is embodied in the principles of causation. Human action caused by initial actor's conduct is not treated the same as physical events which are subject to laws of nature. In the former, the "resultant" human action is chosen by the second person alone
    - The principle of autonomy teaches that the individual's will is the prime cause of behavior
    - Qualification on this special treatment: **Subsequent human actions are only independent when they are freely and voluntarily chosen**
* Subsequent Action Problems
  + Subsequent victim actions - Somewhat similar to assisted suicide; where subsequent action of the victim, in response to D's initial action, causally contributes to their harm. Is D's initial act such that he is culpable for harm that results from the choices of the victim (autonomy problem)?
  + Subsequent third party actions - Exposing the victim to homicidal third-parties. Does this make D blameworthy for the actions of others? Does it matter that the third-party actions were foreseeable?
    - One perspective: A person is only responsible for what he himself does. The doer of the final act whom autonomously intervenes should bear sole responsibility for the resulting harm
    - What if deliberately misleading a third party to commit the harm?

### Proximate Causation Cases

### *People v Acosta* (1991) (CA Appel)

* Facts: Intense car chase. In pursuit, two police helicopters crash killing the pilots. Is D responsible?
* Holding - But for causation is clear, but proximate causation would depend on foreseeability. Trier of fact's finding of proximate cause was appropriate based on objective standard of reasonableness
* Reasoning
  + Proximate cause is term historically used to separate those results for which actor will be held responsible from those not carrying such responsibility. Legal fiction serving matters of policy based partly on expediency and partly on concerns of fairness and justice
  + If not a factual cause (but-for), then no need to even consider proximate causation
  + Standard for proximate cause should exclude extraordinary results and allow the trier of fact to sense of common man (objective)
  + In choosing to engage in high-speed escape from police, within D's reasonable apprehension that the police may be harmed in the pursuit
  + **Since the result was possible consequences that could have been reasonably contemplated, a finding of proximate cause is appropriate**

### *People v. Brady* (2005) (CA Appel)

* Facts - D recklessly started a fire in meth lab. Two firefighting planes went to fight fire, but one pilot made an error and the planes collided, killing both pilots. D convicted of causing both deaths, D argued not sufficient cause
* Holding - Deaths foreseeable given location of the fire (it would require extraordinary efforts to control it), thus proximate cause established

### *People v. Arzon* (1978) (NY Appel)

* Facts:D intentionally set fire on fifth floor of abandoned building. Firefighters respond to fire that D started at which point an independent fire is discovered on the second floor. Second floor fire kills firefighter attempting to evacuate building. D indicted for arson and second-degree murder (based on recklessness evincing depraved disregard for human life). D argued no causal link between the fifth floor fire and the fireman’s death
* Holding: Court upholds finding that **D was responsible because conduct was but-for cause and ultimate harm should have been reasonably foreseen. Ultimate harm need not be intended by actor, so long as harm is something which should have been foreseen as being reasonably related to the conduct. Irrelevant that it ws not sole and exclusive factor in V's death or that intervening factor contributed to ultimate harm. Result was certainly foreseeable that fire set would expose responders to life-threatening risk**

### *Warner Lambert* (1980) (NY CoLR)

* Facts - D’s gum factory explodes killing workers b/c D failed to take safety precautions; D acquitted of second-degree manslaughter. D’s convicted of IVM (negligence), but D’s argue no criminal culpability
* Holding - Court rejects theory that But-For causation is sole requirement and that it is irrelevant which chain of events actually caused the harm (i.e. D is culpable for simply exposing to the potential harm by employing them). It holds that D's **conduct must be “sufficiently direct cause” of victim’s death because criminal negligence requires higher standard than civil negligence**

### *State v. Shabazz* (CT 1998)

* Facts - D fatally stabbed victim, but victim died from malpractice while being treated at hospital
* Holding - D criminally liable if D’s despite other contributing factors including negligence on behalf of the hospital treating V. **Gross negligence by a third party is only a defense when the negligence is the sole cause of the death**. At most, the hospital's negligence can be viewed as a contributing factor. Had V been in stable condition and expected to make a full recovery when the malpractice occurred, then this would likely be a valid defense

### *United States v. Main* (1997) (9th CC)

* Facts - D (police officer) failed to move an injured victim who then died from asphyxiation. D convicted of IVM
* Holding - Causation is a matter of fact for the jury, including judgment about morality and culpability related to medical treatment errors. It was inappropriate for trial judge to refuse instructing jury about proximate cause.

### *People v Campbell* (Mich. 1983)

* Facts: V sleeps with D's wife (Borat voice) D encourages V to kill himself and provides him with a gun. V kills himself. Is D responsible for his death?
  + Prosecution argues that inciting suicide along with the overt act of furnishing a gun to an intoxicate and emotionally precarious individual is homicide
* Holding: **Court doesn’t hold D responsible for simply furnishing means of suicide**. V had enough free will to decide whether to kill himself. D's hope that V would kill himself is not alone the degree of intention requisite for a finding of murder

### *People v. Kevorkian* (Mich. 1994)

* Facts: D creates assisted suicide machines that victims activate themselves. D is subsequently indicted for murder
  + Issue: Is D responsible as cause of death so as to support finding of murder?
* Holding - Yes. While the victims freely chose to kill themselves, the court distinguishes from *Campbell* stating that a person who actively participates in the commission of a suicide is responsible
  + Court reasons that this is consistent with overwhelming modern trend where **murder conviction is proper if D participates in the final overt act that causes death, but not where merely involved in events leading up to the commission of the final overt act**
    - Example: Murder if help firing a gun or pushing hypodermic needle, but not when simply furnishing the means
* Subsequent Victim Behavior Scenarios
  + Garcia: D is charged with murder for raping Garcia, as prosecution argues that V's subsequent suicide was the result of her loss of the will to live. Is this sufficient to uphold a murder conviction? Does this square with Campbell and Kevorkian? Commentators have expressed skepticism about the level of causation here
  + Blaue: D stabbed victim, but victim refused medical treatment for religious reasons and died. Can D be found guilty for having caused the death of another when her religiously motivated decision contributed to her death? Were D's actions an independent but-for cause?

### *Commonwealth v. Root* (Pa. 1961)

* Facts: Drag racing on a highway, V attempts to pass D and gets in a fatal crash. D charged with murder for causing his death by assenting to the conditions (i.e. drag race) that led to his death
* Holding: Court rejects the charge. V was a rationale, free actor who decided to engage in the dangerous activity. This cuts off of liability, as D's conduct was not a sufficiently direct cause. To hold D to the same civil liability standard of proximate causation, which are dependent on accidental circumstances, would be unjust
  + When proximate cause was first adopted in criminal proceedings, it had a much more different connotation (related to directness) than it does in the modern liberal definition
* Dissent: Contends that conviction should be upheld because D was both the but-for cause (accepted challenge) and proximate cause (crash foreseeable in race)

### *Commonwealth v. Atencio* (MA. 1963)

* Facts - D’s and a friend played Russian roulette. Friend dies during game. D’s convicted of manslaughter, but D’s argued not sufficient cause of friend’s death
* Holding - D’s encouraging victim to engage in reckless activity may provide sufficient cause for victim’s death. Court upholds the conviction while following the MPC. The case can be distinguished from *Root* in that drag ricing required a degree of skill and independent action – Russian roulette is much more about luck. Much more foreseeable that the this could happen such that the complicit boys are responsible

# Attempt

## Breakdown of MPC 5.01 - Criminal Attempt

* **(1) Definition of Attempt** - A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
  + (a) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
    - *Suggests that reverse mistake of fact may still constitute an attempt.The MPC make clear here that the person’s mens rea is important for establishing attempt, maybe not objectively*
  + (b) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
    - *This captures the traditional "last act" doctrines. If I take all the steps and just miss or fail to carry it out. If the person has done everything needed to commit the crime -- completed actus reus -- they can be found guilty of attempt*
  + (c) Purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime
    - *The MPC here incorporates the notion that when something intervenes that prevents the final actus reus, there needs to be a substantial step*
* **(2) Conduct Which May Be Held Substantial Step** Under Subsection (1)(c) - Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
  + (a) Lying in wait, searching for or following the contemplated victim of the crime;
  + (b) Enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
  + (c) Reconnoitering the place contemplated for the commission of the crime;
  + (d) Unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
  + (e) Possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
  + (f) Possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
  + (g) Soliciting an innocent agent to engage in conduct constituting an element of the crime

## Attempt and Mens Rea

* Statutory definitions of the crime of "attempt"
  + "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such a crime" - NY Penal Law
  + "A person commits the offense of attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step towards the commission of that offense" - IL Comp. Stat
* Punishment
  + Traditionally, an actor who intentionally seeks harm is less punished much less severely if his attempt proves unsuccessful
  + Today, usual punishment for attempt is a reduced factor of the punishment for the completed crime
    - At common law, attempts were misdemeanors
    - In CA, attempt carries a maximum term of half that of the maximum term of the completed offense
  + Justifications for less severe punishment
    - Retributive - Severity of punishment depends on the relationship to the level of harm. Under just deserts, no reason to punish as severely if there is no harm to avenge
  + This might be a problem, considering the the level of culpability an attempt carries is nearly identical to that of successful completion
    - "In one sense, each has committed an offense, but the one has had the bad luck to cause a horrible misfortune..Both certainly deserve punishment, but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm"
  + "The principle of proportionality does not decree that the degree of punishment be proportionate to the offender's good or bad luck, but rather to his...blameworthiness"
* Specific Intent
  + General common law rule and most American statutes hold that an attempt requires **a purpose or specific intent** to produce the proscribed result, even when recklessness or some lesser mens rea would suffice for conviction of the completed offense
  + What does specific intent mean? Under MPC, it exists only when it is the actors "conscious object...to cause such a result"
    - MPC 5.01 - "Required mens rea is satisfied if defendant acts with purpose of causing or with the belief that his conduct will cause the prohibited result"
  + Why should attempt require higher mens rea than required to convict of the actual attempt:
    1. Linguistic - Meaning of the word attempt is to accomplish something and it cannot be said to try if one does not intend to succeed
    2. Moral - One who intends to commit a criminal harm does a greater moral wrong than one who merely does so recklessly or negligently
    3. Utilitarian - Importance of the intent is not to show that act was wicked, but that it was likely to be followed by hurtful consequences
  + If we were to extend this to reckless and negligent conduct, it would be difficult to draw a line between culpable and non-culpable conduct
    - Would speeding motorists necessarily be charged of attempted negligent homicide every time the are cited with a speeding violation?
  + Attempted manslaughter
    - Clearly no such thing as intentional involuntary manslaughter (an unintentional killing by definition), but overwhelming weight of case law recognizes offense of attempted voluntary manslaughter (i.e. failed provoked killing)
  + Attempted felony murder
    - Most courts have rejected this. Felony murder is a strict liability offense which is triggered by the outcome, regardless of the mens rea. In the absence of this outcome (i.e. the killing, ), there is nothing to be strictly liable for
  + Statutory Rape - MA court held D guilty for attempted statutory rape for attempting to sleep with someone he believed was 16
    - This finding is clearly inappropriate. There was no harm done (actus reus) or intent to rape (menus rea). Statutory rape is purely strict liability and the outcome that triggers liability never occurred

### *Smallwood v. State* (1996)

* Facts - D (HIV-positive) convicted of attempted murder for unprotected sex with multiple victims despite knowing his HIV status. D argued that attempted murder charge was improper because lacked intent to kill
* Holding - D's conviction was overturned
  + The **required intent in assault with intent to murder is the specific intent to murder**, i.e., the specific intent to kill under circumstances that would not legally justify or mitigate to manslaughter
  + **Only properly guilty if there was sufficient evidence from which trier of fact could reasonably have concluded that D possessed a specific intent to kill at the time he assaulted the women**
    - Intent to kill may be proved by circumstantial evidence; we can **infer that one intends the natural and probable consequences of his act** (e.g. inferred from the use of a deadly weapon direct at a vital part of the human body - risk of killing becomes so high it is reasonable to assume intent was to kill)
  + Here, court holds that it can't be fairly concluded that death by AIDS was sufficiently probably to support inference that D intended to kill. **In the absence of such evidence from which to infer intent to kill, conviction for attempted murder with intent to murder must be reversed**

### Mens Rea Hypothetical

* Setup: D places a bomb in a room intending to kill person X. He has good reason to believe that other people would be in the room. If the bomb goes off, assume the law suggests that he would get first-degree murder of X and probably third degree murder of everyone else due to extreme recklessness. The bomb does not go off. You’re charged with attempted murder of everyone in the room, person X, Y, and Z. When it comes to X, there’s probably no issue charging attempted murder because there’s specific intent to kill the victim and done everything – completed attempted. But you’re also charged with attempted murder of Y and Z
* Question: How would this fare both under the common law and MPC?
  + In the common law (see Smallwood) you can’t have an attempt unless you specifically intended to kill specific people
  + Under the MPC, you’re probably guilty of attempted murder even though you didn’t intend to kill Y and Z. Here, the intended mens rea is satisfied for all parties since D acted with the belief that his conduct would cause the prohibited result (i.e. that if the bomb exploded, Y an Z would die as well)
    - The code follows it’s own philosophy – find the mens rea. If it’s enough to satisfy mens rea in completed crime, it’s enough to satisfy it in attempt. This challenges the traditional notion that attempt is meaningfully different than the successful actus rea

## Preparation vs. Attempt

* Common law has recognized between acts which are and are not too remote to constitute criminal attempt
  + How far back should we punish an attempt? The doctrine of conspiracy basically means that if you talk and plan about a crime with others, you can be punished. But if you’re acting outside of the conspiracy sphere, what’s the dividing line
  + Modern law also contains several instances in which mere preparation is considered criminal
    - Example: Demonstrating the use of a firearm intending that the same will be unlawfully used in furtherance of civil disorder
    - Example: Possession with intent to distribute
* If criminal intent is there and D is mentally culpable, why should it matter how far D has gotten in effectuating criminal purpose?
  + Locus penitentiae - The opportunity to report and/or change one's mind
    - If the threshold is too low and D is preempted, we may hold them guilty of attempt when we really don't know if they would have gone through with it
    - If D abandoned criminal plan and is subsequently arrested, we would be holding them guilty even if they took every effort to prevent causing any harm (See Abandonment section below for how some jurisdictions address this problem)
  + Punishment of thought crimes
    - Don't want to punish people for merely thinking about committing crime
* Abandonment - Once a D has moved from mere preparation to attempt, can he abandon his attempt and escape liability? No. Although there is disagreement on the matter, most scholars believe that abandonment is not a common law defense to attempt.
  + To the extent that a defense of abandonment is recognized today, however, it applies **only if the defendant voluntary and completely renounces her criminal purpose**. It has to be a genuine change of heart – can’t just abandon your attempt because the plan is falling apart or because the risk of capture is higher or you’re afraid of the police
  + The MPC recognizes this approach of voluntary and complete renunciation, even if a substantial step is taken to make an act an attempt. But it too has to be genuine

### Tests for Distinguishing Preparation from Attempt

* **Final Step Test** (Has pretty much been universally rejected)
  + Traditional theory that effectively that precludes incomplete acts from criminal attempt. A criminal attempt only occurred when the person performed all of the acts that she believed were necessary to commit the target offense
    - Someone who has stopped short of this, either out of repentance/intervention or because time has not yet come, they are still within scope of innocent preparation
    - Example: Attempted murder by shooting does not occur until D pulls the trigger
  + This test really frustrates prevention efforts by law enforcement
* **Unequivocally Test / Res Ipsa Loquitur Test**
  + Doesn't look at how far D has gone in his conduct, but instead at how clearly his acts bespeak his intent
  + An act does not constitute an attempt until it becomes unequivocal. That is, **an attempt occurs when a person’s conduct, standing alone, unambiguously manifests her criminal intent**
    - Must demonstrate that the crime is about to be committed unless frustrated by intervention
  + Some jurisdictions have adopted this approach (e.g. SD, WI)
    - Criticisms include that it allows D to mask his intent in order to avoid conviction of attempt if unsuccessful
* **Proximity to Danger Test** (*Rizzo*)
  + In drawing line between preparation and attempt, **must only consider those acts which are so to the accomplishment of a crime that, in all reasonable probability, the crime itself would have been successfully completed but for timely intervention**
  + A person is guilty of an attempt when her conduct is in “dangerous proximity to success” or when an act “is so near to the result that the danger of success if very great”
  + Justice Holmes dissenting in *Hyde* - "There must be dangerous proximity to success"
  + Consider the distance/gap between D's actions and the unachieved goal of the consummated crime - the distance must be relatively short and the gap narrow if D is to be held guilty of attempt
* **Substantial Step Test** (MPC Approach)
  + Roughly half of states and 2/3rd of federal circuits employ some type of substantial step test
  + **In addition to criminal purpose, an act must be a substantial step in a course of conduct designed to accomplish a criminal result and that it be strongly corroborative of criminal purpose in order for it to constitute such a substantial step**
  + Distinguished from other approaches
    - Unlike proximity, it doesn't matter what remains to be done - what matters is what you’ve done. Fact that further major steps must be taken isn't prelcusive. If you’ve taken a substantial step toward the crime, that’s enough to corroborate mens rea
      * *Rizzo* would probably be convicted under this approach
    - Does not require finding as to whether actor would have desisted prior to completing crime
    - Requirement of proving a substantial step is less of a hurdle for prosecutors than unequivocality test
    - Not requiring last proximate act would allow apprehension earlier on without immunizing D from criminal liability for attempt

### *King v. Barker* (1924 New Zealand)

* Summary: Court rejects rule where in order to constitute criminal attempt, D must have taken the last stp which he was able to tke along the road of his criminal intent (in other words, D must have done all he intended to do for the purpose of effectuating his criminal intent). Court argues that proper dividing line between preparation and attempt is to be found between two extremes (first step and final act)

