

CRIMINAL LAW OUTLINE

§1.01 NATURE OF “CRIMINAL LAW”

The study of criminal law is the study of crimes and the moral principles of criminal responsibility

[A] CRIMES

[1] COMPARISON TO CIVIL WRONGS

- Criminal law involves public law: crime causes social harm in that the injury suffered involves a breach and violation of the public rights and duties, due to the whole community, considered a community, in its social aggregate capacity
- The punishment from a criminal conviction could be no more (or in some cases less) than that in a civil case
- Distinguishment is (or at least should be) the societal stigma and condemnation that results

[2] CLASSIFICATION OF CRIMES

- English common law divided crimes into two categories:
 - Felonies: comprised every species of crime which occasioned at common law the forfeiture of land and goods
 - Misdemeanors: all other crimes were considered misdemeanors
- Modern day:
 - Felonies: offenses punishable by death or imprisonment in a state prison
 - Misdemeanors: offenses where the maximum punishment is a monetary fine or incarceration in a local jail

[B] PRINCIPLES OF CRIMINAL RESPONSIBILITY

- Principles of criminal responsibility identify the point at which it is believed fair to from the factual premise “D caused or assisted in causing X (a social harm) to occur”, to the normative judgment, “D should be punished for having caused or assisted in causing X to occur”

§1.02 PROVING GUILT AT THE TRIAL

[A] RIGHT TO TRIAL BY JURY

[1] IN GENERAL

- 6th amendment provides for a speedy and public trial by an impartial jury → “if the defendant prefers the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he is to have it”
- Right to a jury is only guaranteed in non-petty offenses
 - Constitutional right to trial by jury in all felony and many misdemeanor prosecutions

[2] SCOPE OF THE RIGHT

- Jury composed of 12 persons who must reach a unanimous verdict to convict or acquit → juries as small as 6 persons are still constitutional, as are non-unanimous decisions as long as they are decided by a majority
- Defendant is entitled to draw from a pool of persons representing a fair cross-section of the community

[B] BURDEN OF PROOF

-Due process clause of the United States Constitution requires the prosecutor in a criminal trial to persuade the fact finder “beyond a reasonable doubt of every fact necessary to constitute the crime charged”

[C] JURY NULLIFICATION

[1] THE ISSUE

- Are there reasons that a jury should acquit an individual even if the prosecution has proven beyond a reasonable doubt that they have committed the offense charged?
- A jury returns a verdict of guilty or not guilty; they are not required to explain their decision
- 5th amendment provides that no person shall be subject for the same offense to be twice put in jeopardy

[2] THE DEBATE

- Advocates point out that trial by jury is a constitutional right in order to protect against governmental oppression
- Serves as a community safeguard against morally unjust or socially undesirable criminal convictions that inflexible judges might impose
- Critics respond that juries should not exercise their raw power to nullify the law
- Casts aside the notion that only elected representatives can decide what is a crime and what is not, and only they may revise the law if it is found to be unfair

[3] THE LAW

- Judge can instruct the jury that, if it finds beyond a reasonable doubt that the defendant committed the crime charged, it must find her guilty
- General rule is that such instructions are permissible because, while the power to nullify exists, there is no concomitant right to nullify
- Defendant may request the judge to instruct the jury that it is entitled to act upon its conscientious feelings to acquit the defendant
- A prosecutor may seek to have a juror discharged before or during deliberations if there is evidence that she intends to nullify the law and vote to acquit

[4] RACE BASED NULLIFICATION

- Butler: imprisonment of nonviolent offenders cause more harm than good in the African American community
- Argument against race based nullification: once we have agreed that jurors can legitimately decide the outcome of cases by a cost benefit analysis rather than applying the law as written, it is a dangerous and slippery slope

§2.01 “PUNISHMENT” AND CRIMINAL LAW THEORY

- Any system that inflicts pain on persons by taking their life, liberty, or property needs a justification
- Lawmakers must ascertain which conduct is wrongful, but which persons may properly be held accountable for wrongful conduct
- WHAT and HOW MUCH punishment fits the offense and the offender
- Criminal laws ought to be fair and deal coherently with persons charged with crime

§2.02 “PUNISHMENT”: DEFINED

[A] IN GENERAL

- No general definition of punishment, BUT, D may be said to suffer “punishment” when, but only when, an agent of the government, pursuant to authority granted to the agent by virtue of D’s criminal

conviction, intentionally inflicts pain on D or otherwise causes D to suffer some consequence that is ordinarily considered to be unpleasant

[B] CONSTITUTIONAL LAW ANALYSIS

- Constitutional line between “punishment” and civil remedies is exceptionally difficult to draw
- Supreme Court has held that the categorization of a proceeding as civil, and thus not as “punishment”, is a question of statutory construction

§2.03 THEORIES OF PUNISHMENT

[A] UTILITARIANISM

[1] BASIC PRINCIPLES

- Form of consequentialism that holds that the justification of a practice depends ONLY on the consequences
- Bentham: the purpose of all law is to maximize the net happiness of society and in a perfect world; punishment and crime are unpleasant and wouldn't exist
- Punishment is justifiable ONLY IF it is expected to result in a reduction of the pain of crime that would otherwise occur
- Classical utilitarian's believe that the threat or imposition of punishment can reduce crime because, in general, people act hedonistically and rationally

[2] FORMS OF UTILITARIANISM

- General Deterrence: D is punished in order to convince the general community to forgo criminal conduct in the future
 - D's punishment serves as an object lesson to the rest of the community
- Specific/Individual Deterrence: D's punishment is meant to deter future misconduct by D
 - Deterrence by incapacitation: D's imprisonment prevents him from committing crimes in the outside society
 - Deterrence by intimidation: D's punishment reminds him that if he returns to a life of crime, he will experience more pain
- Rehabilitation: model uses the correctional system to reform the wrongdoer rather than to secure compliance through the fear or bad taste of punishment

[B] RETRIBUTIVISM

[1] BASIC PRINCIPLES

- Punishment is justified when it is deserved
 - It is deserved when the wrongdoer freely chooses to violate society's rules, and the wrongdoer should be punished whether or not it results in a reduction of crime
- “It is morally fitting that an offender should suffer in proportion to his desert or culpable wrongdoing”
- Retributive looks back and justifies punishment solely on the basis of the voluntary commission of crime

[2] FORMS OF RETRIBUTIVISM

- Assaultive Retributive/Public Vengeance/Societal Retaliation: because criminals have hurt society, it is fair for society to hurt them back
- Protective Retributive: punishment is not inflicted because society wants to hurt wrongdoers, but because punishment is a means of securing a moral balance in the society

-Victim Vindication: by committing a crime, a criminal makes a claim that their rights are more important than the victims; this principle reaffirms the victims worth as a human being in the face of the criminal's challenge

[C] DENUCIATION (EXPRESSIVE THEORY)

- Punishment is justified as a mean of expressing society's condemnation and the relative seriousness of a crime
- Denunciation is education, channels anger away from personal vengeance and is retributive in that it is a form of moral condemnation

§2.04 THE DEBATE BETWEEN THE COMPEETING THEORIES

[A] CRITICISMS OF UTILITARINISM

[1] DETERRENCE

- Retributivists criticize deterrence theory in the ground that it uses people solely as a means to an end
- Utilitarianism can justify the punishment of an innocent person
- Act Utilitarianism: a calculation of whether a particular act, in the immediate occasion, is justified on utilitarian grounds
- Rule-Utilitarianism: the determination of whether a particular act, publicly announced as a rule of law that applies to an entire community would be justified

[2] REHABILITATION

- Critics doubt that criminals can be reformed, noting that if school, family, and religion have failed, why should prison work any better?
- Criticized on the ground that the theory removes from punishment the concept of desert
- Rehabilitation can also justify cures that violate the offender's personhood

[B] CRITICISMS OF RETIBUTIVISM

- The intentional infliction of pain though punishment is senseless and cruel if it does no good
- Retibutivism glorifies anger and legitimizes hatred
- Retibutivism is irrational because it is founded on emotions, such as anger rather than reason

§2.05 MIXED THEORIES OF PUNISHMENT

- Utilitarianism and retibutivism conflict with each other→ criminal law does not adhere to one policy over another
- Mixed theoretical system that asks two questions:
 - Why have we set up a criminal justice system, i.e, devised criminal laws prohibiting conduct, created a police force to arrest law violators, set up courts to adjudicate guilt and innocence, and imposed penalties for those law?
 - Given our justice system, who should be held responsible for their actions, and how much punishment is appropriate for those who are held responsible?