### *People v. Rizzo* (1927 NY CoA)

* Facts: Four armed men drove around looking for V, whom the expected would be withdrawing large sums of money from the bank. They entered various buildings, but two police officers arrested them before they could find V
* Rule: **The act or acts must come or advance very near to the accomplishment of the intended crime in order to constitute an attempt**
* Holding: The court overturned the attempted robbery charges because Ds weren’t dangerously close to success since V was nowhere to be found. The opportunity to commit the crime never came. We wouldn't charge someone with attempted murder if he set out to kill but couldn't find the victim

### *McQuirter v. State* (1953 AL CoA)

* Facts - D, black man, convicted of attempted assault for following a white woman around based on confession to police, although D claims he wasn’t following her at all. D convicted of attempted assault.
* Holding - Intent is a question of fact for the jury to decide based on facts/circumstances and social customs based on race. Conviction of attempted assault affirmed

### *United States v. Jackson* (1977 2d)

* Facts: D’s planned to rob a bank but aborted first attempt because the bank was too crowded. D’s returned days later and FBI agents arrested D’s while driving towards the bank in a car filled w/ guns and supplies. D’s convicted of attempted robbery
* Rule: In order to convict of attempt, **acts must constitute a substantial step and corroborate criminal purpose**
* Holding: Convictions affirmed. D's were seriously dedicated to commission of a crime and passed stage beyond preparation. Would have assaulted bank had they not been dissuaded by other factors. Either type of conduct alone is a substantial step under MPC and corroborated their criminal purpose

### *US v. Harper* (1994 9th Cir.)

* Facts: ATM bill trap case. D's purposely cause ATM to malfunction so they can rob it when repair man shows up. While waiting, they are apprehended by police and charged with attempted robbery
* Rule: **Must take a step of such substantiality that, unless frustrate, the crime would have occurred**
* Holding: Convictions overturned. Necessary stage of crime had not been entered. Major difference between causing something that will result in the appearance of a potential victim (ATM repairman) and actual moving towards victim with gun and mask
  + Would MPC follow? I don't think so. Luring and waiting for person against which crime would be committed are each "substantial acts" under the MPC. As is possessing instruments necessary to commit the crime. Seems corroborative of criminal purpose

### *US v. Joyce* (1982 8th Cir.)

* Facts: D negotiating cocaine price but refused to buy the cocaine when he grew suspicious at the sellers reluctance to reveal the contents of the packaging to verify it was cocaine. Seller was actually undercover officer and D was subsequently arrested for attempting to purchase with intent to distribute
* Holding: Conviction overturned. Intention was abandoned prior to commission of substantial step necessary to effectuate the purchase. It was merely a preliminary discussion. Motive for refusing to commit substantial step is irrelevant (doesn't matter if he was tipped off)
* Appropriate application of MPC?
  + Could make an argument that this was solicitation to have seller commit crime and appearing at place are both substantial acts that,when viewed together, are corroborative of criminal purpose

### *United States v. Howard* (2014 5th Cir.)

* Facts: D negotiated sex with minors, told the mother to perform sex acts on them and take birth control in preparation. Failed to book flight
* Holding - Court upholds attempt conviction. D takes substantial step when he instructs preparation for the crime. Definite plan to travel not itself necessary to constitute a substantial step
* Appropriate application of MPC?

## Solicitation

* Solicitation = Inchoate offense of requesting another person commit a target crime
  + Courts differ over question whether solicitation itself constitutes an attempt by the person making it
    - Some states hold solicitor cannot be convicted of attempt because it is not his purpose to commit the offense personally
* **MPC 5.02**
  + (1) D requests, commands, encourages a person to attempt or commit a crime
  + (2) Failed communication is still sufficient for solicitation
  + (3) Withdrawal is defense if D voluntarily thwarts the target crime

### *State v. Davis* (1928 MO)

* Facts - D and accomplice planned to kill accomplice’s husband to collect life insurance payment. D asked person (undercover cop) to get ex-convict to kill the husband; D gave person photos of the husband and paid him $600. D convicted of attempted first-degree murder, but D argued no attempt because no overt act toward committing the crime beyond mere preparation
* Holding - **Mere solicitation, unaccompanied by an act directly toward commission of crime, is not overt act constituting attempt**. Evidence only shows verbal arrangement and communication of instructions. These alone are mere acts of preparation. Undercover cop obviously had no intention of following through, nor did he take steps. Thus, no attempt

### *US v. Church* (1991 US Military Court)

* Facts - D hired person (undercover officer) to kill his wife, giving the person details. Person faked killing and D paid him. D convicted of attempted first-degree murder, but D argued no attempt because no overt act toward committing the crime beyond mere preparation
* Holding - Detailed planning qualifies as overt act towards commission of a crime (court openly rejects holding in *Davis*)
  + Detailed instructions and payment constituted substantial step. Court can't conceive of anything more that D could have done to effectuate his intent aside from committing the murder himself
* NOTE: D’s conviction reduced from attempted first-degree murder to attempted second-degree because no death (CL idea that punishment should be proportionate to resulting harm vs. MPC idea that punishment should be proportionate to D’s culpability)

## Impossibility

* Impossibility is concerned with the question of: What if you attempt a crime, but it’s a literal impossibility that you could complete the attempted crime?
  + Utilitarian/subjective not as concerned if it’s impossible. You have the requisite mens rea, so you should be punished
* **Pure Factual Impossibility** = No defense
  + Under the attendant circumstances, though unaware at the time, there was no way that D could have possibly succeeded in carrying out his intended criminal action. Example: Attempt misfires do to poor aim, inadequate weapon, unloaded gun, etc.
  + Example: D shoots a bed thinking he’s going to kill the victim. Full mens rea, but no one was in the bed. Attempted murder?
    - Yes – this is a factual impossibility. We’ve got full mens rea, full actus reus, and only luck that no one was in the bed. Most states will treat this as attempted murder
* **Pure Legal Impossibility** = Valid defense
  + True legal impossibility - Person engages in activity they believe to be prohibited but no such crime actually exists
  + Example: Same situation, but this time the person is in the bed. D shoots, hits the victim but it turns out the victim had been dead for hours previously. Attempted murder?
    - No – it’s legally impossible to murder a dead person. Though there’s some debate
    - However - you can see how you might be able to spin this into a factual impossibility
* **Hybrid Legal Impossibility** = Usually not a defense - Mislabeled factual impossibility
  + This situation exists if the actor’s goal is illegal, but commission of the offense is impossible due to factual mistake (and not simply a misunderstanding of the law) regarding the legal status of some attendant circumstance that is an element of the charged offense
  + Example - D receives recovered stolen property believing it was stolen
  + What distinguishes these cases from simple ‘factual impossibilities’ however, is that these factual mistakes relate to legal status of the defendant’s conduct
  + Ultimately, hybrid legal impossibility cases may be reasonably be characterized as factual impossibility…
    - For example, if D shoots a corpse believing it to be human, D would say it’s legal impossibility – you can’t murder a dead person
  + MPC approach has influenced the debate – If the factual circumstances had been as D believed – that the victim had been alive – he would be guilty of murder
  + Most states have abolished hybrid legal impossibility on the grounds that it sure looks like factual impossibility. Objectivists/retributionists say that if something is legally impossible, there’s no actual harm to society – subjectivists who care about mens rea disagree – these are people with malicious intent that are dangerous to society

### *People v. Jaffe* (NY 1906)

* Facts - The Defendant sought to purchase what he believed was stolen property – twenty yards of cloth. In fact, the property had lost its character as “stolen” by the time it was offered to Defendant for purchase, having been restored to its rightful owner and made available to him through their agency. Though Defendant believed he was purchasing stolen property, his belief was in error. D charged with crime is receiving stolen property
* Issue - Improper to convict of attempted stolen property?
  + Defense argues that this was a legal impossibility – there is no crime of possessing non-stolen property (although you could argue it’s factual impossibility, is it stolen or not)
* Holding - Conviction overturned
  + Court distinguishes this from pickpocket cases in which it is not necessary for there to be something valuable in pocket to be subject to larceny. The pickpocket cases are frustrated only be the fact that there’s no money in the pocket. The frustration here is the property turns out not be stolen. The latter would not have been a crime if successfully consummated, hence it was legally impossible
    - This is factual v. legal impossibility
    - However, couldn’t the State say that this is just like the pickpocket? In the same way that there was no money in the pocket, these were not stolen
      * One could argue that there’s no distinction between this and factual impossibility, which is not a defense
    - The court looks at whether the attendant circumstance is really a stolen property. It’s a legal status question

### *People v Dlugash* (1977 NY)

* Facts: Man shoots victim in the chest a few times. A few minutes later, the Defendant shoots the victim in the chest and head again. The man is convicted of attempted murder because it was unknown whether or not the victim was alive at the time the Defendant shot him. If he was dead, then an attempted murder charge would be bogus – matter of impossibility. If he was alive, he could be convicted of murder / attempted murder. The facts are heavily disputed
* Issue: We know that there’s full mens rea, but the question is whether there is attempt?
* Court recognizes general rule that legal impossibility is a valid defense whereas factual impossibility isn't
* Court adopts **MPC** approach - **It is an attempt if the crime would have occurred if the attendant circumstances were as you thought them to be**. Virtually eliminates any impossibility defense - **legal or factual impossibility under attendant circumstances are irrelevant if D intentionally engages in conduct tending to effect commission of crime**
* Under MPC standard, there is sufficient evidence in record from which jury could conclude that D believed V was still alive, it is irrelevant whether V was still alive as a matter of fact at the time D fired the shots

### *United States v Berrigan* (1973 3rd Cir.)

* Facts - Father Berrigan was imprisoned for being a Vietnam War resister. A federal statute made it a crime to send and receive letters in prison without the warden’s consent. Father Berrigan was doing just that, thinking that he was acting in violation of the warden’s consent. In reality, the warden knew the whole time and allowed the letters to go through
* Issue: Any basis for an attempt charge?
  + Berrigan argues that I cannot be guilty of this crime because the warden knew about it. That’s right, but the state argues that it’s an attempt
* Holding - No attempt, this is a legal impossibility because “Legal impossibility is said to occur where the intended acts, even if completed, would not amount to a crime. Thus, legal impossibility would apply to those circumstances where (1) the motive, desire, and expectation is to perform an act in violation of the law; (2) there is intention to perform a physical act; (3) there is a performance of the intended physical act; and (4) the consequence resulting from the intended act does not amount to a crime”:

### *United States v Ovideo* (5th Cir. 1976)

* Facts: Drug dealer was contacted by an undercover agent for the sale of heroin. It turns out the sale was of fake heroin and the dealer was arrested for attempted sale. On appeal, the court vacated the conviction
* Holding: The court chose to reject the distinction of legal impossibility and factual impossibility because the court didn’t think they helped. Technically you could convict here under a factual impossibility standard (i.e. it didn’t matter that it was fake) but not under legal impossibility. The court also rejects the MPC approach because it amounts to prosecuting mere thoughts
  + “Thus, we demand that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant’s conduct as criminal in nature”
* Related Hypothetical
  + Setup: Two hunters both kill deer on Oct. 15. It turns out that hunting is permitted on that day. It is illegal to hunt before Oct. 1st. One of them thought it was Sept 15, thinks he’s acting illegally. One way to think about it is that he’s just wrong about the attendant circumstances, the facts. The other person knows it’s Oct. 15, but think it’s only permissible in November. This seems to be legal mistake/legal impossibility
  + One is clearly factual impossibility and other is legal impossibility. Yet, under the doctrines, the first person would be punished, but not the second. Why do we distinguish? The situation seems to be the exact same thing, the same wrong
    - Perhaps this is why the MPC approach is better – which would consistently hold them both culpable because of their mens rea

# Group Criminality

* Two bases of complicity fore acts committed by others are to be considered
  1. A person may be held accountable for the conduct of another person if he assists the other in committing an offense. This is called **accessory or accomplice liability**
  2. In the great majority of jurisdictions, a person who has conspired with another may be held accountable for the conduct of his-co conspirator who commits a crime in furtherance of their agreement. In this case, the mere existence of a **conspiracy** is sufficient to justify liability for the other’s conduct; assistance in commission of the crime is not required.

## Accomplice Liability

* Mens Rea of Accomplice Liability
  + The problem of mens rea for complicity is complicated by the presence of two levels of mens rea: (1) that required of the accomplice (the helper or encourager) and that required of the principle (the actual perpetrator). However, the mens rea of the accomplice is distinct
  + A true purpose, often called a **specific intent**, is generally required to hold a person liable as an accomplice; that is, he must actually intend his action to further the criminal action or conduct of the principal”
    - However, most courts agree that this specific intent is only required for the conduct he engages in, whereas the result only requires same mens rea needed to satisfy the substantive offense (i.e. must intend to aid in something reckless, but need not specifically intend to aid in crime of recklessness/negligence)
    - As shown below, this specific intent requirement has been incorporated into the MPC and adopted in state statutes
* MPC Approach - requires actor have "the purpose of promoting or facilitating" the commission of the crime
  + (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
  + (2) A person is legally accountable for the conduct of another person when:
    - (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or
    - (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or
    - (c) he is an accomplice of such other person in the commission of the offense.
  + (3) A person **is an accomplice** of another person in the commission of an offense if:
    - (a) **with the purpose of promoting or facilitating** the commission of the offense, he
      * (i) **solicits** such other person to commit it, or
      * (ii) **aids or agrees or attempts** to aid such other person in planning or committing it, or
      * (iii) having **a legal duty to prevent** the commission of the offense, **fails to make proper effort so to do**; or
        + Example: Most courts agree that parents can be liable under an aiding and abetting theory for a crime committed by a third party when they fail to protect their children from abuse
    - (b) his conduct is expressly declared by law to establish his complicity
  + (4) If a specific result is an element of the target crime, D acts with “**the kind of culpability, if any, with respect to that result that is sufficient for commission of the offense**” \* Example: Where 3rd degree murder is satisfied by gross recklessness, accomplice that aids with same level of recklessness with respect to the result needed can be held legally accountable as an accomplice
  + Recap:
    - Actus reus for acting as an accomplice
      * Aiding or soliciting is enough, omissions can sometimes be if based on legal duty
      * D’s mere presence is not sufficient to establish actus reus
    - Mens rea for accomplice liability
      * D must act with the purpose of promoting/facilitating target crime OR
      * D must act with same level of culpability with respect to result that is sufficient for commission of that offense
* Substantive Crimes of Facilitation
  + Majority in *Rosemond* suggests that if the crime is already in progress when the defendant first becomes aware of the use of a gun, the defendant may not have sufficient notice to be held responsible for it. The Dissent argues that the defendant should be liable as long as he is aware of the gun and persists with the drug deal with that knowledge”
  + One possible way to mitigate in this regard is to just make criminal facilitation a stand-alone crime all the time and make it a lesser penalty than the crime aided
  + Often times, states have created special statutes making aiding and abetting certain crimes spelled out, including: Selling Guns to Juveniles, Material Support to Terrorism, Money Laundering
* Accomplice Liability for Non-Specific Intent Crimes
  + There is a general rule that accomplice liability requires specific intent. But specific intent with respect to which elements. McVay and Roebuck make clear that there is a distinction between conduct elements and result elements. These cases recognize that **for accomplice liability, the accomplice must have specific intent to further the underlying conduct committed by the principle, but for the result, he need only have the mens rea required for the result element of the substantive offense**
* Attempt v Complicity under MPC
  + Result
    - With attempt, MPC requires D have the purpose to produce the proscribed result or the belief that his conduct will cause the result, even when lesser mens rea (e.g. recklessness) would satisfy completed offense. However, for D charged with accomplice liability in an offense, the required mens rea for resulting harm is not purpose, but only the mens rea required for the commission of the charged offense
  + Attendant Circumstances
    - MPC is less demanding with attempt than with complicity when it comes to attendant circumstances. The mens rea for attendant circumstances in cases of attempt is not purpose, but only the mens rea required for the completed crime”. Thus, under MPC, attempted statutory rape can be satisfied without any suspicion that victim was underage
* **Natural and Probable Causes Doctrine**
  + Addresses the question of what happens if a different crime occurs than the one the accomplice intended to help with occurs
  + Holds that if the result is a “natural and probable” consequence in the “ordinary course of things,” then the accomplice can be found liable. In other words, a “person encouraging or facilitating the commission of a crime [may] be held criminally liable not only for that crime, but for any other offense that was a natural or probably consequence of the crime aided and abetted
* Relationship Between Liability of Parties
  + Feigned Principal Approach
    - It is frequently stated that, to be an accomplice, a person “must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, but the accomplice musts also share in the same intent which is required for commission of the substantive offense.
    - What happens when a police officer or private person joins a criminal endeavor as an “accomplice” and feigns a criminal intent in order to obtain incriminating evidence against the primary party or ensnare the other in criminal activity
  + Vaden Principal Approach:
    - If there is a crime but there is also a legal barrier to prosecuting the principal (i.e. immunity, self-defense, etc...) the accomplice does not benefit from the unique defense. It does not transfer to the accomplice because the accomplice has his own mens rea and actus reus
    - Notice how this is different from Hayes. In Hayes there was also no underlying crime. However, *Hayes* court held that you can’t be an accomplice to a principal not committing a crime, regardless of mens rea
      * These could be reconciled. In *Hayes*, there was no actus reus in the underlying crime - no actual criminal act took place. However, argument can be made that crime took place in *Vaden*, but qualified immunity was simply an defense/justification which relieved principal of any liability
    - Most modern codes carve this out???
* Acquittal on the Basis of a Defense
  + If the principle is acquitted on a defense, does that transfer to the accomplice? We know that the Vaden Principle doesn’t transfer immunity, but what is the general rule?
    - If the acquittal is a Justification:
      * The defense passes to the accomplice. For example, recognition of self-defense for the principle implies that no crime has occurred, or even that positive good has resulted. In absence of wrongdoing by the principle, like in Hayes, the accomplice can’t be charged
    - If only a partial justification (e.g. unreasonable self-defense)
      * Accomplice can still be liable… see below hypo
    - If the acquittal is an Excuse...
      * When the primary party is acquitted on the basis of an excuse (e.g. insanity) his acquittal should not bar a successful prosecution of a secondary party to whom the excuse does not extend. An acquittal on the ground of an excuse means that the actions of the primary party were wrongful, but that he was not responsible because of a personal excusing condition
  + Innocent Agent Doctrine
    - There is no such thing as accomplice liability if a person forces another person to be the agent or instrument of the crime
    - So if Z comes up to you and forces you to commit a crime or he kills you. If you commit the crime, you obviously have a duress defense
      * The way the law treats this situation is to say: There is NO accomplice liability. Z’s guilt is not derivative from your actions. Rather, it is direct liability situation – your actions transfer to Z because you are simply a forced instrument of criminality

## Accomplice Liability - Cases

### *Hicks v. United States* (1893)

* Facts: Two Native Americans appear to engage in dispute with V. One of the men raises rifle at V several times. Other man (D) overheard yelling at V "take your hat off and die like a man" where upon the other man shot V to death. Two men rode off together. D convicted of encouraging and abetting a murder
* Issue: Was it proper to instruct jury that if deliberate/intentional use of words had effect of encouraging killing of another man proper, we can infer intent and D is responsible?
* Holding:
  + No. This phrase was not enough to infer mens rea. **Use of the words must be intended to encourage the act.** The jury instructions were defective insofar as they assumed intent to encourage could be inferred from the intentional use of certain words (regardless of how he intended to use the words and thus regardless of mens rea)
  + **While it is true that mere presence, but non-participation due to lack of necessity, can be interpreted as aiding in the crime, this only applies in instances such as where there is a previously discussed criminal conspiracy**. No evidence of such conspiracy here. Conviction reversed

### *State v Gladstone* (1970 WA)

* Facts: Defendant Gladstone was approached by an undercover officer looking to nab him for selling marijuana. Gladstone said he could sell any to him at the time, but suggested he go and check out his friend Robert Kent. The undercover officer then went to Kent and bought marijuana. Kent was arrested, but then Gladstone was charged with abetting the sale of marijuana despite the fact there was no evidence of any communication between the parties
* Rule: **In order to aid and abet, D must associate himself in some sort with the venture, participate in it as something he wishes to bring about, and that he seek by action to make it succeed**
* Holding: Court reverses the conviction
  + Vital element - a nexus between the accused and the party he is accused of abetting in the crime--is missing
  + Nothing from which we can infer that had any communication with seller, that he was encouraged/counseled/commanded/hired to refer potential buyers to seller
  + Even without prior agreement/communication, can still be guilty if coming to aid of a robber and knowingly assisting him in committing the crime
    - This is not happening here. Merely described the seller as someone who may possess weed. Had no interest in whether buyer actually obtained it

### *Rosemond v United States* (2014)

* Facts: Rosemond (D) took part, with two others, in an attempted drug deal. The buyer, upon being given them to inspect, grabbed the drugs and ran. Someone in D's party, though unclear who from the evidence, fired shots. Rosemond was charged with aiding and abetting the use of a gun in connection with a drug-trafficking offense. The jury convicted Rosemond. CoA affirmed
* Issue: Was jury properly instructed when told to return guilty verdict if "(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and (2) the defendant knowingly and actively participated in the drug trafficking crime.”
* Rule: **Intent requirement is satisfied when person actively participates with full knowledge of the circumstances constituting the charged offense**
* Holding: Conviction is affirmed
  + Under the common law and MPC, mere knowledge of an offense does not create culpability - must be purpose to aid in the offense
  + But in this case, the SCOTUS says that advance knowledge was enough. Advance knowledge had a weapon that could be used in the commission of drug deal and actively participating in it was enough to impute accomplice liability
    - Example: If friend pulls out a you didn’t know he had, then no liability. However, advance knowledge of the gun would be enough
* Notes
  + Many states have adopted the advanced knowledge standard as qualifying for complicity
  + Does this mean that knowledge is the actual standard after all? Is purpose the same active participation knowing the consequences? Is there a clear line between incidental facilitation and active participation?

### *State v McVay* (1926 RI)

* Facts: The captain and his crew were charged with manslaughter arising from criminal negligence resulting in the explosion of a boiler on a ship, which killed multiple passengers. Ds told steamboat captain to use boat despite knowing the engine was unsafe
* Issue: Is it possible to hold someone as an accessory to a crime when they did something negligent before the fact (i.e. before the actual crime?)
* Rule: It is possible to be an accessory to manslaughter or negligence before the fact
* Holding:
  + **There is no inherent reason why, prior to the commission of such a crime, one may not aid, abet, counsel, command, or procure the doing of the unlawful act or of the lawful act in a negligent manner**
    - The violation of the duty was intentional in the sense that it was a choice among possible courses of action. D is charged with full knowledge of that duty and of the fact that the boiler was unsafe, yet procured captain to act in a grossly negligent manner (i.e. **D knew of the duties yet purposefully got them to ignore it**)
  + “A jury might find that defendant Kelley, with full knowledge of the possible danger to human life, recklessly and willfully advised, counseled, and commanded the captain and engineer to take a chance by negligent action or failure to act”

### Commonwealth v Roebuck (2011 PA)

* Facts: D helped helped orchestrate the events, even though he didn't participate in the highly reckless murder. Helped lure the victim to the room. But had no intent that the victim be killed. D convicted as an accomplice to 3rd degree murder
* Defense Argument: “There is no rational legal theory to support accomplice liability. Accomplice liability attaches only where the defendant intends to facilitate or promote an underlying offense; third-degree murder is an unintentional killing committed with malice; therefore, to adjudge a criminal defendant guilty of third degree murder as an accomplice would be to accept that the accused intended to aid an unintentional act, which is a logical impossibility”
* Prosecution Argument: The accomplice liability readily pertains to third degree murder because it is the shared criminal intent motivating the underlying conduct (here, designing a reckless/dangerous alteration) which establishes the requisite criminal liability
* Rule: **As long as there is specific intent in the underlying conduct which lead to the result, intent component (and thus mens rea for AL) is satisfied**
* Holding: Conviction on basis of accomplice liability is upheld
  + The court accepts the prosecution argument, pointing to §2.06(4) of MPC
    - "Indeed, an accomplice to third degree murder does not intend to aid an unintentional murder; he intends to aid a malicious act which results in killing"

### *People v Russel* (1998 NY)

* Facts: Ds got into a shoot-out with each other. One stray bullet killed a victim bystander. Ballistics could not determine who’s gun the stray bullet came from. However, each defendant was charged with second-degree depraved murder under a theory that “each of them ‘intentionally aided’ the defendant of the fatal shot”, regardless of whom was the principal offender and who was merely and accomplice
* Holding - Court upholds the convictions; **multiple defendants can be charged with depraved indifference murder committed by only one defendant if each defendant intentionally aided the defendant who committed the murder**
  + “The prosecution was not required to prove which defendant fired the fatal shot when the evidence was sufficient that each defendant acted with the metal culpability required for the commission of depraved indifference murder, and each defendant intentionally aided the defendant who fired the fatal shot, even if it is impossible to identify that particular defendant”
  + Adequate proof that defendants acknowledged and accepted gunfight challenge prior to the shooting and thus acted with the required mental culpability
* Notes:
  + Causation not really an issue here because one of the Ds was clearly the but-for and proximate cause. The conviction of the other Ds derives not from causing the result, but by acting as accomplices of whoever caused the result

### Rudovsky Email

Where an offense has more than “conduct” elements, the issue is what level of mens rea will be required beyond the intent or purpose to engage in that conduct. With respect to results, both McVay and Roebuck are good examples of how courts (and the MPC) address this issue in homicide cases, where of course, the result is an element of the crime. In both cases the alleged accomplice could be found to have engaged in the underlying conduct (encouraging or ordering use of the boiler; luring victim to a certain location) but in both, at worst, the defendant risked the death of the victim, and had no intent to help kill or harm the victim. If specific intent or purpose to harm or kill was required, there could be no accomplice liability. These courts and MPC find that as long as the accomplice acted with the level of culpability required for the principal (e.g., recklessness) that is sufficient.

So how is the analysis different where the other element is not the “result” but an attendant circumstance? Perhaps the best example is Bowman (p. 718) where the defendant was charged as an accessory to statutory rape., which in NC is a strict liability crime, at least for the person who engages sexual contact with the underage person. Age is an attendant circumstance (not a “result”), and now the issue is whether someone who assists or the principal in having sex, but does not know that the other person was below the statutory age, is an accessory. This issue has divided the courts and the MPC took a pass on the question. I think Bowman is correct, as I don’t think it fair to hold one liable in effect on vicarious liability basis where he has no knowledge of this attendant circumstance. Of course, one could say the same for the principal. The same analysis is provided by the Gardner court (p. 718) where the issue was whether the accomplice had knowledge that the person to whom he helped to provide a firearm was a former felon.

Russell is not a clear case of conduct, result, or attendant circumstance, and I read it as another court following the division between intentional conduct (firing shots) and a mens rea of gross recklessness or malice given the huge risks that were created. And see the comment regarding Rosemond (p. 718) on the issue of whether the “knowledge” standard applies to the central conduct of the defendant or an attendant circumstance. I think it is better understood as a case on conduct mens rea (modified from strict purpose, given the context of the conduct and results).

### *People v Luparello* (1987 CA)

* Facts: Defendant sought to get information on his former wife, who had left him for another man. Defendant sought the aid of several friends to try to get info from a good friend of the husband named Martin. The friends ended up killing Martin. Defendant was charged with first degree murder under the natural and probable consequences theory. Luparello argues that the trial court improperly imposed “mens rea” upon him in the killing of Martin, as he did not share the killer's intent
  + One Plurality Opinion – "Jurisdiction requires a holding than aider and abettor or co-conspirer **is liable not only for those crimes committed by a co-felon which he intended or agreed to facilitate but also any additional crimes which are ‘reasonably foreseeable.’**"
  + Another Plurality Opinion – Concurs, but law needs to be changed because it is logically indefensible. We need be concerned about the fact that the contemplated crime was far less serious than the one committed. The lack of regard for this violates a policy in the criminal law not to hold people responsible for things that they did not intend to do an to punish in proportion to one's mental state

### *Wilcox v Jeffrey* 1951 (UK)

* Facts: Hawkins is a celebrated saxophone player. Mr. Curtis and Mr. Hughes, owners of a jazz club in Willesden, invited Hawkins to the United Kingdom to perform a concert. Although Mr. Curtis and Hawkins had applied for permission for Hawkins to land, their petition was refused. Wilcox was present when Hawkins landed at the airport. Despite the law, Hawkins came to the country anyway and a concert was arranged at the Princess Theatre in London. Wilcox purchased a ticket for the show and subsequently, wrote about that show for publication in his magazine.
* Issue: Wilcox never met Hawkins and simply benefited from his presence. Can he be convicted of encouraging the illegal performance of Hawkins simply by writing on that said performance?
* Rule: **Not Much is Required for finding of encouragement. Knowledge of unlawful act of a third-party without intervention in order to serve some personal interest is sufficient**.
* Holding: Wilcox's conduct was sufficient enough encouragement to sustain an accomplice liability. Wilcox knew he was here illegally (thus had the mens rea) and the court ruled the purchase of the ticket (not only the magazine article) was enough for accomplice liability. He was there for the purpose of reporting for his publication. Had he shown some evidence of protest, such as booing, then perhaps his conduct would not be viewed as aiding and abetting
* Notes
  + Begs the Question – This Seems Too Low of a Threshold
    - Could all the audience members be guilty of conspiracy
    - There’s no but-for causation. The encouragement didn’t seem to assist
  + Some offenses, such as dog fighting, hold spectators criminally liable for there mere presence at such events
    - New Bedford rape case saw two people acquitted of involvement in gang rape despite verbal encouragement while crime was on going
  + Speech has been criticized as basis for encouragement
    - Hard to determine true mental state thus difficult to infer what was intended

### *State ex rel. Attorney General v Tally Judge* (1894 AL)

* Facts: V seduces D's sister in law. D's brother in law go out to find and kill him. D goes to telegraph office and prevents message warning V of danger from getting through.
* Rule: Establishes and emphasizes that you don’t need to prove but-for causation. If an act MIGHT have encouraged or assisted, then that’s enough. Low threshold for encouragement.
* Quote: The assistance given, however, need not contribute to the criminal result in the sense that but for it the result would not have ensued. **It is quite sufficient if it facilitated a result that would have transpired without it. It is quite enough if the aid merely renders it easier for the principle actor to accomplish the end intended by him and the aider and abettor, though in all human probability the end would have been attained without it**”
* Notes:
  + As Tally and Wilcox make clear, it is not necessary to establish a but-for relation between the defendant’s action and the criminal conduct of another to establish accomplice liability. What is the justification for holding someone liable for a crime if it would have occurred anyway?
    - Doesn’t this contradict the Bedford Rape Cases?

### *State v. Hayes* (1891 MO)

* Facts: S proposed to P that P join S in the burglary of V’s store. S was unaware of the fact that P was a relative of V. With V’s approval, P agreed to the plan. S assisted P into the building, and took possession of property handed to him by P. Before they could leave the store, S got arrested for burglary and was convicted.
* Rule: **Where criminal liability derives from principal, regardless of intent, not an aider & abetter if principal doesn't satisfy elements of the underlying criminal act**
* Holding: The Court vacated the charge
  + While S had the full intent, P was the primary party doing the stealing: P committed the acts that arguably constituted the burglary
    - "Where overt acts going to make up the crime charged is personally done by D and with intent, his guilt is complete". However, D did not complete eery overt act. He never stepped foot into the store; he only assisted P. Thus, he did no crime regardless of his intent
  + S’s liability therefore had to derive from P
    - But P was not guilty of burglary because he entered the building with the express approval of the owner, his father, therefore he lacked the specific intent to commit a felony (theft, which requires specific intent to permanently deprive property)
  + So because P was not guilty of crime, S cannot be charged with accomplice liability because it is a derivative offense
    - To make D responsible for acts of P, they must have common motive and design. Clearly they did not
    - But S can probably be charged with attempt

### *Vaden v State* (1989 AK)

* Facts: Law enforcement received a tip that Douglas Vaden (defendant) was using illegal hunting methods while providing guiding services to hunters. John Snell, an undercover agent from the Alaska Department of Fish and Game, posed as a hunter, asking Vaden to act as a guide. During the hunt, Snell shot and killed four foxes from Vaden’s aircraft using a shotgun provided by Vaden. At the time, fox-hunting season was closed
* Rule: **A justification defense (e.g. qualified immunity) does not transfer from principal to accomplice. The fact that principal is not guilty of underlying crime does not absolve accomplice of aiding and abetting**
* Holding: The majority refused to follow Hayes and upheld the conviction. A justification defense that is available to an undercover agent for the commission of a crime is not transferable to the agent’s accomplice
  + In cases involving accomplice liability, the principal actor does not need to be convicted or even prosecuted in order for the accomplice to be found guilty. Therefore, the accomplice’s intent is the central issue, and the defenses of entrapment and public authority justification, which focus on an undercover agent’s state of mind, may not be transferred to the accomplice.
* Dissent:
  + It is improper for the police to personally engage in criminal conduct for the purpose of securing convictions of accomplices to crimes - "the act of a feigned accomplice may never be imputed to the targeted D for purposes of obtaining a conviction"

Some final, challenging hypos:

* Modern code anticipates defense like the one in *Hayes*
  + Attempt under 5.01 (instead of 2.06)

### Acquittal Hypotheticals

* Hypothetical #1 - Principle is acquitted, but Accomplice is Not
  + Setup: Principle is acquitted. Accomplice argues that as a matter of law, if the principle is not guilty than the accomplice can’t be guilty
  + SCOTUS says that it’s up to jury discretion. It can be tried again, the fact that one jury found the principle not guilty doesn’t mean that the accomplice doesn’t necessarily benefit from the verdict if the prosecution can convince another jury that the principle is guilty AND so to the accomplice
    - There might be a collateral estoppel if this was a civil case. But like with Vaden, you can’t
* Hypothetical #2 - Can the Victim be an Accomplice to His Own Injury?
  + Setup: Principal is charged with statutory rape. Defense is that the victim told me she was 18, but it turned out she was under 16. Principal is clearly liable, since it’s strict liability crime
  + Question: Can the girl be prosecuted that she was an accomplice for telling her that she was 18?
  + Generally the law says a victim cannot be viewed that she’s an accomplice. But why does this matter – the D may not have committed the crime if she didn’t say. Most courts kick this to the legislature – if they want to create an immunity for the victim, then that’s their prerogative
* Hypothetical #3 - Severity of Accomplice's Crime
  + Question: Can the accomplice be found guilty of a crime more serious than the principle?
  + Answer: No
    - Straight forward application of derivative liability. Even if the accomplice has a higher level of mens rea the most they can be punished for is the level of crime the principle commits
* Hypothetical #4 - What if the Principle on has a Partial Justification?
  + Setup: If a principle kills in an unreasonable belief of self-defense (in most states if your killing is unreasonable self- defense, but self-defense nonetheless, you get manslaughter instead of murder)
  + Question: What can an accomplice get in this situation?
  + Answer: The accomplice can get MURDER not MANSLAUGHTER because it’s not a full justification. Impartial Self-Defense mitigation cannot benefit the accomplice. It’s hard to square with the above hypo.