§2.06 SENTENCING

- Criminal codes provide that a defendant convicted of a noncapital felony offense may receive a sentence consisting of a term of years of imprisonment in a state prison, a monetary fine, or both
- Sentencing systems should be consistent with the principles of punishment at the foundation of that particular jurisdiction's criminal system

- By the 1960s, most states utilized some form of intermediate sentencing; which gives judges considerable sentencing discretion
- NOW, nearly all states have abandoned indeterminate sentencing systems for a determinate one
 - Result of disillusionment with the rehabilitative model, pressure from the public, increased interest in retributive goals, and a widespread desire to cut back on judicial sentencing
- In determinate sentencing, the offender's sentence is determined once and for all based on a defined sentence for a specific offense

§6.01 "PROPORTIONALITY IN THE CRIMINAL LAW: OVERVIEW

- A person is not justified in using force against another unless it is "proportional or reasonable in relation to the harm threatened or the interest to be furthered"
- Proportionality is considered in sentencing as well to ensure that the offender receives an appropriate punishment for the crime
- How much punishment is excessive or disproportionate to a particular crime?
- Under what circumstances is disproportional punishment not only unwise or unfair, but also unconstitutional?

§6.02 UTILITARIANISM AND PROPORTIONALITY

[A] GENERAL PRINCIPLES

- Philosophy directs that punishment be neither too little or much, but proportional to the crime inflicted
- 5 rules to deter crime:
 - (1) Punishment must not be less than required to outweigh the potential profit to the criminal of committing the offense
 - (2) The greater the mischief of the offense, the greater the expense, which it may be worth while to be at, in the way of punishment
 - (3) Lawmakers must grade offenses in a manner that will induce a person to choose always the least mischievous of two offences
 - (4) Punishment should be set in a manner to induce the criminal to do no more mischief than what is necessary for his purpose
 - (5) Punishment ought in no case to be more than what is necessary to bring it into conformity with the previous rules

[B] APPLICATION OF THE PRINCIPLES

[1] GENERAL DETERRENCE

- Very dangerous crimes should be punished more severely than less dangerous ones
- The degree of dangerousness is measured by predicting the overall mischief that is likely to result from commission of the offense in the future by this and other offenders
- The degree to which conduct can be deterred will be considered when setting a punishment

[2] SPECIFIC DETERRENCE

- When deterrence of a specific offender is desired, punishment is proportional to the extent, BUT ONLY TO THE EXTENT, that it is necessary to prevent the individual offender from committing future criminal acts more painful to society than the punishment that will be inflicted on the wrongdoer

[3] REHABILITATION

- Proportionality has little meaning in a rehabilitative system of treatment, though in many cases, rehabilitation constitutes punishment for purposes of the criminal law

§6.03 RETRIBUTIVISM AND PROPORTIONALITY

[A] GENERAL PRINCIPLES

- The offender owes a debt to society; punishment is the mode of repayment. The payment due varies with the crime committed: the punishment must be proportional to the offense committed, taking into consideration both the harm caused and the wrongdoer's degree of moral desert for having caused it
- Rejection of the principle of lex talionis: the infliction upon the wrongdoer of the same injury caused to the victim

[B] APPLICATION OF PRINCIPLES

[1] IN GENERAL

- Crime has two parts:
 - External part: involving the harm inflicted by the actor
 - Internal part: involving the actor's moral blameworthiness, as represented by the offender's mental state in causing the harm inflicted
- Harm component: legislature looks backward at the crime committed and determines what harm ordinarily results from the commission of the offense in question
- Blame component: retributivists consider a person more deserving of punishment if he intentionally, rather than negligently causes a particular harm

[2] DEVISING A PROPORTIONAL RETRIBUTIVE SYSTEM

- With the absence of lex talionis punishment, penalties can only approximate the seriousness of the crimes committed
- Proportion punishment BETWEEN offenses rather than to offenses

§6.04 COMPARING THE TWO THEORIES OF PROPORTIONALITY

- Utilitarian punishment is linked to predictions of future harm and the extent to which the undesired conduct is deterable
- Retributivists seek proportion punishment to the offense already committed, without consideration of future harm
- Retributivists believe punishment for wrongdoing is morally right
- Utilitarians contend that punishment is undesirable unless it will result in a net benefit to society

§5.01 PRINCIPLE OF LEGALITY

[A] DEFINITION

- “nullum crimen sine lege, nulla poena sine lege”: no crime without law, no punishment without law
- A person may not be punished unless their conduct was defined as criminal by the law (cannot AFTER THE FACT decide that some behavior SHOULD be punishable and punish for it)
- Prohibition on retroactive criminal lawmaking constitutes the essence of the principle of legality
- Doctrine of legality should override all other principles of criminal law
- Three interrelated principles:
 - (1) Criminal statutes should be understandable to reasonable law abiding citizens
 - (2) Criminal statutes should be crafted so as not to delegate basic policy matters to police, judges, and juries on an ad hoc and subjective basis
 - (3) Judicial interpretation of ambiguous statutes should be biased in favor of the accused (lenity doctrine)

[B] RATIONALE

- Legality doctrine is designed to serve fundamental justice by preventing the arbitrary and vindictive use of the laws

- Legality principle enhances individual autonomy and maximizes the opportunity of individuals to pursue their own purposes and ends by reducing the risk that a person's lawful conduct will be punished retroactively
- Legality is justified on fair notice grounds; the existence of legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed

[C] CONSTITUTIONAL LAW

- The legality principle has constitutional foundations

[1] BILL OF ATTAINDER AND EX POST FACTO CLAUSES

- Article I, Sections 9 & 10 of the constitution prohibit federal and state legislatures from enacting bills of attainder and ex post facto legislation
- Bill of attainder: declares a specific person guilty of a crime and subject to punishment without either a trial or conviction

[2] DUE PROCESS

- Principle of legality applies to the judicial branch through the 5th and 14th amendment due process clauses
- Due process clause provides significant protection against retroactive punishment

§5.02 STATUTORY CLARITY

- A criminal statute must not be so vague that men of common intelligence must guess at its meaning and differ as to its application
- A person is denied due process of the law if she is convicted and punished for violation of a statute that lacks clarity
- Requirement: fair notice that conduct may entail punishment
 - Courts look at the purpose of the statute, the extent to which the statutory ambiguity was necessary to further the legislative goal, and the impact of the statute on the protected rights of the individual

§5.03 AVOIDING UNDUW DISCRETION IN LAW ENFORCEMENT

- Statutes without clarity and with insufficient notice are susceptible to enforcement in an arbitrary or discriminatory manner
- Statutes must establish minimum guidelines to govern law enforcement → otherwise it is a due process violation
- Statutes can be narrow to achieve a specific purpose, but may not be so vague as to confuse enforcement

§5.04 STRICT CONSTRUCTION OF STATUTES (RULE OF LENITY)

- When a statute is ambiguous, it is the job of the court to use all means to ascertain the intent of the legislature
- What happens when courts cannot interpret the meaning of the statute? Courts developed the rule that when a criminal statute is subject to conflicting reasonable interpretations, the statute should be interpreted strictly against the government
- Principle of lenity prevents a court from inadvertently enlarging the scope of a criminal statute through its interpretive powers
- Lenity doctrine only comes into play if a statute is ambiguous (and is not recognized by the MPC)

§9.01 ACTUS REUS: GENERAL PRINCIPLES

[A] DEFINITION

- The physical or external portion of a crime
- The actus reus of an offense consists of:
 - (1) A voluntary act
 - (2) That causes

(3) Social harm

[B] PUNISHING THOUGHTS: WHY NOT?

- Actus reus ensure that only criminal ACTIONS are punished by society
- Most people in society have “impure” mental thoughts that harm will befall on someone; punishing that would result in an invasion of privacy
- Actus reus requirement is premised on the retributive belief that it is morally wrong to punish for unacted-upon intentions

§9.02 VOLUNTARY ACT: GENERAL PRINCIPLES

[A] GENERAL RULE

- A person is not guilty of a crime unless her conduct includes a voluntary act
- Two components:
 - Act
 - Voluntary nature

[B] THE “ACT”

- For the purpose of the requirement, the act is any bodily movement
- An act involves physical but not necessarily visible behavior
 - (1) There can be movement without an act
 - (2) Act does not apply to the results of a person’s bodily movements
 - (3) To be an act, it must be voluntarily performed

[C] VOLUNTARY

[1] BROAD MEANING: IN THE CONTEXT OF DEFENSES

- Because the actor faced an extremely hard choice (duress) or was irrational (insanity) she does not deserve to be punished for her actions
- NOT how the term is used in the context of the actus reus requirement

[2] NARROW MEANING: IN THE CONTEXT OF THE ACTUS REUS

- “Movement of the body which follows our volition”
- Criminal responsibility should only be attached to those responsible for their actions

[3] VOLUNTARINESS: AT THE EDGES

[a] HYPNOTISM

- It is best and more consistent with our assumptions about human free will to recognize the acts of the hypnotized subject as voluntary, and deal with her culpability, if any, as a potential excusing defense

[b] MULTIPLE PERSONALITY (OR DISSOCIATIVE IDENTITY) DISORDER

- MPD implicates the voluntary act requirement, since there is ONE person committing the wrong act

[D] VOLUNTARY ACT REQUIREMENT: RATIONALE

- Voluntary act requirement is closely linked to the retributivist’s respect for human autonomy
- Criminal punishment should only be imposed on those who deserve it; in the absence of a voluntary act, there is no basis for social censure

[E] BURDEN OF PROOF

- A voluntary act is prerequisite to criminal responsibility
- Prosecution should be required to prove beyond a reasonable doubt that the defendant's conduct included a voluntary act

[F] THE ISSUE OF TIME FRAMING

- It is sufficient to show that the defendant's conduct included a voluntary act, time doesn't matter
- A person is not guilty of an offense unless her conduct, which must include a voluntary act, and which must be accompanied by a culpable state of mind, is the actual and proximate cause of the social harm, as proscribed by the offense
- Court must focus on the RELEVANT conduct that caused the social harm; must determine whether THIS conduct contained a voluntary act

§9.03 VOLUNTARY ACT: SUPPOSED (BUT NOT REAL) EXCEPTIONS TO THE REQUIREMENT

[A] POORLY DRAFTED STATUTES

- Some statutes appear to dispense with the requirement of a voluntary act based on sloppy wording; not an exception

[B] STATUS OFFENSES

- Require proof of a "status" rather than proof of conduct
- Very likely that any statute that punishes a person for a mere propensity to act will run afoul of constitutional principles

[C] CRIMES OF POSSESSION

- Crimes of possession are inchoate offense
- Courts interpret these statutes to require proof that the defendant knowingly procured or received the property possessed

§9.05 VOLUNTARY ACT: MODEL PENAL CODE

[A] GENERAL PRINCIPLES

- MPC provides that no person may be convicted of a crime in the absence of conduct that includes a voluntary act or the omission to perform an act which he is physically capable
- Code defines act as a bodily movement whether voluntary or involuntary
- Possession is an act if the possessor either knowingly obtained the object possessed or knew she was in control of it for a sufficient period of time to have been able to terminate possession

[B] EXCEPTIONS TO THE RULE

- Voluntary act rule applies to crimes, but does not apply to offenses that constitute violations unless a court determines that application of section 2.01 is consistent with effective enforcement of the law defining the offense

§9.06 OMISSION: GENERAL PRINCIPLES

[A] GENERAL RULE

- Not even moral obligation to act creates a concomitant legal duty
- A person has no criminal law duty to act to prevent harm to another, even if the person imperiled may lose her life in the absence of assistance
- Criminal law distinguishes between acts that cause harm and the failure of a bystander to prevent harm

[B] CRITICISMS OF THE GENERAL RULE

- General criticism is that of moral repugnancy; in a civilized society, should have a duty to help others when there is no harm to him
- Effect of the omission rule is to exonerate people who are guilty of moral indifference, since they have created no crime

[C] DEFENSE OF THE GENERAL RULE

- People cannot be as responsible for their “not doings” as they are for their actions
- Where should the line be drawn in WHO is responsible?
- Liability for non-actions would create serious problems of proof of mens rea
- The omission doctrine is consistent with the principle of autonomy

§9.07 OMISSIONS: EXCEPTIONS TO THE NO-LIABILITY RULE

[A] COMMON LAW DUTY TO ACT: COMMISSION BY OMISSION

[1] OVERVIEW

- A defendant’s omission of a common law duty to act, assuming that she was physically capable of performing the act, serves as a legal substitute for a voluntary act
- If the remaining elements of the defense are proven, the defendant can be charged with the crime
- Punishment for commission by omission has been criticized as volatile of the legality principle

[2] WHEN THERE IS A DUTY TO ACT

[a] STATUS RELATIONSHIP

- A person may have a common law duty to act to prevent harm to another if she stands in a special status relationship to the person in peril
- Relationships founded on the dependence of one party on another or the interdependence of the parties on each other

[b] CONTRACTUAL OBLIGATION

- Duty to act may be created by express or implied contract

[c] OMISSIONS FOLLOWING AN ACT

- In some cases, an omission following an act will create criminal responsibility, even when there is no liability for the original act

[i] 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
- Duty can also arise from non-culpable risk creation

[ii] VOLUNTARY ASSISTANCE

- One who voluntarily commences assistance to another in jeopardy has a duty to continue to provide aid, at least if a subsequent omission would put the victim in a worse position than if the actor had not initiated help

[B] STATUTORY DUTY (INCLUDING BAD SAMARITAN LAWS)

- Independent of common law, a duty to act may be statutorily imposed
- Bad Samaritan Laws: make it an offense for a person not to come to the aid of a stranger in peril under specific circumstances

-Critics assert that no one can be fairly prosecuted under these laws

§9.08 OMISSIONS: MODEL PENAL CODE

-MPC does not significantly differ from common law in terms of omissions

-A person is not guilty of any offense unless his conduct includes a voluntary act or omission to perform an act of which he is physically capable

-Liability based on an omission is permitted in two circumstances:

- (1) If the law defining the offense provides for it
- (2) If the duty to act is otherwise imposed by law

§9.10 SOCIAL HARM: GENERAL PRINCIPLES

[A] OVERVIEW

-For social harm to be an essential element of all offenses, the term must be carefully and broadly defined

[B] DEFINITION OF SOCIAL HARM

-Society is wronged when an actor invades any socially recognized interest and diminishes its value

-Social harm may be defined as the negation, endangering, or destruction of an individual group, or state interest which was deemed socially valuable

[C] FINDING THE SOCIAL HARM ELEMENT IN A CRIMINAL STATUTE

-The definition of the offense will identify the proscribed social harm

-The words of the statute tell us what society does not want to occur

[D] DIVIDING SOCIAL HARM INTO SUBELEMENTS

-Social harm may consist of wrongful conduct, wrongful results, or both

[1] CONDUCT ELEMENTS (OR CONDUCT CRIMES)

-Conduct crimes are those where no harmful result is required, the harm comes from the act not the result