## Conspiracy

* The Actus Reus of Conspiracy
  + Conspiracy is typically defined as an agreement by two or more persons to commit a crime, unlike accomplice liability which is satisfied when accomplice facilitates the crime regardless of prior agreement of such facilitation
  + Actus reus of the offense is the agreement itself. It’s easy to get conspiracy if the agreement is recorded somehow, but rarely does evidence exist that explicitly shows conspiracy. Thus, courts need to infer conspiratorial agreement from circumstances surrounding the commissions and separate acts of the accused co-conspirators
* Overt Act Requirement? Conspiracy = (Agreement) + (Some Overt Act in Furtherance of it)
  + Conduct can be punishable as a conspiracy at points much further back in the stages of preparation than the point where liability begins to attach for attempt
    - Example: 18 U.S.C. §371 - "If one or more persons conspire to commit any offense and one or more such persons do any act to effect the object of the conspiracy"
  + Most statutes across the country require an agreement & some act in furtherance of it. The thought is similar to the requirement for attempt. But for conspiracy, a lot of these statues require a lot less of an overt act than for attempt
    1. Attempt = Requires much more substantial overt act
    2. Conspiracy = Doesn’t require much
  + Example: A and B say “let’s rob a bank” and B goes and Googles local banks. This is usually enough of an overt act. Prosecutions rarely fail on this ground
  + Other states require a more substantial overt act and Maine even requires same standard needed for attempt
* Mens Rea of Conspiracy
  + MPC goes beyond mere knowledge by requiring purpose. Thus, you need to prove two things:
    1. **Knowledge of Illegal Conduct**
    2. **Intent to Facilitate that Illegal conduct**
  + Corrupt Motive - Old common law requirement that has pretty much been rejected in modern law
    - *Powell* Doctrine - Conspiracy must be animated by a "corrupt" motive or an intention to engage in conduct known to be wrongful
  + Attendant circumstances - Mistake of fact
    - Should mistake of fact to some attendant circumstance act as defense to conspiracy if it wouldn't be recognized as defense to underlying crime?
      * *Freed* court considers facts which increase the gravity of the offense in answering this question. Agreement to acquire hand grenade is enough here, even if D was ignorant that grenade was unregistered (this was not an act innocent in itself)
      * Where act is truly innocent, MPC commentaries seems to leave this up to the courts
* Conspiracy as a Form of Accomplice Liability
  + Most jurisdictions follow ***Pinkerton* liability doctrine - Vicarious liability for substantive offenses committed by co-conspirators in furtherance of the conspiracy**
    - Some extend even further to offenses that were reasonably foreseeable as a consequence of the conspiracy, like in *Bridges* and *Alvarez*
  + **Arguments in favor of *Pinkerton* Standard**
    - Counter to Sophistication: “The ever-increasing sophistication of organized crime presents a compelling reason against abandonment of Pinkerton. Complicated and highly refined stock frauds….and narcotics conspiracies represent a substantial and ever-increasing threat to society justifying retention of the Pinkerton doctrine. Empirical evidence has repeatedly demonstrated that those who form and control illegal enterprises are generally well insulated from prosecutions” if not for conspiracy statues
    - Difficult to Apprehend: “Where individual members of conspiracies are difficult to apprehend, conspiracy law makes it possible to inflict costs on them indirectly by punishing other members who are more accessible.” Punish lower level drug dealers to force the more difficult to find high level managers to take on greater risk
    - Get People to Squeal: Get low level criminals to squeal by cutting deals on conspiracy charges
  + **Arguments against *Pinkerton* Standard**
    - Repugnant to Our System: Not offensive to permit conviction of conspiracy to stand on the overt act of another, for the act merely provides corroboration of the existence of an agreement which has reached point where it poses threat to society. However, it is repugnant to our system of jurisprudence, where guilt is generally personal to the defendant…to impose punishment, not for the socially harmful agreement to which the defendant is a party, but for substantive offenses in which he did not participate
    - Violates Individual Criminal Liability: “Violates the principle of individual criminal liability in a context where ‘proof is often notoriously uncertain’ because ‘convictions for conspiracies themselves often rest on dubious evidence”
    - MPC Takes Different Approach: “The MPC also rejects Pinkerton, imposing accomplice liability on conspirators for the substantive crimes of their co-conspirators only when the strict conditions for accomplice liability are met”
  + Contrasting *Pinkerton* with Accomplice Liability in *Luparello*
    - Traditional accomplice liability requires proof of intent to promote/facilitate the action, thus theory in *Pinkerton* (and *Bridges* to an even greater extent) may represent significant expansion of liability
    - However, we saw a similar such expansion of accomplice liability in *Luperello*
* MPC approach to defining scope of conspiracy
  + D liable for conspiracy with another person if he knows that his co-conspirator has conspired with other persons, even if D does not know other person’s identity
  + D liable for one conspiracy involving a string of multiple crimes so long as they are the object of the same agreement or continuous conspiratorial relationship

### *Perry v State* (2014 FL) – Conspiracy & Parallel Action

* Facts: Perry let known sex offender sleep in same bed with 8 year old daughter. Sex offender molested daughter on numerous occasions. Perry charged with conspiracy and aiding abetting for the sexual assault of her daughter. Accomplice liability was sustained – it was proven Perry helped with the sexual assault (i.e. helped unlock the doors) but was their conspiracy?
* Rule: Fact finder may infer the agreement from the circumstances; direct proof is not necessary
* Holding: No, the court said that Perry may have known about the illegal act, but simply knowing is not enough or conspiracy
  + Perry indicates that a key inquiry in cases involving multiple parties to crimes is to determine whether the parties are acting together based on an agreement or whether they are acting independently, albeit in parallel with one another
    - No evidence in the record to establish the existence of an agreement or intent to conspire
  + When there is independent, parallel actions occurring – there is no conspiracy
* Notes
  + Some jurisdictions -- > will say that simply knowing about another’s criminal plans and not doing anything counts as implicit conspiracy
* *Interstate Circuit City v Dallas* – Inferring Conspiracy
  + SCOTUS case where prosecutors alleged that movie distributors entered into a conspiracy among themselves not to distribute movies unless they all charged 25 cents. This way they could all drive up prices
  + SCOTUS found that we can infer conspiracy here because it would be against each individual business distributor to charge 25 cents without this agreement (because otherwise they would be undercut by lower prices)
  + They wouldn’t engage in this conspiracy but-for this conspiracy (game-theory element to this factual scenario)

### *People v Lauria* (1967 CA) – Mens Rea for Conspiracy

* Facts: Telephone answering services that take messages for missed calls is owned and operated by D. The prosecutor’s theory was that D conspired because he knew that a prostitution ring would use this service to get their assignments
* Question: Under what circumstances does a supplier become a part of a conspiracy to further an illegal enterprise by furnishing goods or services which he knows are to be used for criminal purposes?
* Rule: **Both element of knowledge of illegal use of goods AND element of intent to further that use must be present for conspiracy**
  + **Intent of supplier, who knows of criminal use to which his services are put, to participate in the connected criminal activity is established by**
    1. **Direct evidence that he intends to participate OR**
    2. **Through an inference that he intends to participate based on:**
       1. **His special interest in the activity OR**
       2. **The aggravated nature of the crime**
* Holding: Court upholds finding that absolved D of conspiracy charge
  + Lauria indisputably knew that some of his customers were prostitutes, thus this case hinges on the finding of intent
  + Since direct proof is lacking, intent to further criminal purpose must be inferred from circumstances and the sale itself. Court identifies different ways intent can be inferred:
    1. Intent may be inferred from knowledge, when the purveyor of legal goods for illegal use has acquired a stake in the venture
    2. Intent may be inferred from knowledge, when no legitimate use for the goods or services exits
    3. Intent may be inferred from knowledge, when the volume of business with the buyer is grossly disproportionate to any legitimate demand, or when sales for illegal use amount to a high proportion of the seller’s total business.
  + However, there are also cases in which there was no personal stake or special interest, yet liability was held on the sole basis of knowledge due to the nature of the criminal conduct
    - Duty to take positive action to dissociate oneself from criminal activities is far stronger/compelling for serious crimes
    - Derives from societal duty imposed on all to suppress heinous crime
  + In any case, there was no evidence in record that D took any direct action to further/encourage/direct activities nor circumstances that would suggest special interest in doing so. Likewise, underlying crime is non-violent misdemeanor

### *Pinkerton v United States* (1946)

* Facts - Ds were brothers who lived a short distance from each other on farm. Brothers were indicted for various violations of IRC. A jury found D1 guilty on nine of the ten substantive counts and on a conspiracy count, and found D2 guilty on six of the ten substantive counts and on the conspiracy count. Each brother was fined and sentenced to terms of imprisonment. No evidence that D2 directly participated in the substantive offenses - he was in prison for a part of the period over which the offense was committed
* Question - Can D2 be found guilty of substantive offenses if it was found that he was party to unlawful conspiracy and the substantive offenses were committed in furtherance of it?
* Rule - **In an ongoing conspiracy, the overt act of one co-conspirator may be the act of all conspirators without any new agreement specifically directed to that act**
* Holding - Yes, D2 was part of continuous conspiracy and can be held vicariously liable for substantive offense
  + No affirmative action by D2 to establish his withdrawal from the conspiracy. Until he does some act to disavow or defeat the purpose, he is still offending for as long as the offense has not been terminated
  + When there is conspiracy to commit illegal acts, criminal intent to commit the substantive offenses has been achieved, regardless of who actually commits the illegal substantive offense. It was formed for purpose of executing the act and the act is done in execution of the enterprise
    - This is the same underlying principle for holding responsible individuals who command/counsel another to commit a crime
* Dissent
  + No evidence that D2 was involved in these offenses. He was in prison for a majority of this time
  + Result of the majority's holding is vicarious criminal liability is equally broad or broader than vicarious liability for acts done by co-partner in course of crime
* Lecture Commentary:
  + In the absence of providing assistance or encouragement, there is probably no liability here for aiding or abetting - there is no duty to prevent the crime
    - Prosecution has a different theory - D2 had more than just knowledge, but initially agreed that they would work together. Court says that this is enough to hold him vicariously liable. Once a conspiracy is established, you can be held responsible for any acts in furtherance of it, regardless if your lack of participation is insufficient to constitute aiding and abetting
  + Foreseeability applied to the facts of *Pinkerton*
    - Hypothetical - Assume that the facts are the same, but while D2 is in jail, D1 acts in furtherance of the conspiracy. During one of the acts, he encounters and assaults a police officer. Is D2 vicariously liable?
      * The offense here is difficult to view as "in furtherance" of the conspiracy, but rather something that simply arose in the process of executing it. It also clearly exceeded the scope of the agreement. However, the question is whether or not D2 could still be vicariously liable on the grounds that such an act was reasonably foreseeable as the probable result of the conspiracy. In argument could be made for both sides in that question
  + Exceptions that discharge this liability:
    1. You can withdraw from a conspiracy through some affirmative act, though this must meet a high standard
    2. End of conspiracy - the offense by a co-conspirator occurred after what was conspired about had already been accomplished

### *State v. Bridges* (1993 NJ)

* Facts - Ds get into a fight with a guest at the part, leave, and come back with friends who brought guns. Friends brought guns to hold everyone at bay while Bridges fights it out with the guest. Someone in crowd hits one of the friend in the face. Friends begin recklessly firing and someone is fatally shot. These seems to show enough for conspiracy among the three friends; but the agreement is one that the friends are supposed to just keep people at bay
* Rule - **A co-conspirator may be liable for substantive criminal acts not committed by him and outside the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy**
  + If criminal acts exceed the scope of what is conspired to, intent doesn't matter if these acts were reasonably foreseeable
* Holding - Ds are criminally responsible under the circumstances
  + Court rejects standard that there is only vicarious liability between co-conspirators when there is shared intent/purpose
    - They argue this is misunderstanding of *Pinkerton* standard, the purpose of which is to impose vicarious liability based on objective standard of reasonable foreseeability (i.e. broader and lest strict than accomplice accountability)
  + There is evidence that jury could conclude there is reasonably foreseeable risk that as probable consequence of carrying out plan to intimidate with loaded guns was that someone would be shot
* Dissent - No liability is foreseen other than for the crime that were the object of the conspiracy
* Lecture Commentary:
  + Goes even further than *Pinkerton* in expanding vicarious liability
  + Is there a Mens Rea problem here? How can we describe D's state of mind. It wasn’t his purpose that his co-conspirator kills. Had he known they would do this, he probably wouldn't have agreed to what was conspired
  + **More importantly, how do we reconcile this with the intent requirement that exists in almost all formulations of conspiracy?**

### *US v. Alvarez* (1985 11th Cir.)

* Facts: Undercover sting operation for drug buying. While the transaction is going on in the house, the agents move in too quickly and a shootout begins killing an officer. The person who shot the officer is liable for homicide, though 3 others involved in the operation were also charged with 2nd degree murder even though they didn't take part in the shooting
* Issue: Is everyone involved in the drug deal is liable for the death?
* Holding: Yes. *Pinkerton* liability was properly imposed on those who were part of the operation but didn't take part in the shooting
  + Court says there is evidence to find that murder was a reasonably foreseeable consequence of the drug conspiracy. The planned sale was for an abnormally large volume and based on the money involved, good reason to expect buyers to be carrying weapons and to use deadly force if necessary
* Question: Did the court get it right here? The relationship between the actual conspiracy and the murder seems pretty remote. Is this a probable consequence or a fluke?

### Accomplice and Conspiracy Hypotheticals

* Note: When it comes to sentencing, you either are sentenced for conspiracy OR accomplice liability, not both. Though the substantive crimes stack up (Conspiracy/Accomplice + Substantive Crimes). That’s why we’re interested in whether the substantive crimes are imputed
* Factual Setup: A is the organizer and ringleader of a conspiracy to rob banks. He hires B and C to rob banks 1 and 2, respectively. Although B and C do not meet face to face and do not know each other, the both know that they are members of a larger conspiracy, and each knows of the other’s assignment with respect to the two banks. A then gets D, who also knows of the larger conspiracy, to steal a car for use in both bank robberies. B and C then rob banks and 1 and 2, but only B uses the car stolen by D
* What is A criminally responsible for?
  + Under Pinkerton liability, A is guilty for all substantive offenses committed by B, C, and D. These acts were clearly in furtherance of the conspiracy which A facilitated.
  + If prosecutors instead try to impose accomplice liability, they need to show that there’s aiding and abetting. Here, A directed and funded the entire operation in furtherance of the crimes so it would have the same outcome as *Pinkerton*
* What is B/C criminally responsible for?
  + Prosecutors will argue that B and C are part of a conspiracy via Pinkerton and therefore B is liable for C’s crime. Defense will argue that there are only two different conspiracy – Between A-B and A-C
    - However, this might be a more difficult question because it seems like B knew C was committing the crime. Especially if B and C are sharing the profits as part of A’s conspiracy, it definitely seems like there would be Pinkerton liability
    - B and C probably not liable as accomplices to each other; there’s no evidence that they aided and abetted each other in helping to rob their respective bank. Depending if you expand complicity theory (i.e. *Luperello*) – you might be able to get there, though probably not
* What is D criminally responsible for?
  + There is likely *Pinkerton* liability for B & C's crimes. D is part of the conspiracy. What B did was in furtherance of the conspiracy and D’s robbed car has helped
  + *Pinkerton* Liability for C's robbery not as easy since C didn't use stolen car. The prosecutor’s argument is that it doesn’t matter under Pinkerton who uses the car – you’re agreement is to steal the car for use in either case. It matters for accomplice liability, but not conspiracy
    - This is an example of conspiracy being broader than accomplice liability
  + D is also liable for the offenses as an accomplice to B because his stolen car aids and abets the robbery
  + However, because C did not use the car, there is no accomplice liability here
* What is D wasn’t able to steal the car? Can D still be charged?
  + Yes with *Pinkerton*. Once you’re in the agreement anything done in furtherance of the crime by co-conspirators makes you liable as well
  + However, in this case, you couldn't impose on D any accomplice liability to B or C
* Are B & C both responsible for D’s theft?
  + Under *Pinkerton* – it’s easy if B, C, and D meet together – then everything’s in furtherance. If it’s not that clean, then the argument would have to be that B and C are responsible because it’s foreseeable that bank robbers might need a car and someone in the conspiracy is actually doing this
  + Under accomplice theory, question becomes whether B or C had done anything to encourage and assist D to steal the car. It probably wasn’t B’s purpose that D steal the car. The question is whether B and C encouraged D to do it. Probably a stretch, you’d have to argue – but for the bank robbery plans, D wouldn’t steal the car

### *Kotteakos v United States* (1946)

* Facts: Brown organizing people to apply for false credit in a housing program and get some false money
  + Wheel and Spoke Conspiracy - Brown enlists a bunch of people to fake false credit
* Question: Is this five separate conspiracy or just one conspiracy?
  + This is important because if there is one conspiracy, then all the individuals under Pinkerton are responsible for each others’ acts. Brown wants it this way so that he doesn’t get multiple conspiracy charges
  + Government’s theory is that Brown organized this venture, gets five people to assist him in doing the same acts
  + Individual Ds argue that they have a relationship only with Brown, but not the others
    - Individuals just want multiple conspiracy because they don’t want to be one the hook for each others’s substantive crimes
* Holding: SCOTUS find that the notion of the **hub and spoke consists of multiple conspiracies**. If the venture can’t happen unless they all participate – given the nature of the criminal activities.
  + **A single conspiracy cannot exist when two or more persons have no contact or transactions with each other**, even though each person may transact with the same, single individual
* Notes case: *Anderson v Superior Court* (1947 CA)
  + How do other jurisdiction deal with this? Persons are referring patients to a doctor to perform illegal abortions. Obvious conspiracy here. But in Anderson, the several people who allegedly refer women for abortions are charged with a single conspiracy
    - Court agrees that it’s a single conspiracy. But it’s a hub and spoke conspiracy where the individuals don’t know they’re part of a larger conspiracy – for this scheme to work all the individuals don’t have to agree
    - Completely counter to *Kotteakos*
* Conclusion: *Kotteakos* is probably right