-It is enough that socially valuable interests have been endangered by the actor's conduct

[2] RESULT ELEMENTS OR RESULT CRIMES

-An offense may be defined in terms of a prohibited result

-The nature of the defendant's conduct is definitionally irrelevant; it does not matter how the result occurs, just that it does

[3] ATTENDANT CIRCUMSTANCES

-In order for any offense to occur, certain facts or conditions must be present when the actor performs the prohibited conduct and or causes the prohibited result

-The social harm of the offense has not occurred unless the specified attendant circumstances are present

§9.11 SOCIAL HARM: CONSTITUTIONAL LIMITS

-Constitutional provisions limit the extent to which a legislature may properly prohibit socially harmful conduct

§10.01 MENS REA: GENERAL PRINCIPLE

-Actus non facit reum nisi mens sit rea: an act does not make a person guilty unless the mind be guilty

-A person is not guilty of an offense unless the government proves both the actus reus and mens reus of the crime

-Criminal liability requires proof of an evil meaning mind with an evil doing hand

§10.02 DEFINITION OF MENS REA

[A] AMBIGUITY OF THE TERM

- Mens rea has two meanings; broad and more narrow
- Over time the law has refined the doctrine, developing a more precise meaning of the term

[B] BROAD MEANING: THE CULPABILITY MEANING OF MENS REA

- General immorality of motive, vicious will, or an evil meaning mind
- General notion of moral blameworthiness
- It is sufficient that the defendant committed the proscribed acts in a manner that demonstrated his bad character, there is need to show that the offense was committed with a particular frame of mind

[C] NARROW MEANING: THE ELEMENTAL MEANING OF MENS REA

- The particular mental state provided for in the definition of an offense (ELEMENTAL sense)
- A person may possess mens rea in the culpability sense of the term, and yet lack the requisite elemental mens rea

§10.03 RATIONALE OF THE MENS REA REQUIREMENT

[A] UTILITARIAN ARGUMENTS

- Some persons justify the mens rea requirement on the grounds of deterrence
- However, even if one acting without a culpable state of mind cannot be deterred on the present occasion, his punishment can serve as a useful warning to others to be more careful
- Prosecution is constitutionally required to prove beyond a reasonable doubt every element of a criminal offense, including the mens rea
 - This can be a hard burden to satisfy, and thus some who do have the required mens rea are able to escape conviction

[B] RETRIBUTIVE ARGUMENTS

- Mens rea requirement flows from our society's commitment to individual choice; it is morally unjust to punish those who accidentally, rather than by choice cause injury to society
- Crimes are public wrongs that harm society as a whole; by convicting the criminal, society renounces the actor and his conduct
 - It makes sense that this process should not exist for one who has acted without a culpable state of mind

§10.04 FREQUENTLY USED MENS REA TERMS

[A] INTENTIONALLY

[1] DEFINITION

- Prosecution must prove that the defendant intentionally committed the social harm that constitutes the actus reus of the offense
- At common law, a person intentionally cause the social harm of an offense if:
 - (1) It is his desire to cause the social harm, or
 - (2) He acts with knowledge that the social harm is virtually certain to occur as a result of his conduct
- “Known Certainties” prong of intent: only satisfied if the actor realize that the undesired event will “for sure” occur

-Both versions of intent involve subjective fault; an actors fault is subjective if he possesses a wrongful state of mind, or the awareness that harm will most likely occur from his conduct

[2] MOTIVE DISTINGUISHED

-A defendant's motive is often relative to the criminal law

(1) Specific Intent crimes by definition require proof of a specific motive

(2) Motive is relative to claims of defense

-If the defendant's motive for his intentional actions is legally justifiable, he will be acquitted

(3) Motive is relative at the sentencing phase of a criminal proceeding

-In specific jurisdictions, good/bad conduct can be considered in mitigation

[3] TRANSFERRED INTENT

[a] GENERAL DOCTRINE

-Liability is attributed to a defendant who, intending to kill one person, accidentally kills another

-Law transfers the actor's state of mind regarding the intended victim to the unintended one

-Justified on grounds of necessity and proportionality

-Necessity: should not avoid conviction just because he killed the wrong person

-Proportionality: ensure punishment in accord with culpability

[b] AN UNECESSARY AND POTENTIALLY MISLEADING DOCTRINE

-In some cases, actus reus and mens rea can be satisfied without inducing the doctrine of transferred intent

-Transferred intent transfers the intent from the intended victim to the unintended one; it does NOT transfer the intent to cause one type of social harm to another

-Confusion could be avoided if courts rejected the transferred intent doctrine and decided independently if the actor had the intent to cause the social harm required in the definition of the offense

[c] LOOKING PAST THE EASY CASES

-Paradigmatic transferred intent case has these characteristics:

(1) A intends to cause a specific harm to one-just one-specific individual, B;

(2) B escapes unscathed; and

(3) An unintended victim, C, suffers the harm intended for B

-Not all cases are this easy; the purpose of the transferred intent doctrine is to put the bad aim wrongdoer in the same position he would have found himself if his aim had been good

-Punishment proportional to the wrongdoer's culpability

[B] KNOWINGLY OR WITH KNOWLEDGE

-Sometimes knowledge of a material fact (an attendant circumstance) is a required element of an offense

-A person has knowledge of a material fact if he:

(1) Is aware of the fact; or

(2) Correctly believes that the fact exists

-Most jurisdictions also permit a finding of knowledge in the case of "willful blindness" or "deliberate indifference"

(1) Actor is aware of a high probability of the existence of the fact in question; and

(2) Actor deliberately fails to investigate in order to avoid confirmation of the fact

- For willful blindness, culpability can be based on nothing more than a failure to take obvious steps to confirm suspicions
- Proponents of the doctrine contend that absolute knowledge is hard to come by, and this definition rewards those who seek to avoid criminal responsibility by purposeful ignorance
- Critics hold that if willful blindness is morally equivalent to knowledge; that is not the same as saying that willful blindness IS knowledge

[C] WILFULLY

- Can have many different meanings, but in most circumstances, an intentional wrongdoer acts with a bad purpose or evil motive, and with knowledge that he is violating the law, so it doesn't matter which meaning is applied

[D] NEGLIGENCE AND RECKLESSNESS

[1] OVERVIEW

- Four categories of risk taking:
 - (1) Desirable or neutral risk taking
 - (2) Risk taking that justifies civil liability
 - (3) Criminally negligent risk taking
 - (4) Reckless conduct

[2] NEGLIGENCE

[a] IN GENERAL

- 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 a deviation if the actor takes an unjustifiable risk of causing harm to another (objective fault)
- Three factors in determining if a reasonable person would have acted like the defendant:
 - (1) The gravity of the harm that foreseeably would result from the conduct
 - (2) The probability of such harm occurring
 - (3) The burden to the defendant of desisting from the risky conduct (BPL analysis)

[b] DISTINGUISHING CIVIL FROM CRIMINAL NEGLIGENCE

- Criminal negligence is conduct that represents a GROSS deviation from the standard of reasonable care; a person is criminally negligent if they take a substantial and unjustifiable risk of causing social harm

[c] SHOULD NEGLIGENCE BE PUNISHED

- Can you punish someone for acting without the requisite mens rea (guilty mind)?
- Negligent actors fail to perceive the risks of his conduct, and therefore cannot be deterred
- Utilitarian defense: general deterrence for the perceived wrong
- Retributive defense: criminal blame is justified on the ground that the negligent actor's failure to perceive the riskiness of his conduct constitutes culpable indifference to the rights of those around him

[d] WHO REALLY IS THE REASONABLE PERSON?: INITIAL OBSERVATIONS

- A prudent and careful person who is ALWAYS up to the correct standard
- Traditional rule, which is under attack, is that although a defendant's physical characteristics are relevant (blindness), his mental characteristics are not

[3] RECKLESSNESS

- Reckless falls on the culpable side of the line of criminal negligence
- Tort definition: a person acts recklessly if he takes a very substantial and unjustifiable risk
- Criminal definition: requires proof that the actor disregarded a substantial and justifiable risk of which he was aware
- Subjective fault: actor was aware of the risk, yet proceeded with his dangerous conduct anyway

[E] MALICE

- A person acts with malice if he intentionally or recklessly causes the social harm prohibited by the offense
- Rarely employed in its popular/nonlegal sense

§10.05 STATUTORY INTERPRETATION: WHAT ELEMENTS DOES A MENS REA TERM MODIFY

- General rule is that if a statute is not clear on its face, the court will seek to interpret the statute in a manner that best gives effect to legislative history of an act and the circumstances surrounding its adoption; earlier statutes on the subject; the common law; and previous interpretations of the same statutes
- Courts also take into consideration rules of grammar; but won't use this method if such an interpretation would conflict with the background assumptions of criminal law

§10.06 SPECIFIC INTENT AND GENERAL INTENT

- General Intent: historically referred to any offense for which the only mens rea requirement was a blameworthy state of mind; today there is a mens rea requirement, holding that a crime is general in nature if the actor can be convicted upon proof of any lesser state of mind, such as when he causes the harm knowingly, recklessly or negligently
- Specific Intent: historically required proof of a particular mental state specific to the offense; today, a specific intent offense is one in which the definition of the crime expressly:
 - (1) Includes an intent or purpose to do some future act, or to achieve some future consequence beyond the conduct or result that constitutes the actus reus of the offense
 - (2) Provided that the actor must be aware of a statutory attendant circumstance

§10.07 MODEL PENAL CODE

- Purpose of Section 2.02 is to obliterate ill-defined, confusing common law language and concepts, and replace them with four specifically defined hierarchical levels of culpability used to define crimes

[A] SECTION 2.02: IN GENERAL

- Exclusively elemental approach to the concept of mens rea
- Unless a person acted purposely, knowingly, recklessly or negligently, they cannot be convicted of an offense under the code
- Code requires that the prosecution to prove that the defendant committed the actus reus of the offense with a culpable state of mind
- Code requires that a person may not be convicted solely on the ground that he acted with a morally blameworthy state of mind
- Common law distinction between general intent and specific intent is discarded
- MPC removes the term mens rea, replaces it with purposely, knowingly, recklessly, and negligently
- “Material element of the offense” as used in Section 2.02, includes elements relating to the existence of a justification or excuse for the actor's conduct

[B] CULPABILITY TERMS

[1] PURPOSELY

- Two definitions, one based on conduct or results, and the other based on attendant circumstances

- Result definition: a person acts purposely if it is his conscious object to engage in conduct of that nature, or to cause such a result
- Attendant Circumstances definition: a person acts purposely if he is aware of the existence of such circumstances or he believes or hopes that they exist

[2] KNOWINGLY

- Two definitions, one that applies to results, the second that pertains to conduct and attendant circumstances
 - Result Definition: a result is knowingly caused if the actor is aware that it is practically certain that his conduct will cause such a result
 - Attendant Circumstances/Conduct Definition: one acts knowingly if he is aware that his conduct is of that nature or that such attendant circumstances exist

[3] RECKLESSLY AND NEGLIGENTLY

[a] IN GENERAL

- A person acts recklessly if he consciously disregards a substantial and unjustified risk that the material element exist or will result from his conduct
 - Risk is substantial and unjustifiable if its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actors situation
- Person's conduct is negligent if the actor should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct
- Both definitions require the same degree of risk taking (substantial and unjustifiable)
- Difference is that the negligent actor acts inadvertently with regard to the risk, while the reckless actor consciously disregards the risk

[b] NATURE OF THE REASONABLE PERSON

- Conduct of the reasonable person is evaluated from the perspective of a person in the actor's situation
- Physical factors considered, mental factors not

[C] PRINCIPLES OF STATUTORY INTERPERTATION

- MPC provides solutions to some of the difficult problems of statutory interpretation that have confounded courts dealing with pre-code statutes

§11.01 STRICT LIABILITY: GENERAL PRINCIPLES

[A] DEFINITION

- A strict liability doctrine is a rule of criminal responsibility that authorizes the conviction of a morally innocent person for a violation of an offense, even though the crime, by definition, requires proof of a mens rea
- Strict liability offenses are crimes that, by definition, do not contain a mens rea requirement regarding one or more elements of the actus reus

[B] PRESUMPTION AGAINST STRICT LIABILITY

- In general, courts will interpret a statute, silent in regard to mens rea, as containing an implicit requirement of some culpable mental state
- When will a court interpret a statue to be one of strict liability?
 - (1) The statutory crime is not derived from the common law

- (2) There is an evident legislative policy that would be undermined by a mens rea requirement
- (3) The standard imposed by the statute is reasonable and adherence to it is properly expected of a person
- (4) The penalty for violation of the statute is small
- (5) The conviction does not gravely besmirch

[C] PUBLIC WELFARE OFFENSES

- Malum in se crimes: crimes that are inherently wrongful
- Malum prohibitum: crimes that are wrong because they are prohibited
- Courts frequently authorize strict liability in the case of public welfare offenses:
 - (1) Public welfare offenses not derived from the common law
 - (2) A single violation of such an offense can simultaneously injure a great number of people
 - (3) The standard imposed by the statute is reasonable
 - (4) The penalty for violation is relatively minor
 - (5) Conviction rarely damages the reputation of the violator

[D] NON-PUBLIC WELFARE OFFENSES

- Some non-public welfare offenses can be characterized as strict liability because they do not require proof that the defendant possessed a mens rea regarding an element of the offense
- Differ from public welfare offenses in two regards:
 - (1) Non-public welfare offenses often result in severe punishment
 - (2) Non-public welfare offenses typically involve conduct malum in se

§11.02 POLICY DEBATE REGARDING STRICT LIABILITY OFFENSES

[A] SEARCHING FOR A JUSTIFICATION FOR STRICT LIABILITY

- Support for strict liability is limited to its use in the enforcement of public welfare offenses
- Utilitarian arguments for strict liability:
 - (1) The absence of a mens rea requirement may have the desirable effect of keeping people who doubt their capacity to act safely from participating in dangerous activities
 - (2) Those who do choose to engage in the risky activity will act with greater caution in light of the strict liability nature of the law
 - (3) An inquiry into the actor's mens rea would exhaust courts, which have to deal with minor infractions every day

[B] ALTERNATIVES TO STRICT LIABILITY

- Mechanisms other than the abandonment of the mens rea requirement are available to legislatures seeking to protect the public
- Require proof of negligence, but set higher penalties
- Legislature might retain the minor penalties that apply to public welfare offenses, but require proof of an extremely low mens rea
- Legislature might continue to define public welfare offenses in strict liability terms, but permit a lack of mens rea affirmative defense

§11.03 CONSTITUTIONALITY OF STRICT LIABILITY OFFENSES

- While there have been attempts to use the Due Process Clause or the 1st amendment to invalidate strict liability legislation, the courts have not come up with a cohesive thesis to invalidate the doctrine's use

§11.04 MODEL PENAL CODE

- The code attempted a bold assault against strict liability
- Only exception is for offenses graded as violations rather than crimes

§12.01 MISTAKE OF FACT: PUTTING MISTAKE OF FACT IN CONTEXT

-Why and when does mistake of fact relating to an element of an offense exculpate an actor for the social harm he causes?

§12.02 WHY DOES A FACTUAL MISTAKE SOMETIMES EXCULPATE?