### *United States v Bruno* (1939)

* Facts: There’s a narcotics conspiracy. Importer, Seller provides the drugs and passes them to a NYC middle-manager and a LA middle-manger. They distribute them to people on the street
* Rule: **A single conspiracy exists when the success of the part with which the defendant was immediately concerned, was dependent upon the success of the whole scheme**
* Issue: Whether this is a single or multiple conspiracy?
* Holding: Single conspiracy. In order for the parties’ drug scheme to succeed each group had to do its illegal part in furthering the conspiracy. Thus, the conspirators at each end of the drug chain knew that the unlawful business could not stop with the buyers. A single conspiracy existed because each participant knew that he was a necessary link in the chain of the drug distribution scheme. The judgments of conviction are affirmed
* Notes
  + Chain Relationship - one large conspiracy if series of sub-agreements (links) form part of a single larger agreement (chain) that all parties are interest
  + One of the low-level drug dealers is likely in competition with each. One argument is that the more we sell, the more the Seller will give us product. So how can it be a conspiracy with each other when they’re in competition which each other
    - So maybe it’s a mischaracterization

### *United States v. McDermott* (2001 2nd CC)

* Facts - D1 had affair with woman who also had affair with D2; D1 gave woman stock tips which she passed onto D2. D1 and D2 convicted of insider trading only circumstantial evidence that D1 knew of D2’s involvement
* Rule - **A conspiracy does not exist if there is no agreement to commit a crime between the defendant and at least one other person**
* Outcome - Court reverses conspiracy conviction
* Holding - A conspiracy to commit securities insider trading requires the essential element of an agreement among all members of the conspiracy. Government must show that each member agreed to participate in a criminal plan to reach an overall common goal. The individuals involved do not necessarily need to agree on the details. There is no evidence that the stock information D1 supplied to D2 encompassed a broader scope or common goal outside of the two of them. To support D1's conspiracy conviction, D2 must agree with D1 to pass the insider information to another person, even if that person is unknown to D1

## Conspiracy within Parties and Enterprises

* **Gebardi Liability** - A person with protected status cannot be convicted of conspiracy
* **Wharton Rule** - A conspiracy requires more parties participate in the agreement than are required for the crime; affects crimes requiring two or more people (e.g. selling drugs). Courts are split on this:
  + Majority - Wharton rule always precludes conspiracy conviction
  + Minority - Wharton rule enacts the merger doctrine for conspiracies (i.e.) conspiracy conviction is viable if the crime is NOT completed)
    - NOTE: Wharton Rule does NOT apply in certain situations:
      * If statute about crimes requiring two or more parties only imposes liability on one party (ex: drug selling statute only puts liability on the seller; this negates the Wharton Rule so both buyer and seller could be conspiracy)
      * If a conspiracy member is part of protected class (ex: statute prohibiting transport of prostitutes
* **Racketeer Influenced and Corrupt Organizations Act (RICO)**: An organization violates RICO if it conducts racketeering enterprises such as murder, kidnapping, illegal gambling, bribery, extortion, etc; D liable for violating any section of RICO, but two independent and unrelated conspiracies may not form the basis for prosecuting a single conspiracy

### *Gebardi v. United States* (1932)

* Facts - D (unmarried) convicted for violating the Mann Act when he brought an unmarried woman across state lines for sexual intercourse. The trial court found Gebardi and the woman guilty and their convictions were affirmed by the court of appeals
* Outcome - SCOTUS reverses convictions
* Rule: Person who cannot be convicted of crime (e.g. due to rule of justice or policy) cannot be liable for conspiracy to commit the substantive crime
* Holding
  + Mann Act doesn't make it make it illegal for women to consent to this. It is evidence of Congress’ intent to leave her acquiescence unpunished. Since D did not conspire with anyone else and the woman didn't violate the man act, there was no conspiracy to do so. D did it unilaterally

### *Garcia v. State* (1979 IN)

* Facts: D discussed marital problems with neighbor. Expressed desire to kill husband in these discussions multiple times. Neighbor went to police and all future discussions were recorded. D asks neighbor for help planning to kill husband. Neighbor introduces D to undercover detective and made payment, agreeing to pay rest when job was done. D is subsequently arrested and convicted of conspiracy to commit murder. She appealed, arguing that she could not be convicted of such an offense when the only person with whom she allegedly conspired (the neighbor) feigned acquiescence in the scheme
* Rule: **Under the “unilateral” concept of conspiracy, an individual may be convicted of conspiracy even if the other persons involved in the scheme feigned acquiescence in the plan**
* Holding - Conviction of conspiracy is affirmed
  + Traditional bilateral view of conspiracy comes from CL - each person agrees to commit a crime with intent to do so. This left major gap for instances like the present case where one party only feigned acquiescence
  + MPC responded by introducing unilateral concept of conspiracy, which has been adopted in at least 26 states, where the culpable party’s guilt would not be affected by the fact that another participant feigned acquiescence in the scheme
  + Indiana statute - No defense that person with whom D is alleged to have conspired with is not or cannot be prosecuted for any reason is not convicted/is acquitted
* Notes
  + Argument for traditional rule and against unilateral conception: Conspiracy is separate crime because view that collective action towards antisocial end risks greater harm to society and increases chances of success. These dangers are not present when person "conspires" with another person (e.g. government agent) who has no intent to carry out the crime. Also the issue of entrapment

## Liability within the Corporate Framework

* Pro Corporate Liability
  + Criminal law most powerful tool for expressing conduct outside the bounds of acceptable corporate behavior and for expressing expectations of how corporations should conduct affairs (i.e. sends societal message). Failure to prosecute egregious violations blurs line between acceptable and unacceptable conduct.
  + Provides incentives for managers to patrol lower ranking employees and incentivizes employers to create law-abiding corporate culture
  + If corporations are provided constitutional rights and protections that individuals, why wouldn't we hold them liable for misconduct like we do with individuals?
* Anti Corporate Liability
  + Questions the effectiveness of the expressive/instrumental view
  + Questions the level of deterrence it actually provides, especially in light of the cost of monitoring and litigating
* Prosecutorial Discretion
  + Despite breadth of principles of respondeat superior, there is no fixed rule of law for imputing corporations for acts of there employees. Prosecutors can exercise discretion in deciding whether to forgo corporate prosecution. However, absent any countervailing policy justification, the interest in incentivizing corporations monitoring and preventing illegal employee conduct is strong enough to justify holding corporations liable
    - This is especially true where the employee is acting with intent to further the interests of his employer
    - Corporation's willingness to cooperate with investigation can be a factor in prosecutorial discretion
    - There are also alternatives to charging corporations in th eform of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). In NPA, there charges are filed by government retains right to prosecute if terms of agreement are not met. In DPA, charges are filed but are later dismissed if terms of agreement are met
  + Also a collective knowledge problem with respondeat superior - several individuals were acting together, but no single individual has the mens rea sufficient to prosecute. In this case, corporation seems culpable, but no single person to impute
* MPC's Trifurcated Approach to Corporate Liability
  + First rule - **§2.07(1)(a)**
    - Adopts broad respondeat superior theory. Corporation may incur liability for minor infractions and for non-Code offenses when a legislative purpose to impose liability on corporations **plainly appears**, assuming agent was acting within scope of employment and on behalf of corporate interests
      * Limited by a defense of due diligence that managerial agent can show it exercise to prevent crime
  + Second rule - **§2.07(1)(b)**
    - Corporation is accountable for failure to discharge specific duties imposed on corporations by law
  + Third rule - **§2.07(1)(c)**
    - Corporation incurs liability for true crimes (i.e. those defined in MPC) only if the offense is authorized/commanded/solicited/performed/toleratd by high managerial agents whose acquiescence may be regarded as reflecting corporate policy due to their authority
* Liability of Corporate Agents
  + MPC §2.07(6)
    - A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or on its behalf to the same extent as if it were performed in is own name or behalf
    - Whenever a duty is imposed on corporation by law, any agent having primary responsibility for the discharge of that duty is legally accountable for reckless omission to perform the required duty to the same extent as if it were imposed upon himself
  + Bureaucratic structure makes it difficult to impose liability on upper level employees for aiding where accomplice liability standards for aiding/encouraging require intent. Imposing vicarious liability runs the risk of unfairness

### *NY Central RR v. United States* (1909)

* Facts: New York Central (D) was an entity bound by the federal Elkins Act which prohibited common carriers (e.g. railroads) from charging rates less than their posted rate. D and employee of D convicted for paying rebates to certain companies who shipped their products, thereby lowering their shipping rate in violation of the Act. D appealed, arguing that Congress lacked authority to impute to a corporation the commission of criminal offenses or to subject a corporation to criminal prosecution Issue
* Issue: May a corporation be held criminally culpable for the acts of its employee agents when committed within the scope of their employment?
* Rule: **A corporation may be held criminally culpable for the acts of its employee agents**
* Holding: Conviction is affirmed
  + Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of the corporation as are the things done
    - This principle is present in the law of torts, where corporations are liable for damages caused by employees acting within the scope of their employment
    - Justice requires that the corporation be held responsible for damages to the individual who has suffered by such conduct
    - No reasonable justification as to why the corporation, which acts through its employee agents and which profits by the transaction, should not be held punishable by fine because of the knowledge and intent of its agents to whom the corporation has entrusted authority

### *U.S. V. Hilton Hotels Corp* (1972 9th Cir.)

* Facts: Tourism trade association in Portland, OR that is funded by monetary contributions by its members. To aid the associations, Hilton (D) agreed to show preference towards those members who contributed and boycott those that didn't. It was the hotel’s policy to purchase supplies solely on the basis of price, quality, and service, though purchasing agent ignored orders not to participate in the boycott and proceeded to coerce a supplier into contributing to the association. Charged with violating the Sherman Act by restricting trade. District court found D responsible for the acts and statements of the agent despite disregarding official instructions or the corporation’s policies
* Issue: Is a corporation liable under the Sherman Act for the acts of its employee agents committed within the scope of their employment even though the acts are done contrary to general corporate policy and official instructions?
* Rule: **A corporation is liable under the Sherman Act for the acts of its employee agents committed within the scope of their employment even though the acts are done contrary to general corporate policy**
* Holding: Criminal conviction of the corporation affirmed
  + The intent and construction of the Act suggests that a corporation is criminally liable for acts of its employee agents committed within the scope of their employment even if those acts are done against corporate policy
    - Many legislators believe that such liability is necessary to effectuate regulatory policy - such exposure to potential convictions may provide substantial spurt to corporate action preventing violations of employees
    - This is especially true with Sherman Act. These violations are commercial and almost always arise out of desire to enhance profits. Additionally, highly-positioned corporate officers are likely to be aware of, if not fully responsible for, many of the corporation’s policy decisions underlying Sherman Act violations (i.e. not inconspicuous ones by low-level employees). Profit-maximizing motive trickles down to lower-levels through pressure exerted by management - it is the corporation, not the individual agents, that reap the benefits of these violations
  + The purchasing agent was authorized to purchase supplies for the hotel and was in a unique position to add the corporation’s purchasing power to the force of the boycott

### *US v. Guidant LLC* (2010 MN)

* Facts: D sells implantable defibrillators to treat heart disorders. D identified and fixed defects with devices, but did not notify FDA as required by law. D plead guilty to making materially false and misleading statements on FDA filings and failing to promptly notify the FDA of the corrections. Agreement included criminal forfeiture of over $42 million, but did not include a provision that ordered restitution or probation. The victims and several physicians urge the court to reject the plea agreement because of this.
* Question: Can/should D be made to pay restitution of sentenced to term probation?
* Rule: **Manufacturers are held liable for the safety and effectiveness of their products and may be fined, sentenced to a term of probation, or required to pay restitution**
* Holding: The plea agreement was rejected. Court holds the interests of justice are not served by allowing a company such as D to avoid probation simply by changing its corporate form. Manufacturers control quality of the devices and know of any potential dangers, thus safety of future generation of patients is at stake. To allow repeat offender to get off with fine doesn't hold D accountable and undermines patient safety

### *Gordon v. United States* (1953 10 Cir.)

* Facts: D is manufacturer knowingly selling equipment on unlawful credit terms in violation of Defense Production Act.. The case was tried and submitted to the jury on the theory that knowledge of one partner regarding the transactions was “imputable, attributable, and chargeable” to the other partners and that knowledge of lower-level employees who made the sales and kept the records, while acting in the course of their employment, were imputable and chargeable to the employing partners. D and the others were convicted and they appealed
* Rule: **In cases involving “public welfare” offenses, an employer may be held criminally liable for the knowledge and acts of its employees**
* Holding - Convictions upheld
  + Deeply rooted principle of criminal law: Criminal guilt is personal to the accused and that willfulness or a guilty mind is an essential ingredient of a punishable offense. A person cannot intend an act in which he did not consciously participate, acquiesce, or have guilty knowledge. Thus courts have been reluctant to hold employers responsible for acts he did not authorize, counsel, approve or ratify
    - However, in “public welfare” offenses—those involving regulations of food, drink, or drugs—that courts have relaxed the necessary showing of willful intent
    - Court placed a duty upon the employer that he has knowledge of the records he is required to keep and knowledge of the acts or omissions performed by his agents and employees. Here knowledge is constructive
    - **In these situations, it is permissible proof to show “willfulness” as being more than mere negligence but less than a bad purpose or motive**

### *United States v. Park* (1975)

* D was CEO of Acme Markets, Inc. D is charged in federal district court with violating the FDCA. The Government alleged that Park and Acme had received food at its warehouses that had been shipped in interstate commerce and allowed the food to be accessed by rodents and exposed to contamination. Acme pleaded guilty, but Park proceeded to trial. Email correspondence showing D was aware of violations was introduced a evidence. D admitted in cross-examination that he was largely responsible for ensuring the provision of sanitary conditions in his position as CEO
* Issue: Can D be criminally liable for the FDA violations based on his knowing failure to prevent or remedy the violations?
* Rule: **A corporate officer may be held criminally liable for the illegal acts of a corporation under federal law which the officer had the ability to prevent before the occurrence or had the ability to correct after the fact**
* Holding:
  + Conviction affirmed. Case law reveals not only a positive duty on the part of corporate officers to seek out and remedy violations when they occur, but also to implement measures that will ensure that violations do not occur. The FDCA does not make criminal liability turn on “awareness of some wrongdoing” or “conscious fraud.” If a defendant claims that he was “powerless” to prevent or correct the violation, he has the burden of showing that evidence. D failed to satisfy this burden
* Dissent:
  + Majority described a negligence standard, which is not the one the jury was instructed to apply by the trial court. Before D could be convicted of a criminal violation of the FDCA, the jury should have first been instructed that it was required to find evidence beyond a reasonable doubt that he engaged in wrongful conduct amounting to at least to common-law negligence. There were no such instructions and thus no finding in this case
* Notes
  + The Responsible Corporate Officer doctrine, which holds officer can be convicted of a misdemeanor without traditional showing of awareness of wrongdoing. However, it is clear that this is not merely by reason of the officer's position in the organization's hierarchy. While this is certainly an important consideration, it must be shown that D had, by reason of his position, responsibility and authority either to prevent or promptly correct the violation complained of
    - While responsible officer may assert impossibility defense that they were powerless to prevent the violation, courts have made it clear that this defense does not extend to the corporation as a whole

### *United States v. MacDonald & Watson Waste Oil Co.* (1991 1st Cir.)

* Facts: D was president, and a “hands on” manager, of hazardous material disposal company. Operated facility without permit to dispose of hazardous material. D was warned by consultant multiple times, but proceeded to bring contaminated material into the disposal facility. He was subsequently convicted of knowingly transporting hazardous material to facility without a permit. Judge instructed jury that actual knowledge can be established if defendant was what is called a responsible officer of the corporation committing the act (an officer of the company having direct responsibility over the activities). D appealed, arguing that the district judge incorrectly instructed the jury regarding the element of knowledge in the case of a corporate officer
* Rule: **In a crime having knowledge as an express element, a mere showing of official responsibility by a corporate officer is not an adequate substitute for direct or circumstantial proof of knowledge**
* Holding: Conviction reversed
  + At trial, prosecution conceded that the government had no evidence that D had actual knowledge that the waste shipments were being transported to the facility, though it did show that he was a “hands-on” manager who was in a position to ensure compliance and had failed to do so even after being warned by the consultant
  + The district court's instructions suggest that proof D was a responsible corporate officer would conclusively prove the element of his knowledge shipment
    - Court says *Park* doesn't apply here because it involved misdemeanor crime that dispensed of intent/knowledge requirement. The instant case contains a much more serious charge
    - A mere showing of official responsibility is not an adequate substitute for direct or circumstantial proof of knowledge where crime requires this element
    - Since no evidence that D had actual knowledge of the hazardous waste shipments, conviction is reversed

# Exculpation

* 3 distinct sorts of defenses can be invoked to bar conviction for an alleged crime:
  1. Assertion that prosecution has failed to establish one or more required elements of the offense
  2. Justification - Affirmative defense that D acted properly
  3. Excuse - Affirmative defense that while the act is not condoned, D’s responsibility is mitigated
* Justification and excuse are different from the first insofar as they don't seek to refute any require element of prosecution's case; rather they suggest considerations that negate liability even when all elements are present