-An actor who is mistaken about some fact does not have the same kind of opportunity to avoid doing evil that he would have if he knew what he was doing

-Courts use mens rea in two ways:

-In a general sense to describe the actor's vicious will

-In a narrower sense to describe the particular mental state that is an express element of the offense

-Mistake of fact may negate the actor's mens rea in one or both senses

-Mistake of fact can also negate the mens rea in an elemental or culpability meaning

§12.03 COMMON LAW RULES

[A] GENERAL APPROACH

-From the two types of crimes and the two types of mens rea came a dual approach to mistake of fact

-With specific intent crimes, common law developed the rule that a mistake of fact is exculpatory if it negates the particular element of mens rea in the definition of the offense

-With general intent crimes, jurists sought to determine if the actor's mistake negated his moral culpability for the crime

-First step in analyzing a mistake of fact claim in a jurisdiction that follows the common law doctrine is to identify the nature of the crime for which the defendant is being prosecuted; is it strict liability, specific intent or general intent?

[B] STRICT LIABILITY OFFENSES

-Under no circumstances does a person's mistake of fact negate his criminal responsibility for violating a strict liability offense

-By definition, a strict liability offense is one that does not require proof of any mens rea; inasmuch as the basis for exculpating on the ground of mistake is that it negates the actor's mens rea, the absence of any mens rea to negate necessarily precluded the use of this defense

[C] SPECIFIC INTENT OFFENSES

-A defendant is not guilty of an offense if his mistake of fact negates the specific intent portion of the crime

-It doesn't matter that the defendants mistakes in these cases may have been entirely unreasonable under the circumstances; acquittal follows from the fact that a person may not be convicted of an offense unless every element thereof, including the mental state element, is proved

[D] GENERAL INTENT OFFENSES

[1] ORDINARY APPROACH: WAS THE MISTAKE REASONABLE

-Ordinary rule is that a person is not guilty of a general intent crime if his mistake of fact was reasonable, but he is guilty if his mistake was unreasonable

-Denying the defense to those who act on the basis on an unreasonable mistake of fact is to permit punishment on the basis of negligence

-When a crime is defined in terms of negligence, a person is not ordinarily liable unless his negligence is gross; thus, the actor who is only liable for civil negligence may be punished as a criminal wrongdoer

-Mistake of fact rule permits conviction and punishment of a negligent wrongdoer as if he were guilty of intentional wrongdoing

[2] ANOTHER APPROACH: MORAL WRONG DOCTRINE

[a] THE DOCTRINE EXPLAINED

- According to the moral wrong doctrine, one can make a reasonable mistake regarding an attendant circumstance and yet demonstrate moral culpability worthy of punishment
- Basis is that there should be no exculpation for mistake where, if the facts had been as the actor believed them to be, his conduct would still be immoral
 - The intent to commit an act that is immoral furnishes the requisite culpability for the related, but unintended, outcome
- Three step process:
 - (1) Determine whether the actor's mistake of fact was reasonable or unreasonable
 - (2) Look at the factual panorama through the defendant's eyes
 - (3) Court evaluates the morality of the actor's conduct, based on the facts as the actor reasonably believed them to be
- Pursuant to the moral wrong doctrine, a person who knowingly performs a morally wrong act assumes the risk that the attendant factual circumstances are not as they reasonably appear to be and that, therefore, his conduct is not only immoral but also illegal

[b] CRITICISM OF THE DOCTRINE

- Permits conviction of a person who did not know, and had no reason to know, that his conduct would violate the law
- Doctrine is founded on the premise that it is fair to punish a person for unintentionally committing the actus reus of an offense if he intentionally committed an immoral act

[3] STILL ANOTHER APPROACH: LEGAL WRONG DOCTRINE

[a] THE DOCTRINE EXPLAINED

- D is guilty of criminal offense X, despite a reasonable mistake of fact, if he would be guilty of a different, albeit less serious, crime Y, if the situation were as he supposed
- The actus reus of crime X with the mens rea of crime Y

[b] CRITICISM OF THE DOCTRINE

- Authorizes punishment based on the harm that an actor caused while ignoring the fact the actor's mens rea was at the level of the lesser crime
- Thus, in some circumstances, the legal wrong doctrine will result in punishment grossly disproportional to the offender's blameworthiness

[E] REGINA V. MORGAN: COMMON LAW IN TRANSITION OR AN ABERRATION?

- Dichotomy between general intent and specific intent makes no sense in the context of this case; either a person possess the mental element required in the definition of the offense or he does not
- Thus, the elemental approach used by common law jurists in the prosecution of specific intent offenses should be applied to all offenses

§12.04 MODEL PENAL CODE

[A] GENERAL RULE

- Section 2.02(1) states the general rule that one is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each element of the offense
- Thus, as to each element of the offense, there is some mens rea requirement

-Section 2.04(1) provides that a mistake is a defense if it negates the mental state required to establish any element of the offense

-Either the actor had the culpable state of mind required in the definition of the offense or he did not

[B] EXCEPTION TO THE RULE

-MPC provides one exception to the general rule stated above:

-Code provides that a mistake of fact defense is not available if the actor would be guilty of another offense, had the circumstances been as he supposed

-Code only permits punishment at the level of the lesser offense

§13.01 MISTAKE OF LAW: GENERAL PRINCIPLES

[A] GENERAL RULE

-Ignorantia legis neminem excusat: ignorance of the law excuses no one

-Ignorance or mistake of law does not usually serve as a failure of proof defense

-Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense, or as to the meaning of an offense, is ordinarily an element of that offense; therefore, it follows that there typically is no mens rea element capable of being negated by an actor's ignorance or mistake of law

[B] RATIONALE OF THE RULE

[1] CERTAINTY OF THE LAW

-At common law, the principle that laws were definite and knowable was often fiction

-Even a person with a "clear moral compass" is frequently unlikely to realize that a particular conduct is prohibited

[2] AVOIDING SUBJECTIVITY IN THE LAW

-Legal system favors objectivity to subjectivity because otherwise the law would lose its meaning and it would just mean whatever a person subjectively (or perhaps incorrectly) thought it meant

[3] DETERRING FRAUD

-A pragmatic justification for the no excuse rule is that recognition of a mistake of law defense would provide opportunities for wrong minded individuals to contrive claims of mistake solely to get an exculpatory motion before a jury

-Risk of fraud can be mitigated by allocating to the defendant the burden of persuasion regarding any mistake of law claim

[4] ENCOURAGING LEGAL KNOWLEDGE

-If mistake of law were a defense, it would foster lawlessness by encouraging ignorance of the law rather than a respect and adherence to the law

-If the criminal law permitted a reasonable mistake of law to serve as a defense while punishing for negligence (for an unreasonable mistake), there would be an incentive to try and learn the law

§13.02 WHEN MISTAKE OF LAW IS A DEFENSE: EXCEPTIONS TO THE GENERAL RULE

[A] PUTTING THE EXCEPTIONS IN CONTEXT

-While the no defense rule stated in Section 13.01 is strict, there are three categories of mistake of law exceptions:

(1) Reasonable Reliance (Excuse defenses)

(2) Fair Notice (Excuse defenses)

(3) Failure of proof claim

- Defendant claims that because of a mistake of law, she did not have the requisite mens rea to be convicted of the charged offense

[B] REASONABLE RELIANCE DOCTRINE (ENTRAPMENT BY ESTOPPLE)

[1] RELIANCE ON ONE'S OWN INTERPRETATION OF THE LAW

- A person is not excused for committing a crime if she relies on her own erroneous reading of the law, even if a reasonable person would have similarly misunderstood the law
- In such situations, the ordinary defense rule applies: one is never excused for relying on a personal, even reasonable, misreading of a statute

[2] ADVICE OF PRIVATE COUNSEL

- Reliance on erroneous advice provided by a private attorney is not a defense to a crime
- Biggest problem is one of line drawing: while in some instances it would encourage people to seek the advice of better-trained professionals, it could encourage people to intentionally seek out dishonest lawyers