## Justification - Self Defense

* When the use of defensive force against an aggressor is necessary to protect the actor from seriously bodily harm, that action is justified - it was the appropriate thing to do under the circumstances
  + However, court in *Peterson* states widely accepted view that it **isn't required that use of force be truly necessary**; it is available when the **actor reasonably believes defensive force to be necessary**
  + If it turns out that force wasn't truly necessary and reasonable belief was false, then it is more precise to say that the actor is excused; the action was not right, but the mistake was reasonable. Regardless of the label (usually labeled as a justification), one who satisfies the self-defense requirement is entitled to acquittal
* **MPC 3.04**
  + (1) Force justifiable if D subjectively believes it is "immediately necessary for purpose of protecting himself against the use of unlawful force"
  + (2)
    - (a) Force is NOT justifiable if:
      * (i) D knowingly resists lawful arrest
      * (ii) D knowingly resists force of person protecting their property
    - (b) Use of **deadly** force is only justifiable if actor believes force is necessary to protect against death/serious bodily harm, kidnapping, or forced sexual intercourse. It is also unjustified if:
      * (i) Actor provoked the use of force against him in the same encounter with purpose of causing death or serious bodily harm (i.e. is the initial aggressor)
      * (ii) Actor knows he can avoid necessity of using such force with safety by retreating, surrendering property, or complying with demands that he abstain from some action. Exceptions:
        + (1) Not obliged to retreat from dwelling or place of work unless he was initial aggressor or is assailed by co-worker
    - (c) Other than in subsections (a) and (b), person using protective force may estimate its necessity under the circumstances as he believes them to be without surrender or retreat
* **Battered Women's Syndrome**
  + Different subcultures of violence between the sexes. When women do kill, it frequently targeted towards an abusive spouse or partner. In these cases, it is not uncommon for D to assert defense of self-defense on the basis of history of physical and mental abuse and the associated trauma
  + We see this in two forms
    - Confrontational homicides - Woman kills partner amidst battering incident. This is most common and primary issue becomes whether D is entitled to introduce history of abuse evidence and expert testimony
    - Non-confrontational homicides - Battered woman kills abuser in his sleep. Here the issues are related to (1) the imminent threat requirement and whether D is entitled to jury instruction on self defense absent some aggressive act by the abuser; and (2) can BWS evidence and testimony be introduced to show that D reasonably subjectively believed such actions were necessary to combat imminent deadly assault. Courts are divided here
    - Evidence of prior abuse not ordinarily allowed - the victim is not the one on trial and it improperly focuses jury in his character. However, it's now common to allow battered women to introduce evidence to support defense claim. It makes sense in cases where actions were not overtly threatening, but prior history is relevant to show actor reasonably feared for her life. A reasonable person in her shoes would surely take such history of abuse into consideration in determining whether threat is deadly
  + Expert testimony - Gives D credibility as to her subjective belief and objective belief of similarly situated reasonable person
    - Any testimony is inadmissible in criminal case unless:
      * Subject matter is beyond the grasp of a lay person
      * Expert has sufficient knowledge/experience to aid jury in search for truth
      * The subject matter is such that it permits a reasonable opinion to be asserted by an expert (i.e. not something like phrenology or a novel/undeveloped science)
    - Varies by state and standard used by state to evaluate the reasonableness of the perceived threat

### *People v. Goetz* (1986 NY)

* Facts: Man approached on subway by unarmed 4 men attempting to rob him (two have them had screwdrivers). He shot and wounded all four of them with an unlicensed hand gun. He later admitted he didn't think the robbers had weapons but was afraid of being jumped because he had been mugged before. After indictment, D attempted to get dismissed the assault and attempted murder charges, contending that jury was improperly instructed to apply "reasonable man" standard. The court granted this dismissal, holding the objective element included in the instructions was erroneous
* Issue: Is a person justified in using deadly force in self-defense if he subjectively believed such force was necessary to prevent an attack or a robbery? Or must there be objectively reasonable belief under the circumstances?
* Rule: **A person is justified in using deadly force in self-defense or defense of another only if she objectively and reasonably believes an attacker is either (1) using or about to use deadly force or (2) committing or attempting to commit a kidnapping, forcible rape, forcible sodomy, or robbery**
* Holding: Grand jury was properly instructed; dismissal overturned and charges re-instated
  + The right to use deadly force in self-defense has contained an element of objective reasonableness from the days of the common law
  + Legislature in NY State specifically rejected MPC approach of allowing subjective mistaken belief that motivated use of force to negate intent requirement, thus only allowing negligent/reckless homicide
  + The repeated references to reasonableness are proof of the legislative intent that there be **an objectively reasonable basis for the belief** (only then will mistaken belief be justified)
  + Court not persuade that objective standard would preclude taking circumstances into consideration; **courts may still consider the situation, including the defendant’s knowledge and prior experience, in determining whether the belief was reasonable**

### *State v. Kelly* (1984 NJ)

* Facts: D's husband beat and abused her for years. One day, D's husband attacked her in public and ran at her with his arms raised in a menacing nature. Not knowing if he was armed, D stabbed and killed her husband with scissors. She was charged with murder, and claimed self-defense. At trial, D's counsel called an expert witness on battered woman's syndrome, but the court determined her testimony was inadmissible. The jury convicted D of reckless manslaughter, a lesser charge. D appealed, claiming that the expert’s testimony should have been admitted at trial.
* Issue: Should the testimony have been allowed?
* Rules:
  + **Expert testimony on battered women's syndrome is admissible in the trial because if it is relevant to D's claim self-defense**
  + **Use of force in self-defense is only justified if the actor reasonably believes that such force is immediately necessary for purpose of protecting themselves against use of unlawful force by such other person**
* Holding - Testimony should have been admissible; conviction is overturned and case remanded
  + Expert testimony on battered woman syndrome is relevant because it relates to D's claim of self-defense
    - Her defense claim is only justified if she reasonably believed force was necessary to protect herself against serious harm
  + Recurrent abuse and effects of battered woman's syndrome would have impacted D's reasonable belief about the threat of harm posed by the circumstances
    - "Combination of all these symptoms, resulting from sustained psychological and physical trauma compounded by aggravating social and economic factors, constitutes the battered woman's syndrome"
    - If not for D's status as a battered woman, this belief might not be reasonable
  + Battered woman's syndrome is also an appropriate subject for expert testimony. Despite the fact that the field is relatively new, the expert was sufficiently qualified. The question of whether the testimony is scientifically reliable is best left answered by the trial court
* Notes:
  + Court says BWS evidence is relevant to question of reasonableness, but the extent to which may be limited. Similar cases have provided further illumination on the standard of reasonableness
    - CA Supreme Court in *Humphrey* - Objective reasonableness must view the situation from D's perspective, though this is not changing the standard to a subjective one or a objective battered woman standard. Testimony can help jury overcome biases and misunderstandings which is relevant to how they view the evidence and how D perceived circumstances (also allowing them to better evaluate credibility of D). However, ultimate question is response of reasonable person under those circumstances
    - *Romero* - CA court property refused to instruct jury to use subjectivity in applying the standard or to apply a reasonable battered person standard
    - A few other courts have moved closer to a fully subjective standard, some going as far to consider if a person who had assumed psychological peculiarities of D would have reasonable belief under the circumstances (e.g. ND). Others have applied something like a reasonable battered person standard (e.g. MO)
      * Arguments have been advanced that purely objective standard of reasonableness is unfair because it cannot be possibly be met by D because such a reasonable person does not have her perspective or history of experiencing violence and psychological trauma. On the other hand, completely subjective standard removes the normative component by introducing a form of moral relativism

### *State v. Norman* (1989 NC)

* Facts: D was abused, physically and psychologically, by her husband for most of their 25 year marriage. Some of the abuse incidents were extremely severe, leading to a suicide attempt. After being beat particularly bad, D shot husband while he was asleep. She was convicted of voluntary manslaughter, but appealed citing BWS as a defense and CoA reversed and remanded for new trial with jury being instructed of the defense. State appeals to NC Supreme Court
* Rules:
  + **D is entitled to have jury consider acquittal by reason of perfect self-defense when evidence (viewed in most favorable light) tends to show that at time of the killing, D believed it was necessary to kill to save themselves from imminent bodily harm**
  + Imperfect self-defense, which reduces culpability, is also recognized where victim escalates confrontation to point where it reasonably appears to D killing is necessary to prevent serious harm
* Holding: D was not entitled to perfect or imperfect self-defense
  + Killing out of self-preservation can only be justified by utmost necessity, which is why harm must by imminent
    - Harm here was not imminent. There was no immediate danger that could not be guarded against by any other way (e.g. through summoning protection of the law). Victim was sleeping and had been for some time. D had opportunity to resort to other means
    - Subjective belief of what is inevitable at some indefinite point in time is not "imminent". Even more, it hadn't be established that whatever victim might have done to D in the future (based on history of abuse) would have constituted the level of serious bodily harm necessary to justify using deadly force
      * Too much speculation here to warrant self-defense instruction based on evidence
* Dissent:
  + For the battered wife, there is no escape from the abuse. The next attack from the abuser could be the fatal one and thus, the abused wife is in constant fear of imminent death
  + The relevant question was whether belief in the impending nature of the threat, given the circumstances as Norman viewed them, was reasonable in the mind of a reasonable person
* Notes: 30 something states recognized gender-neutral "battered" defense

### *State v. Abbott* (1961)

* Facts: D got into a fist fight with V1 over a dispute involving a driveway D shared with V's family. V2 and V3 then came after D with a hatchet and carving knife/large fork. The parties’ accounts of what happened differed, but each of the Vs was ultimately hit by the hatchet. D was indicted for atrocious assault and battery upon each of the Vs. A jury acquitted D of charges related to V2 and V3, but found him guilty of the charge related to V1. D appealed
* Rule: **An individual has a duty to retreat before using deadly force to defend himself only to the point that he knows that he may retreat with complete safety**
* Holding: Conviction is reversed because the trial court’s instructions on retreat were ambiguous and confusing
  + The issue of whether an individual must retreat only arises if the defendant resorts to the use of deadly force to defend himself
    - MPC instructs that the use of deadly force is not justifiable if the actor knows he can avoid the use of such force by retreating with complete safety
  + If the individual does not use deadly force to defend himself, he may stand his ground regardless of the force used by an aggressor
  + Thus, jury should have been instructed to determine two issues:
    1. Did D intend to use deadly force himself? If not, he had every right to stand his ground using non-deadly force
    2. If so, did D know the opportunity to retreat with complete safety was present during the altercation?
* Notes:
  + Duty to retreat when faced with an aggressor before using deadly force to defend himself has historically divided the courts
    - Advocates of the no-retreat rule argue that an individual must hold one’s ground. They argue that the law should not require something that resembles cowardice ("true man doctrine")
    - Proponents of the retreat rule claim it is better that an assailed individual flee instead of unnecessarily taking a life
    - The MPC embraces the retreat rule while acknowledging that most courts oppose it
  + Traditional common law rule imposed a strict duty to retreat, allowing use of deadly force in self-defense only if every opportunity to flee had been exhausted ("had back against the wall" concept). Over time, majority of states adopted no-retreat or "true man" rule
    - However, it is a bit more complex than that. Some states still retain require retreat when confrontation occurs outside the home while several others treat possibility of retreat as a factor
    - States that still retain the retreat rule will make **exception to requirement of retreating where it is dangerous to do so**
  + **Stand your ground statutes**:
    - 33 states enacted laws permitting force to be met by force, including deadly force, even in public spaces where retreat is possible. While this enables those who are truly innocent to protect themselves and potentially save lives, there is also the issue of unintended consequences: more unnecessary killings may result and mistakes can be made on unfounded suspicion (including that which is racially influenced)
  + **Castle exception**
    - Even where retreat rule is still enforced, jurisdictions invariably make exception for using deadly force in home invasions
      * Not as clear in cases within the home where confrontation is between homeowner and guests or even co-occupants

### *United States v. Peterson* (1973 DC)

* Facts: V attempts to steal windshield wipers from D's store. D and V argue and D retreat's to store to get gun. When he returns outside, V is in car and prepared to drive away. D threatens to shoot and kill him, at which point V gets out of the car wielding a wrench. D warns V not to come any further. V continued moving towards D so he shoots and kills him. Instructions to jury included: self-defense generally not recognized if D provokes (though words are not enough), however it is if D withdraws from the conflict in good faith and let V know through words or actions. Also, there is no strict duty to retreat, but it is factor to be considered in determining necessity. D is convicted of manslaughter and appeals, challenging the jury instructions
* Rules:
  1. **The initial aggressor in a fatal conflict may not invoke the doctrine of self-defense to justify killing his adversary, unless he withdrew from the conflict in good faith and communicated his withdrawal by words or acts**
  2. **The initial aggressor in a fatal conflict is under a duty to retreat, if he may do so safely, before using deadly force in self-defense**
* Holding - Verdict is affirmed; jury was properly instructed
  + Court affirms instruction that self-defense not available to the aggressor, a rule that is based on the doctrine of necessity
    - Deadly force is only justified if there is no alternative. A person must honestly and reasonably believe that there is an imminent threat of death or serious injury
    - Person who provokes conflict does not have right to exercise deadly force. However, this right is restored if aggressor withdraws and communicates this to the victim
    - Since grabbing the gun made D the initial aggressor, jury instruction was correct. Jury would then need to decide if he properly withdrew or else self-defense would not be justified
  + Court affirms instruction that jury consider whether there was opportunity to safely retreat (quite obvious that there was)
    - DC still follows retreat rule; there is duty to avoid use of deadly force by retreating unless it would be dangerous to do so
    - Castle doctrine does not apply to initial aggressors, thus this would not remove him from the retreat rule despite this confrontation occurring on his own property
* Notes:
  + Some states will also allow initial aggressor to regain right to self-defense if they are faced with an excessive life-threatening respond
  + *Allen v. State* (1994 OK)
    - Facts: D fighting with partner and as partner leaving the partner hits D in the face. D pursues partner in car and parked to ask partner to reconsider. Partner came towards D with rake and D shot partner
    - Holding - D who initiates a confrontation, even without intention of killing, loses the right of self-defense
  + MPC slightly deviates from common law rule found in both *Allen* and *Peterson*. MPC provides narrower forfeiture of self-defense rights - only if one provokes with the purpose of causing death or serious bodily harm
    - Example: A attacks B with fists and B defends himself. B manages to subdue A by pinning him to the floor and begins to violently slam his head into the ground. A, who now fears for his life, manages to escape B's hold. B charges at him again and he pulls out a knife, fatally stabbing B
      * Under MPC, A would only lose his right to self defense if he intended to kill/seriously harm B when initiating the conflict. Starting a mere fist fight does not express such intent. Since this fist fight doesn't satisfy subsection (1) either, B is also not justified in using deadly force in response, but can only defend himself using moderate, non-deadly force. Once B begins slamming A's head into the ground, he clearly exceeds the boundaries of moderate force. At this point, A would be justified in using deadly force under subsection (1), but only if he believes

## Justification - Defense of Property

### *People v. Ceballos* (1974 CA)

* Facts - D set up spring gun in garage after noticing evidence that someone had attempted to forcibly enter. One night two teenage boys try to enter the garage, and one of the boys is shot in the face. D found guilty of assault with a deadly weapon. D contends use of the spring gun was lawful since it would have been lawful to exercise deadly force had he been present that time of the attempted burglary - he has right to do indirectly what he can do directly
* An individual may be held criminally or civilly liable if he sets upon his premises a deadly mechanical device which injures or kills another person
* Holding - Conviction is upheld
  + Regardless of tort liability in this area, the direct/indirect argument is not workable in this context. Person has control and discretion over the exercise of deadly force when physically present. Not the case with a spring gun; it poses significant safety risks to children, firefights, etc. Thus, liability depends on fortuitous results and imperils the lives of innocent people
  + Even if the direct/indirect argument was recognized as valid, D wouldn't have been justified in using deadly force even if he were there
    - MPC appears to permit use of deadly force when resisting attempt of a felony or in defense of property against one who manifestly intends, by violence or surprise, to commit a felony
    - However, literal interpretation is undesirable here since the categorization of "felony" has been expanded to include a very wide number of crimes, many of which are essentially non-violent. Case law has narrowed the interpretation of this language to mean atrocious crimes committed by force. This also applies to the "surprise or violence" language
    - **Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life or use of deadly force**
  + Here, two unarmed teenagers did not present such a threat. D's belief that burglary could present such a threat, which lead him to install the trap gun, is both unfounded and does not shield him from liability
* Notes
  + MPC limits use of deadly force, but will nonetheless permit it when the use of non-deadly force to prevent commission of the crime would expose the individual to substantial danger of serious harm
  + Some states have passed statutes expanding the use of deadly force in the home
    - CA Home Protection Bill of Rights - Reasonable fear of imminent serious harm is presumed by owner using deadly force when intruder does and is known to have unlawfully and forcibly entered the home
    - Colorado "Make-My-Day" law - Can use any level of force when non-occupant has made unlawful entry onto the property and there is reasonable belief that he intends to commit a crime
    - FL "stand your ground" - Whenever intruder forcibly enters car or dwelling, reasonable imminent fear is presumed if intruder was in process of unlawful entry and the person threatened knew or had reason to believe forcible/unlawful entry was occurring