[3] OFFICIAL INTERPRETATION OF THE LAW

- A person WILL be excused for relying on an official interpretation of the law, later determined to be erroneous, obtained from a person or public body with responsibility for the interpretation, administration, or enforcement of the law defining the offense
- Justifications:
 - Threat of punishment can have little deterrent effect on an individual whose conduct has been authorized
 - A person who acts on the basis of an official, albeit erroneous interpretation of the law had acted the way society would want her to act
 - “Clean hands” justification: it is fundamentally unfair for a government agent to authorize conduct and then seek to have the individual who relied on that authorization prosecuted, even if it later turns out that the original authorization was incorrect
- Narrowly applied. For a statement to be official, it must be contained in:
 - (1) A statute later declared to be invalid
 - (2) A judicial decision of the highest court in the jurisdiction, later determined to be erroneous
 - (3) An official, but erroneous, interpretation of the law, secured from a person or public body with responsibility for the interpretation, administration, or enforcement of the law

[C] FAIR NOTICE AND THE LAMBERT PRINCIPLE

- At common law, it is said that every one is conclusively presumed to know the law
- Some exceptions where it would be so grossly unjust to assume knowledge of the law
 - Lambert Doctrine: A person who is unaware of a duly enacted and published criminal statute may successfully assert a constitutional defense in a prosecution of that defense
- Three aspects:
 - (1) Punishes an omission
 - (2) Duty to act was imposed on the basis of a status rather than an activity
 - (3) The offense was malum prohibitum

[D] IGNORANCE OR MISTAKE THAT NEGATES MENS REA

[1] GENERAL APPROACH

- Mistake of law, whether reasonable or unreasonable, will not usually negate any mens rea element found in the definition of a crime
- On occasion, knowledge that the prohibited conduct constitutes an offense is itself an express element of the crime
- Different law mistake: claimed mistake relates to a law other than the criminal offense for which the defendant has been charged
- When a defendant seeks to avoid conviction for a criminal offense by asserting a different law mistake, on the ground that the different law mistake negates her mens rea, the first matter for determination is whether the offense charged is one of specific intent, general intent, or strict liability

[2] SPECIFIC INTENT OFFENSE

- A different law mistake, reasonable or unreasonable, is a defense in the prosecution of a specific intent offense, if the mistake negates the specific intent in the prosecuted offense
- Parallels the mistake of fact rule in the prosecution of specific intent crimes

[3] GENERAL INTENT OFFENSES

- A different law mistake, reasonable or unreasonable, apparently is NOT a defense to a general intent offense
- Most likely policy based, but the outcome is inconsistent with the general principle that people should not be punished in the absence of culpability, since one who acts on the basis of a reasonable mistake lacks moral blameworthiness

[4] STRICT LIABILITY OFFENSES

- A different law mistake, reasonable or unreasonable, is NOT a defense to a strict liability offense
- If liability is strict, there is no mens rea to negate

§13.03 MODEL PENAL CODE

[A] GENERAL RULE

- Unless the definition of a crime provides so, neither knowledge nor recklessness or negligence as to whether conduct constitutes a crime or as to the existence, meaning, or application of the law determining the elements of an offense is an element of such offense

[B] EXCEPTIONS TO THE GENERAL RULE

[1] REASONABLE RELIANCE DOCTRINE

- MPC codifies the common law reasonable reliance doctrine
- A person's belief that her conduct is lawful constitutes a defense if:
 - (1) She relies on an official but erroneous statement of the law
 - (2) The statement of law is found in a statute, judicial decision, administrative order or grant of permission, or an official interpretation by a public body responsible for the interpretation, administration, or enforcement of the law
 - (3) The reliance is otherwise reasonable
- Because of the danger of collusion, the MPC, like the common law, does not recognize an excuse for reliance on the advice of a private attorney

[2] FAIR NOTICE

- MPC provides that a defendant is not guilty of an offense if she does not believe that her conduct is illegal, and the statute defining the offense:
 - (1) Is not known to her

(2) Was not published or otherwise reasonably made available to her before she violated the law

-As a result of Lambert, the code concedes that a case may require exculpation in some extraordinary circumstances not reached by the situation

-Code defense applies only if the statute was neither published nor otherwise made available to the actor before she committed the crime

[3] IGNORANCE OR MISTAKE THAT NEGATES MENS REA

-MPC requires proof of some culpable state of mind regarding every material element of an offense

-Section 2.04(1) provides that mistake of law is a defense if it negates a material element of the offense, or if the law expressly provides for a mistake of law defense

-However, unless the definition of an offense so provides, neither knowledge nor recklessness or negligence as to whether conduct constitutes a crime or as to the existence, meaning, or application of the law determining the elements of an offense is an element of such offense

-Section 2.04(1) relates to different law mistakes; a claim that a different law mistake negates the mens rea of the offense is handled in the same manner as a claim of mistake of fact under the code

§31.01 CRIMINAL HOMICIDE

[A] DEFINITION OF HOMICIDE

-Common law definition followed by modern statutes is the killing of a human being by another human being

-Legally neutral term, can be innocent or criminal

[B] DEFINITION OF HUMAN BEING

[1] THE BEGINNING OF HUMAN LIFE

-At common law, a fetus must be born alive to constitute a human being within criminal law

-Following the CL approach, a homicide occurs when one causes the death of a being that is not considered human at the time of the death producing act, as long as it is human when it dies

-Many critics consider this rule outdated, and many jurisdictions now define a viable fetus as being protected by the homicide laws

[2] THE END OF HUMAN LIFE

-A human being is dead when there was a complete and permanent stoppage of the circulation of the blood and the cessation of vital functions

-With life support functions, this definition is no longer complete

-Now, cessation of brain function is a more complete definition of death; brain death is when all three parts of the brain cease to function

[C] YEAR AND A DAY RULE

-CL indicates that a defendant may not be prosecuted for criminal homicide unless the victim dies within a year and a day of the act inflicting the fatal injury

-Current trend is to abrogate this rule or apply a longer time limitation

§31.02 CRIMINAL HOMICIDE: GENERAL PRINCIPLES

[A] MURDER AND MANSLAUGHTER: COMMON LAW DEFINITIONS

- Criminal homicide is one committed without justification or excuse

- Murder: the killing of a human being with malice aforethought
- Manslaughter: an unlawful killing of a human being without malice aforethought
 - Today, voluntary and involuntary manslaughter is distinguished between

[B] MURDER: DEFINITION OF MALICE AFORETHOUGHT

[1] AFORETHOUGHT

- Aforethought has always been superfluous to the definition of murder in American law; unless a statute modifies the common law by requiring proof of premeditation, a spur of the moment killing may constitute murder

[2] MALICE

- A person who kills another acts with malice if she possesses one of four states of mind:
 - (1) The intention to kill a human being
 - (2) The intention to inflict grievous bodily injury on another
 - (3) An extremely reckless disregard for the value of human life (depraved heart murder)
 - (4) The intention to commit a felony during the commission or attempted commission of which death results
- One feature in common: in the absence of justification, excuse, or mitigating circumstance, each mental state manifests the actor's extreme indifference to the value of human life

[C] MANSLAUGHTER: TYPES OF UNLAWFUL KILLINGS

- Manslaughter is an unlawful killing that does not involve malice aforethought
- Three types:

- (1) An intentional killing committed in sudden heat of passion as the result of adequate provocation is voluntary manslaughter
- (2) An unintentional killing that is the result of an act, lawful in itself, but done in an unlawful manner, and without due caution and circumspection is involuntary manslaughter
- (3) An unintentional killing that occurs during the commission or attempted commission of an unlawful act may constitute involuntary manslaughter

[D] STATUTORY REFORMULATION OF CRIMINAL HOMICIDE LAW

[1] IN GENERAL

- Not every homicide should be a capital offense; the reformulation of the common law has taken three paths:
 - (1) Many states have divided the offense into voluntary and involuntary components, and grade and punish voluntary homicide more severely
 - (2) A few states have modified the CL by dividing the offense into three degrees
 - (3) Some states have followed the MPC approach, which rejects the degrees of murder, divides homicide into three crimes, and significantly reformulates these offenses