### *Syndor v. State* (2001 MD)

* Facts: D approached at gunpoint to give up property and is assaulted. While being robbed, friends intervene and disarm robber. Robber attempts to flee but D shoots and kills him. Judge instructed trial jury that D was required to retreat/stand-down unless at the moment shots were fired, D was being robbed. D argues the attempt to flee was part of one continuous transaction
* Holding: Jury instructions were appropriate
  + CoA rejected D's argument. It acknowledged that for purpose of felony murder, robbery is not complete until the suspect escapes. However, that doesn't effect rule limiting deadly force
    - Court says relevant issue is not whether criminal enterprise is still in operation, **but whether the force then and there was necessary to avoid imminent danger of serious harm**
    - It was clear that no such threat of harm was posed by robber while attempting to flee unarmed, thus force was excessive

## Justification - Use of Force in Law Enforcement

* General principle is the same as it as for civilians: force must never be excessive in relation to the harm it seeks to prevent
  + However, law enforcement is different because it is not their duty to avoid danger, but to intervene. Much more dangerous work environment and carry firearms
  + Tension between ability to defuse conflict and prevent trouble by force or threat of force and the capacity to inflict unwarranted or unintended injury which may undermine community bonds and flare racial tensions
* Problem: Reasonable belief that a suspect poses serious threat may be informed by social, cultural, and racial presuppositions
  + 21 times as many African-Americans are shot by police than are whites
* When is it acceptable to use deadly force?
  + Not permissible to prevent misdemeanor or effectuate arrest for one - can't shoot suspect of misdemeanor who flees without resisting
    - However, as a general principle, **if suspect's flight poses threat of death or great harm to the public**, use of force may be justified (See *Scott v. Harris*, *Plumhoff v. Rickard*)
    - Additionally, if suspect of misdemeanor resists, general rule is that **officer may meet force with force**, and if threatened with deadly force, they may respond in kind because such response is needed to protect officer from threat of serious harm or death
  + Used to allow deadly force to prevent or make felony arrest. However as definition of felony expanded, courts restricted deadly force to situations involving **forcible and atrocious crime**
    - Such conduct includes use or threat of deadly force, thus substantial risk that failure to immediately apprehend will lead to such harm and thus police are justified in using deadly force to prevent it
    - Use of deadly force to apprehend suspect of felony like burglary has been found to be an "unreasonable" seizure in violation of 4A and thus unconstitutional (See *Tennessee v. Garner*)
      * Constitutional standard is similar to MPC. In order **to justify use of deadly force to prevent felon's escape, it must be necessary measure taken where probable cause exists as to the belief that suspect poses a threat of serious physical harm to the officers or others**
    - Use of taser is generally not considered deadly force

## Justification - Necessity Defense ("Choice of Evils")

* Necessity = Defense that otherwise criminal conduct is justifiable as it was necessary to avoid more serious harm
* MPC 3.02
  + (1) D’s otherwise criminal conduct is justifiable if:
    - D sought to avoid harm greater than the harm resulting from D’s conduct
      * Does not rely on the private judgement of D. **The harm/evil sought to be avoided must actually be greater than that from the commission of the offense, regardless of D's belief**
      * Not enough that actor beliefs conduct is sufficient to ameliorate the harm. **Must believe it was necessary to avoid the evils**
    - Statute does not explicitly preclude necessity defense
    - No obvious legislative purpose or policy reason to deny necessity defense
  + (2) Necessity NOT a defense if situation brought about by D’s reckless or negligent conduct
* CL Self-Defense (see *Unger*)
  + (1) No blame in developing the situation AND
  + (2) D reasonably believed engaging in conduct was necessary to avoid a harm greater than a resulting harm which might result from the conduct (see *Hutchins*) AND
  + (3) (split jurisdiction) Satisfying credibility factors is:
    - Required - D must notify law enforcement as soon as the threat ends (see Bailey, Unger)
    - Not Required - D does not need to notify law enforcement, factors considered holistically

### *People v. Unger* (1977 IL)

* Facts: D (inmate) at minimum security prison sexually assaulted and threatened with rape. Gets anonymous phone call threating to kill him because caller (falsely) heard the D had reported it to prison authorities. D leaves the facilities and is apprehended days later several miles away
* Rule: **Justifiable by reason of necessity if the defendant was without blame in developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might result from his own conduct**
* Reasoning:
  + In *Harmon*, defense of duress was held to apply in case where D alleged that he escaped to avoided repeated homosexual attacks from fellow inmates. Courts had reached similar results in escape cases involving sexual abuse under the theory of necessity
  + Court says necessity is the appropriate defense here - D was not deprived of free will by threat of harm (i.e. duress). Rather, he was **forced to chose between two imminent evils**, as supported by his testimony
  + Factors considered to determine reasonableness of necessity defense include: The threat and imminence of the threat; Opportunity to complain or seek protection through courts/law; No violence employed in the escape; and immediately reports to authorities once reaches position of safety from the threat
    - Must not satisfy all of these to assert necessity defense as matter of law, but relevant consideration
  + Under circumstances, D was entitled to jury instructions for necessity defense - he had no part in developing the situation (i.e. threats against him) and injury avoided by escaping is more harmful than the escape
* Dissent - Allowing this defense will create trouble in the future and may encourage undesirable conduct

### *United States v. Schoon* (1992 9th Cir.)

* Facts: Group of Ds gained access to the Internal Revenue Service (IRS) office in AZ where they protested the policy between US and El Salvador. Chanted, splashed fake blood, and generally obstructed the office’s operation. After repeated warnings to leave or face arrest by a federal police officer, group was arrested after refusing to comply. At trial, Ds proffered testimony about conditions in El Salvador as motivations for their conduct and argued that their actions were necessary to avoid further bloodshed. Judge rejected "necessity" defense and Ds were convicted
* Issue: Is the necessity defense available in indirect civil disobedience cases?
* Rule: **The necessity defense requires a defendant to show that he was faced with a choice between two related evils, that he acted to prevent imminent harm, and there was no legal alternative to violating the law. It is unavailable in indirect civil disobedience cases**
* Holding - Court holds that necessity defense was properly rejected in the trial court
  + To properly invoke the necessity defense, the defendants must have shown that (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) they had no legal alternatives to violating the law
  + "Civil disobedience" is the willful violation of a law, undertaken for the purpose of social or political protest. Indirect civil disobedience involves violating a law or interfering with a government policy that is not, itself, the object of protest
  + The mere existence of a constitutional law or governmental policy cannot constitute a legally cognizable harm. Thus, no greater harm to avert. Court must also take into consideration the likelihood that an alleged harm will be abated by the criminal action. Here, the protest alone is unlikely to change the policy towards El Salvador precisely because the act is indirect. Finally, possibility that congress could change its mind is sufficient to make lawful political action a reasonable alternative to the unlawful conduct

### *Regina v. Dudley and Stephens* (1884 UK)

* Facts: Defendants were on the crew of an English yacht. Ship wrecks and become stranded at sea for 24 days. After week without food, they kill one of the weaker crew members and fed off his body until a passing ship rescued them. Ds tried for murder of the crew member. Trial jury determined Ds would not have survived long enough to be rescued had they not done what they did. They also determined that the member that was killed also would not have survived. Ultimately unable to reach verdict
* Issue: Will the defense of necessity justify a homicide committed to save the defendants' own lives?
* Rule: **The intentional killing of another is murder unless there is some legal justification (e.g. self-defense)**
* Holding: Defendants found guilty of murder and sentenced to death (later commuted to 6 months)
  + Necessity is only a justification for murder when the killing is committed in self-defense. Thus, the defense of necessity may not be used to justify the killing of an innocent bystander.There is no authority supporting the principle that one may take the life of an innocent person to save his own
* Notes:
  + MPC Commentaries appears to endorse utilitarian approach to the "two-evils" problem. Numerical calculus to justify the intentional killing of an innocent person in order to save lives, which is lesser evil than the death of several others. This is a real life trolley problem. Direct tension between rights and maximizing lives

### *Public Committee Against Torture v. Israel* (1999 Israeli Supreme Court)

* Facts: Israeli government (D) authorized one if its national security agencies to employ physical means against those undergoing interrogation. Included sleep deprivation, shaking, forcing subjects to stay in painful positions for long amounts of time. Agency was instructed to consider urgency/severity of potential attacks and to seek alternative measures if possible. Agency argued these methods help thwart imminent terrorist attacks
* Issue: Were torture methods acceptable under the defense of "necessity" as codified in Penal Law Article 34(1), which states, "A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular circumstances, at the requisite time, and absent alternative means for avoiding the harm"?
* Holding: Methods of torture are categorically prohibited and thus unauthorized for use even under necessity exception
  + The interrogation of a suspect must "absolutely" be free of torture, free of cruel and inhuman treatment, and free of dignity-taking methods. Methods employed by the agency violated the subjects' dignity
  + While necessity exception would definitely arise in "ticking time bomb situation" where physical methods used to obtain information about imminent attack and spare innocent lives. However, question is whether the use of such physical means were authorized. The order prohibiting physical means of interrogation is made absolute and can't be justified by necessity

## Justification - Euthanasia

### *Crusan v. Missouri Dept. of Health* (1989)

* Facts - P in vegetative state following car accident and, with no chance of recovery, family requested she be removed from life support. Some evidence from past conversation P would want life support withdrawn. The hospital refused to do so without a court order. The trial court granted P's parents petition to remove the tube. Missouri Supreme Court reversed and held that the evidence of P's desire not to continue life-prolonging treatment was not clear and convincing and thus P's parents lacked the authority to effectuate the court order
* Is Missouri's evidentiary standard for establishing intent to withdraw treatment constitutionally valid?
* Holding - State evidentiary standard is valid and upheld
  + An incompetent person is not able to make informed and rational choice here. Any such right must be exercised by a surrogate
  + Here, Missouri allows surrogate to act for patient in deciding to withdraw life support
  + However, Missouri employs a procedural safeguard by requiring the decision conform as closely to the incapacitated person's wishes as closely as possible. Thus it requires clear and convincing evidence as to the wishes of the incapacitated person
    - This procedural requirement relies on State's interest in preserving and protecting human life. There is no denying this is a valid state interest

### *Washington v. Glucksberg* (1997)

* Facts: Under Washington state law, it is a crime to knowingly cause or aid another person to attempt suicide. P, a physician, brought suit in federal district court seeking a declaration that the Washington state law violated a liberty interest protected by 14A. District court found that it did and CoA affirmed.
* Rule: The right to physician-assisted suicide is not a constitutionally-protected liberty interest under the 14A DPC, though jurisdictions may allow it
* Holding: Washington law banning P.A.S. is constitutional
  + Bans on P.A.S. represent those states’ commitment to the protection and preservation of all human life, a legitimate interest
  + Right to P.A.S. is not a fundamental right under the DPC - the Nation’s history and tradition has almost uniformly rejected the existence of the right, and most states continue to explicitly reject it in the present day
  + The right to P.A.S. is distinguishable from the right of competent persons to remove unwanted life-sustaining treatment recognized in *Cruzan*: the right to be free from unwanted medical procedures, at issue in *Cruzan*, is long established in national traditions upholding bodily integrity and protecting against battery, even by physicians
  + Thus, Washington legislature acted rationally in banning assisted suicide in furtherance of these legitimate objectives

## Excuse - In General

* Unlike justification, which asserts that what the excused did was appropriate or utility-maximizing, **excuse seeks to show that although the acts were harmful, they could not have been expected to do otherwise**
* We can thus characterize excuse as a defense the law allows to a wrongful action because the actor has displayed some disability or deprivation in capacity to know or choose, which renders the person either free of blame or subject to less blame
  + The disabilities that ground excuse in our law seem to fall into one of three groups:
    - Those disabilities that produce involuntary actions
      * As discussed in actus reus section, involuntary action not viewed as a culpable act at all (i.e. nothing to excuse)
    - Those that produce deficient but reasonable actions
      * There is a power to choose in a literal sense, but the choice is constrained either due to cognitive deficiency (e.g. mistake) or a volitional one (e.g. duress)
    - Those that render all actions irresponsible
      * This person could not act otherwise because they were simply not responsible moral agents at the time (e.g. insanity, infancy)
* Three most important forms of excuse: duress, intoxication, and mental disorder

## Excuse - Duress

* Duress = affirmative defense that D coerced into criminal conduct b/c (see Toscano, Contreras-Pinchon)
* MPC §2.09 – Duress
  + (1) Defense if coerced to do so by unlawful force or threat against him or another to which a person of reasonable firmness in the actor’s situation would be unable to resist
    - Threat does not necessarily have to be against the actor; could be against a relative. However, language here omits property
  + (2) Unavailable for crimes of recklessness/ negligence if actor recklessly/negligently brought about the situation
  + Remarks:
    - Possible limitations on the defense **not** in MPC
      * Requirement of imminence
      * Disallow it for murder
      * Treat it as a mitigation factor, not a total defense
* As a defense to homicide (split jurisdiction)
  + CL: No defense to homicide
  + MPC: Available in cases of homicide
* CL Duress
  + (1) person made "specific and imminent" threats of "serious bodily injury or death" against D or D’s family member if should D refuse to commit a crime
    - NOTE: Some jurisdictions apply it to property too (if property value outweighs harm)
  + (2) D reasonably believed the other person would carry out the threat
  + (3) D had no reasonable opportunity to prevent the threatened harm by:
    - (a) Fleeing
    - (b) Informing law enforcement
  + (4) D did NOT recklessly or negligently expose himself to the threat
    - NOTE: this element often arises if D part of criminal enterprise where threats are reasonably expected
  + (5) Crime was not homicide
* Duress distinguished from Necessity in that:
  + (1) Duress is excuse (not right, but circumstances were such that reasonable law abider might have done so) while necessity is justification (under circumstances, D took the right course of action; to do so was the lesser evil)
  + (2) Duress always involves a human threat while necessity may or may not involve human threat (e.g. could be natural condition)
  + (3) Duress D’s free will impaired while necessity D’s free will intact
  + (4) Duress furthers evil while necessity intended to avoid a greater evil to general welfare

### *State v. Toscano* (1977 NJ)

* Facts: Defendant was charged with conspiring to obtain money on false pretenses from insurance company. He agreed to do so because he owed money to a guy for gambling debts. The guy made vague threats against him and his wife. Said he filed because of fear of his life
* Rule: **Duress is defense to a crime (other than murder) if the defendant committed the crime:**
  + **(1) Because he was coerced to do so by threat or use of force**
  + **(2) Which a person or reasonable firmness in his position would have been unable to resist**
* Holding - Conviction reversed and matter remanded
  + At common law duress was recognized only when involving a use or threat of harm which is "present, imminent, and pending," and "of such a nature as to induce a well grounded apprehension of death or serious bodily harm is the act is not done" in a man of ordinary fortitude
  + Drafters of the MPC focused on whether the standard imposed upon the accused was one with which normal members of the community will be able to comply
  + Thus under both MPC and New Jersey Penal Code, D should have had question of duress submitted to jury since his testimony that the act was committed out of fear was a factual basis for finding of duress if it could be determined that a person of reasonable firmness would have done so
* Notes:
  + Inquiry here would focus on the weaknesses and strengths of a particular defendant and his subjective reaction to unlawful demands
  + Taking into account expectations based on the defendant’s character and situation makes this approach more subjective than the reasonable person standard at common law
  + Imminence of the threat:
    - Both *Toscano* and the Model Penal Code treat the imminence of the threatened harm as one factor to be weighed by the jury in determining whether the defendant’s conduct was that of a person of reasonable firmness in his situation
    - Many common law decisions treated imminence as an absolute pre-requisite to the availability of a duress defense and some statutes expressly limited the defense to situations involving threats of instant death
    - Great majority of the recent statutory revisions have rejected the Model Penal Code’s flexible approach and preserved some requirement that the threatened harm be immediate and imminent, or instant

### *United States v. Fleming* (1957)

* Facts: POW was told to create propaganda to promote dissatisfaction among troops or be forced to march to some far away camp in the winter. Charged with aiding the enemy
* Holding: Court affirms conviction
  + Duress not available; D cooperated on mere threats of the march
  + Other soldiers had refused in similar situations, thus it doesn’t meet prong 2 (persons of reasonable firmness had resisted)
* Notes:
  + Potentially problematic application of the standard: instead of ordinary reasonable person in his situation, they seem to be using a much higher standard for soldiers
    - Would require everyone to be like John McCain

*Contreras-Pinchon* (1984 9th Cir.)

* Facts: Taxi driver from Columbia made to swallow balloons of cocaine and travel to America. He and his family were threatened in Colombia. D claimed he only did so because someone threatened to kill him and his family if he didn’t transport the drugs
* Rule: **Threat must be immediate, act must be grounded on fear of threat being realized, and there must be no reasonable opportunity for escape**
* Holding: Conviction is reversed
  + Duress is allowed because threats were serious (dealing with Colombian drug lords) and there was little rescue in Colombia (police are corrupt)
    - D was constrained by belief that police help was futile. Should be up to jury to determine whether the belief renders police help an unreasonable means of escape
* Dissent:
  + Failed to present evidence to support elements of inescapability
    - Illustrates problems for prosecutor – how can they disprove this beyond a reasonable doubt if burden is on them?

## Excuse - Intoxication

* MPC §2.08 - Intoxication
  + (1) except as in (4), intoxication not a defense unless it negatives an element of the offense
  + (2) when recklessness is mens rea, if intoxication causes actor to not be aware of a risk he would have been sober, intoxication not a defense
  + (3) intoxication not a mental disease within 4.01
  + (4) intoxication that is either (a) no self-induced or (b) pathological is a defense if by reason of intoxication the actor lacks substantial capacity to appreciate the wrongfulness/ criminality or to conform his conduct to the requirements of law
    - “Pathological” means intoxication much more than actor expected given the amount of the intoxicant
  + Remarks:
* Common Law - Voluntary Intoxication
  + In some jurisdictions, is not recognized at all
  + However, more common for intoxication to be relevant for determining a specific intent, but not a general intent
    - Specific intent – crime includes that actor desired some additional consequence or do some further act (e.g. assault with intent to rob)
      * You did not act with the required intent, such as, if your actions had been part of a harmless prank, then you cannot be convicted of a specific crime
      * When it does negate specific intent, you have to be more than just “disinhibited”
    - General intent – only intent in crime is with respect to the immediate act; you only need to intend your actions, not any particular result
      * Is not necessary for the prosecution to prove that you intend to cause a specific harm or end result. Must only show that intended to commit some act that the law prohibits
  + Also jurisdictions where defense only to reduce murder charge (PA statute)
* Common Law Involuntary Intoxication
  + D took substance (i) without knowledge of its intoxicating nature, (ii) under duress, or (iii) based on medical advice but unaware of intoxicating effect
    - Availability of defense (split jurisdiction):
      * (1) Treated as mental illness defense (depends on jurisdiction definition)
      * (2) Defense for culpability
      * (3) No defense for culpability (*Kingston*)

### *People v. Hood* (CA 1969)

* Facts: Heavily drunken man was resisting arrest. Grab the officers gun and shot him in the leg. Is convicted of assault with deadly weapon
* Rule: **In crimes of general intent evidence of the accused’s intoxication shall not be considered in determining guilt or innocence**
* Holding: Jury improperly instructed to consider intoxication
  + Evidence of intoxication should not relieve one of blame for simple assault or assault with a deadly weapon, crimes which frequently are committed rashly or in anger
  + In both CA and NY assault with a deadly weapon is a general intent crime

### Roberts v. People

* Facts: Man shoots another while drunk, charged with attempted murder.Allowed to include intoxication evidence to negate mens rea
* Holding:
  + **If renders him incapable of knowing what he was doing (required intent) -> not guilty**
  + If he did have the intent prior to intoxication, subsequent drunkenness is not a defense -> still responsible
  + Likewise, if held to have purposely blinded his moral perceptions and committed act intentionally without knowing it was wrong -> then still guilty

### *State v. Stasio* (NJ 1979)

* Facts: Defendant was charged with assault with attempt to rob (specific intent crime). Asserts intoxication as a defense
* Holding: NJ choses to go in a different direction -> **no admissibility of intoxication regardless of specific or general intent**, except to demonstrate premeditation and deliberation
  + Court doesn't want intoxication to be considered in a specific intent crime either because:
    - Leads to inconsistent results
    - General intent v specific intent distinction is just a guide for admitting intoxication evidence
* Dissent: an intoxicated D can’t form the necessary specific intent, so shouldn’t be held to same standard as others
* Note: States are completely non-uniform on their application of intoxication defense

### *Montana v. Egelhoff* (1996)

* Facts: D intoxicated and found with friends killed in a car. D claimed too intoxicated to remember. Montana statute for deliberate homicide required “purposely” or “knowingly” but did not allow for intoxication defense. Montana Supreme court held it unconstitutional. SCOTUS reversed (5-4, Ginsburg concurrence was the deciding vote)
* Majority (Scalia): While DPC gives right to present relevant evidence, that right is not absolute. All evidentiary rulings can have the effect of reducing the evidentiary burden of the state; doesn’t violate the principle of fairness so its not unconstitutional
  + Refusing to allow a defense of voluntary intoxication deters drunkenness, ensures people who commit crimes while intoxicated go to prison, and fits with society’s moral determination that voluntary intoxication does not excuse criminal conduct
  + Evidence of voluntary intoxication could mislead a jury

### *Regina v. Kingston* (1994 UK)

* Facts: D lures a 15-year-old boy to D's flat and then invited the defendant over to abuse the boy sexually. Person blackmailing D drugged him, then videotaped the incident to use in extortion
* Rule: **Involuntary intoxication does not negate the mens rea necessary from criminal liability**
* Holding:
  + Equates the desire with intent -> When he was engaged in the conduct he knew the boy was underage; he was not in an unconscious state but just disinhibited
    - The essential evil mental state exists; the drug only allows it to be acted upon
  + To recognize this as a complete defense would make assessing guilt in any manner involving intoxication exceedingly complex and raise a host of evidentiary problems
    - Preferable approach to involuntary intoxication is to continue to use the concept of diminished capacity, rather than create a complete defense
    - Only exception if intoxicated to the extent as to be considered insane

## Excuse - Insanity

* **Insanity** - A defense negating mens rea or affirmative defense that D committed criminal act while suffering a legally recognized abnormal mental condition
  + Two types of behavior insanity covers
    - Cognitive defect – D didn’t understand the significance of his actions
    - Behavioral defect – D couldn’t control himself
  + *Ford v. Wainwright*: Supreme Court declares that the Eighth Amendment bars execution of the insane. Court stated that the defendant must have a rational understanding rather than mere awareness of the nexus between his crime and the punishment
  + *Atkins v. Virginia*: Eighth Amendment forbids execution of people with mental retardation
* Important terms:
  + Mental Illness - Medical term referring to D’s diagnosed mental disorder, which ranges in severity and type (personality, psychotic, depression, etc)
  + Insanity - Legal term referring to D’s mental state at time of the crime that may preclude culpability
  + Incompetence - Legal term referring to D’s mental state at time of legal proceedings preventing “rational” and “factual” understanding of the proceedings against him, which may preclude ability to stand trial, undertake a responsibility, or get executed (including mentally disabled)
    - Note: Mental Illness broader than Insanity and Incompetence, so D can have mental illness and NOT be considered insane or incompetent
    - Note: D could get Insanity but not Incompetent, or vice versa
* Procedural impacts of the insanity defense
  + May not be competent to stand trial
  + Normally can’t sentence to death
* Insanity can arise at three points in the criminal process
  + (1) Mental state at the time of the commission of the criminal offense
  + (2) Incompetence to stand trial -> lacks the capacity to understand the proceedings or to assist in his own defense
  + (3) Sentencing -> can not execute the criminally insane
* Approaches for after acquittal
  + (1) Civil Commitment
    - (a) Some jurisdictions require civil commitment; others have make ad-hoc determinations -> juries in the verdict are not to be made aware of whether it is mandatory or not
    - (b) Duration -> may be released when the patient has recovered and is not longer dangerous
  + (2) Guilty but mentally ill -> court retains the same sentencing authority as in guilty verdicts, but if sentenced to prison he is to be given treatment for the illness
* Burden of Proof
  + (1) There is a presumption of legal sanity at the trial
  + (2) Level of evidence required before the presumption disappears
    - (a) Some states require only “some evidence” of legal insanity
    - (b) Others require that the evidence raise a reasonable doubt about the sanity
  + (3) Most States and the federal system require to the defendant to prove by clear and convincing evidence that he is insane.

### Different Rules and Formulations of Insanity

* Empirically speaking, formulations shown to not make much of a difference
* Should the formulation be medical or moral?
  + Criminal law about social approbation, so latter makes more sense – also shouldn’t hinge on changing defs of medical profession
  + If it’s moral, doesn’t a phase of the trial dominated by psychiatrists just muck everything up?
* **M’Naghten Rule** - "[D acted] under such a defect of reason so as to not know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong". Regarded as most restrictive standard
  + In order to meet the burden, must show:
    - Mental disease of defect
    - Causation
    - Lacked knowledge of
      * The nature of quality of the act
      * OR the wrongness of the act (legally/morally)
  + Rudovsky example: D (Vietnam veteran) has PTSD and shoots at fireman who come to his house; D fails *M’Naghten* because knew the “wrongfulness” of shooting and “nature and quality” of shooting
  + A little under half of all jurisdictions still employ some rule similar to this
* **MPC §4.01** - ~40% of jurisdictions have adopted this instead, a more permissive test regarding insanity
  + D meets defense burden if D establishes:
    - (1) Mental disease or defect (severity and type ambiguous, though excludes abnormality manifested only by repeated criminal/anti-social conduct)
    - (2) D lacked “substantial capacity” at time of crime to either:
      * (a) Appreciate his conduct’s criminality (i.e. M’Naghten “wrongfulness” prong; but MPC leave open to moral or legal wrongfulness) OR
      * (b) Conform his conduct to the law’s requirements (i.e. volitional prong)
  + Distinguished from M'Naghten:
    - Loosens cognitive impairment (needs to appreciate right/wrong, not just know the difference)
    - Loosens volitional impairment (lack substantial capacity to conform his conduct to requirements of the law)
    - Began to fall out of favor after *Hinckley*
* **Durham Test** - first standard to question M’Naghten, but considered too broad
  + D meets burden if D establishes:
    - (1) Mental disease (NOTE: severity and type is ambiguous)
    - (2) Caused a defect of reason
    - (3) D’s crime would not have been committed but-for the abnormal mental condition (this is very broad; nothing related to knowledge of wrongfulness or the act itself)
* **Irresistible Impulse Test** - Question of impaired volitional ability, less restrictive than M’Naghten
  + D meets defense burden if D establishes:
    - (1) Mental disease
    - (2) Caused a defect of reason
    - (3) D unable to control his actions and follow the law

### *M'Naghten* (1843 UK)

* Facts: Defendant suffered delusions and killed a secretary to the Prime Minister. There was considerable evidence that the defendant was insane
* Question: What is the proper instruction for the jury in a case where the insanity defense is used?
* Rule: **It must be proven that at the time of the act, the accused was under such a defect of reason from disease of the mind that he did not know the nature and quality of the act he was committing; or if he did know, he did not know what he was doing was wrong**
* Holding: Jurors should be instructed that every man is presumed sane and to posses a sufficient degree of reason to be responsible for his crimes. Therefore, in order to establish an insanity defense, it must be clearly proven that at the time of the act, the accused as under such a defect of reason from disease of the mind that he did not know the nature and quality of the act he was committing; or if he did know, he did not know what he was doing was wrong
* Notes Case - The King v. Porter
  + The court instructed the jury that the first thing they must do is only focus on the condition of mind at the time the act complained of was done. The next thing the jury must do is determine if the defendant’s state of mind was one of disease, disturbance, disorder. Then. Then the jury must decide that if the defendant’s state of mind was that of disease, they must decide if it was such a character to prevent him from knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong

### *Blake V United States* (1969 5th Circuit)

* Background - Case where court Adopts the MPC test for insanity
* Facts: Defendant was charged with robbery. He told people he was about to rob the bank and had a history of mental illness and electro-shock therapy. The evidence overwhelmingly proved his guilt, but he offered the defense of insanity. He was convicted, but appealed by stating that the insanity definition he was convicted on did not meet the standard for was outdated. Defendant had a history of violence and erratic behavior and may have been suffering from schizophrenia at the time of the robbery. The court instructed the jury that the defendant was insane if he completely lacks capacity to know right from wrong. The jury convicted and the defendant appealed.
* Question: Was the jury instruction on insanity correct?
* Holding: No, the original insanity charge to the jury was “the term insanity as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know the act is wrong, yet his will, by which I mean the governing power of his mind has been otherwise than voluntarily so completely destroyed that his actions are to subject to it but are beyond his control.” By contrast, the MPC test for insanity which the defendant urged the court to adopt states, “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.” The MPC definition is slightly less rigid in that lack of capacity must be substantial rather complete. This is the better formula according to the court, so the conviction was overturned.

### *United States V Lyons* (1984 5th Cir.)

* Background: Court rejects MPC requirement, reasoning that it allows too many people to plead insanity
* Facts: Lyon was convicted of twelve counts of knowingly and intentionally securing controlled narcotics. During trial, Lyons claimed his drug addiction was a mental disease within the definition proscribed in the insanity defense. He offered evidence that in 1978 he became addicted to several prescription drugs given to him for pain relief. In addition, Lyons sought to present expert witnesses who would testify that has drug addiction changed the physiology and psychology of his brain resulting an incapacity to conform his conduct to the requirements of the law. The trial court, however, excluded the proffered evidence.
* Question: Does the existing insanity defense standard of a “lack of capacity to conform one’s conduct to the requirements of the law” coincide with current medical and scientific knowledge?
* Holding: No, although addiction is not a mental disease, the addiction itself may cause actual physical damage to the brain resulting in a mental disease or defect in the brain. Defendant rightfully sought to offer such evidence to the jury. Although the court no longer recognizes the volitional prong under the insanity defense, defendant should be afforded the opportunity to offer such evidence in an attempt to satisfy the cognitive prong. A defendant in a criminal case is not guilty by reason of insanity if at the time of the conduct, as a result of mental disease or defect, he us unable to appreciate the wrongfulness of his conduct.
* Dissent: An adjudication of guilt is not only a factual determination but a moral judgment that an individual is to blame. The court’s decision rests on its desire to redefine insanity and narrow the defense on policy considerations. Pleas of insanity and are rarely successful and do not go to trial
* Notes:
  + After the Hinckley case (guy who tried to assassinate president Reagan), many courts got rid of the MPC insanity rule because it allowed too many people to plead insanity (Only 14 states still have MPC requirement)
  + It is generally unconstitutional for a state to try and abolish the insanity defense

### *State v. Crenshaw* (1983 WA)

* Facts: While the defendant and his wife were on their honeymoon in Canada, the defendant was deported to the US. The defendant believed that his wife was unfaithful in the few days it took for her to meet up with him back in the 112 US. Defendant brutally murdered his wife because he believed that under his religious beliefs he had to kill her if she committed adultery. The jury found the defendant guilty of first-degree murder. The defendant contended that the trial court erred in defining “right and wrong” as legal and wrong rather than in a moral sense.
* Question: Did the trial court err in defining “right and wrong” as a legal right and wrong instead of the moral sense?
* Holding: It is society’s morals and not an individuals morals that are the standard for judging moral wrong under M’Naghten. If moral wrong were judged by an individual’s conscience, the criminal law would be seriously undermined because it would allow a person in violation of the law to be excused from criminal responsibility merely because in his own conscience, his act was not morally wrong. There is evidence on the record that the defendant knew his actions were wrong according to societies standards.
* Notes:
  + Defendants who act out of a deific decree will generally have an insanity defense, although this is hotly debated because many people find this is outdated

### *State v. Guido* (1963 New Jersey)

* Facts: The victim in this case was the defendant’s husband. Her husband was a professional fighter who married her at a young age. The defendant was intimidated by her husband and felt as though she were under a constant threat of injury. There was evidence of a few instances of actual injury. The victim had an extra-marital affair and as a result the defendant wanted a divorce. The defendant called the police on several occasions prior to the incident to express her fear of her husband. On the night in question, her husband was asleep on the couch and the defendant took a gun from the living room into the bedroom in order to commit suicide. Once in the bedroom she changed her mind and decided to put the gun away. When the defendant saw her husband lying on the couch she opened fire until there were no bullets left. Defense counsel hired expert witnesses in order to put together the insanity defense. The psychiatrists initial report stated that the defendant was legally sane at the time of the incident. After debate with defense counsel, the psychiatrist agreed to change their opinion as to the legal sanity issue. However, their underlying medical findings remained the same. The psychiatrist thought that only psychosis was what qualified as a disease of the mind.
* Question: What constitutes “a disease of the mind” under the concept of legal insanity?
* Holding: There is widespread reluctance to define what is meant by “disease” under the M’Naghten rule. Because there is no concrete definition, the definition of what constitutes legal insanity is up for discussion. In this case, the defendant emotional insanity met the definition of disease of the mind.
* Notes:
  + Courts define “disease of the mind” differently, some give a broad standard that includes many types of insanity (i.e. emotional) and others give more limited definitions
  + It must be a disease however, and this requirement has defeated insanity claims for battered woman syndrome, compulsive gambling disorder, postpartum disorders, alcohol and drug addictions, and others

### *Clark v. Arizona* (2006)

* Facts: During a traffic stop, defendant shot and killed a police officer, and was prosecuted for first-degree murder. Clark admitted the shooting but brought his paranoid schizophrenia at the time of the incident as a defense, to prove that he did not have the specific intent to shoot an officer of the law the knowledge that he was committing the specific crime. The trial court ruled that the defendant could not use evidence showing that he was insane to rebut the presence of mens rea. Thus psychiatric evidence could not be admitted to prove the absence of specific intent, or of mens rea, defendant was convicted. Defendant pleaded a violation of his due process of law
* Question: Does a state violate a due process of law by preventing the introduction of evidence showing diminished capacity by a criminal defendant?
* Holding: No, a state’s prohibition of the introduction of diminished mental capacity by the defendant in a criminal case does not violate due process. A defendant is presumed sane until he proves otherwise, but allowing a defendant to use evidence of insanity to show that he could not form the necessary criminal intent would enable him to get around that presumption. “Clark presses no objection to Arizona’s decision to require persuasion to clear and convincing degree before the presumption of sanity. And normal responsibility.” But if a state is to have authority in practice as well in theory, it must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial
* Dissent: Defendant should be allowed to introduce evidence of his lack of awareness or intent to commit the specific crime he is charged with, provided it is reliable and thought-through, so that that he can prove he cannot be convicted of either knowingly or voluntarily killing a police officer. The final placing of the burden of proof on the defendant as to his intent or knowledge of the crime he was committing is unconstitutional as the state has the responsibility of proving these elements of the crime beyond a reasonable doubt
* Notes:
  + *United States v. Brawner*: Establishes the Brawner Approach, evidence about D’s mental condition at the time of the crime is admissible to negate a required specific intent but not a general intent
  + Many states impose no special restrictions on the use of mental-health evidence to rebut a required mens rea
    - 16 state bar evidence of mental illness to negate culpability elements of any kind, 13 states permit mental illness to negate only specific intent, and 23 jurisdictions allow mental-illness evidence to negate any element (this is the MPC Approach)
    - MPC Approach: Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense
    - The MPC approach permits the use of mental health evidence to rebut a required mens rea, but for cases when the elements of an offense are proved, the MPC rejects a statutory reduction of punishment for reduced mental capacity