[2] THE DIVISION OF MURDER INTO DEGREES

- The murder statute's role is to divide common law murder into statutory degrees of the offense
- Assuming that the killing can properly be characterized as a murder, three types of murder fall under the 1st degree category:
 - (1) Murders that are committed in a statutorily specified manner are considered sufficiently morally heinous to merit the stiffest penalty
 - (2) Willful, deliberate, and premeditated killing
 - (3) Homicide that occurs during the perpetration or attempted perpetration of a statutorily enumerated felony

-All other forms of murder constitute second degree murder: intentional killings that are not premeditated and deliberate, intent to inflict grievous bodily injury killings, reckless (depraved heart) killings and deaths that occur in the commission of a felony not specifically listed in the first degree section

§31.03 MURDER: INTENT TO KILL

[A] IN GENERAL

-One who kills another human being without justification, excuse, or mitigating circumstance is guilty of killing with malice aforethought, and is guilty of common law murder

[B] PROVING THE INTENT TO KILL

[1] IN GENERAL

[a] NATURAL AND PROBABLE CONSEQUENCES RULE

-Intent to kill is proved by a means of syllogism:

- (1) Ordinary people intend the natural and probable consequences of their actions
- (2) The defendant is an ordinary person
- (3) Thus, she intended the natural and probable consequences of her actions

[b] DEADLY WEAPON RULE

-When a person intentionally uses a deadly weapon directed at a vital part of human anatomy, an intention to kill may be properly inferred

[2] CONSTITUTIONAL LIMITATION

-Although it is permissible or desirable for jurors to draw common sense inferences from objective circumstances, this type of jury instruction violates the due process clause of the constitution

[C] WILFUL, DELIBERATE, PREMEDITATED KILLINGS

[1] OVERVIEW OF THE ISSUE

- In the context of graded murder, willful means a specific intent to kill
- Most jurisdictions understand willful, deliberate, premeditated to mean more than an intention to kill
- Some states treat willful, deliberate, premeditated as independent elements of first degree murder

[2] DELIBERATE

- To measure and evaluate the major facets of a choice or problem
- Deliberation brings first degree murder to the most heinous degree of cold blooded
- Deliberation takes time and thus it is impossible for a person to deliberate unless she premeditates; deliberation speaks to the quality of the thought process

[3] PREMEDITATED

- To premeditate means to think about beforehand
- Courts allow premeditation to be as brief as an instant in criminal cases
 - Equates premeditation with any intentional killing, thus it loses its independent status

§31.04 MURDER: INTENT TO INFLICT GRIEVOUS BODILY INJURY

-Malice aforethought is implied if a person intends to cause grievous bodily injury to another, but death results

-Defined by statute: serious bodily injury that involves a substantial risk of death, protracted unconsciousness, extreme physical pain, protracted or obvious disfigurement, protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty

§31.05 MURDER: EXTREME RECKLESSNESS (DEPRAVED HEART MURDER)

[A] IN GENERAL

[1] TERMINOLOGY

- Malice aforethought is implied if a person's conduct manifests an extreme indifference to the value of human life
- Depaved heart murder is a reckless or extremely reckless homicide

[2] FACTS SUPPORTING A FINDING OF EXTREME RECKLESSNESS

- In DHM, the actor does not intend to kill her victim, but malice is implied because there is a wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm
- DHM is not a factual category; extreme recklessness or depraved heart is a factual matter determined on the basis of the specific circumstances of each case

[B] DISTINGUISHING MURDER FROM MANSLAUGHTER

- Most courts provide that implied malice is proven if the actor's conduct involves the deliberate perpetration of a knowingly dangerous act with unconcern and indifference as to whether anyone is harmed or not, where the killing was proximately caused by an act, the natural consequences of which are dangerous to human life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life
- A person kills recklessly if she consciously disregards a substantial and unjustifiable risk to human life
- When a person should be, but is not, aware that her conduct is very risky, the risk taking is inadvertent, but the callousness that connotes implied malice is lacking
 - In these cases, a killing constitutes involuntary manslaughter

§31.06 MURDER: FELONY MURDER RULE

[A] THE RULE

- One is guilty of murder if a death results from conduct during the commission or attempted commission of any felony
- If the death results from a specifically listed felony (arson, rape, robbery, or burglary) it is a 1st degree murder, if death results from an unspecified felony, it is 2nd degree murder
- Felony murder rule applies whether a felon kills the victim intentionally, recklessly, negligently, or accidentally and foreseeably

[B] RATIONALE OF THE RULE

[1] INITIAL OBSERVATIONS

- (1) Principled argument in favor of the felony murder doctrine is hard to find
- (2) The ancient rule has been bombarded by intense criticism and constitutional attack
- (3) Criticism of the rule constitutes a lexicon of everything that scholars and jurists find wrong with a legal doctrine

[2] DETERRENCE

- Most common defense of the FMR is that it is intended to deter negligent and accidental killings during the commission of felonies

- Critics ask how does one deter an unintentional act?
- Hard to make a case for the need for the felony murder rule on deterrence grounds

[3] REAFFIRMING THE SANCTITY OF HUMAN LIFE

- Argument that a felony resulting in death is more serious than an ordinary felony not resulting in death
- Argument does not follow: one who commits a felony and accidentally kills should not be subject to punishment as severe as those who murder

[4] TRANSFERRED INTENT

- FMR is sometimes defended on the basis of the transferred intent doctrine, arguing that the felon's intent to commit a felony is transferred to the homicide; thus the offense is not one of strict liability but one of intent
- Misuse of the doctrine; law does not recognize a transference of intent to cause one social harm to a different and greater harm involving the same victim

[5] EASING THE PROSECUTOR'S BURDEN OF PROOF

- Even when a felon does not intend to kill or seriously injure another person, her felonious conduct will often manifest a depraved heart
- Effect of the doctrine is to ease the prosecutor's burden of proof regarding malice aforethought, by dispensing with 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 to human life

[C] LIMITS ON THE RULE

[1] INHERENTLY DANGEROUS FELONY LIMITATION

- Many states limit the rule to homicides that occurred during the commission of a felony dangerous to human life
- What is an inherently dangerous felony:
 - (1) Abstract approach
 - To determine whether a felony is inherently dangerous, a court will ignore the facts of the specific case and consider the elements of the offense in the abstract
 - (2) Determine the dangerousness of a felony by considering the facts and circumstances of the case to determine if such felony was inherently dangerous in the manner and circumstances in which it was committed

[2] INDEPENDENT FELONY (OR MERGER) LIMITATION

- Most states recognize an independent felony or collateral felony limitation of the felony murder rule
 - FMR only applies if the predicate felony is independent of, or collateral to, the homicide
 - If the felony is not independent, then the felony merges with the homicide and cannot serve as the basis for a felony murder conviction

[3] THE RES GESTAE REQUIREMENT

[a] OVERVIEW

- Common law FMR applies when a killing occurs during the commission or attempted commission of a felony
- Courts generally require that the homicide must occur within the res gestae (things done to commit) the felony

[b] TIME AND DISTANCE REQUIREMENTS

- In order for the felony murder rule to apply, there must be relatively close proximity in terms of time and distance between the felony and the homicide
- Begins at the point which the actor could be prosecuted for an attempt to commit the felony and continues until all the elements of the crime are committed
 - For the purposes of felony murder, most courts provide that the res gestae continues even after the commission of the crime
- Major issue is when the killing occurred, not when the death occurred

[c] CAUSATION REQUIREMENT

- Must be a causal relationship between the felony and the homicide

[4] KILLING BY A NON FELON

[a] THE ISSUE

- What happens if a killing occurs DURING the commission or attempted commission of a felony, but they did not occur in furtherance of it
- Does the FMR still apply?

[b] THE AGENCY APPROACH

- Consideration of agency, which provides that the felony murder rule 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
- Why does this approach relieve the felon of punishment as a murder?
 - People are responsible for their own acts, but not the actions of others
- EXCEPTION to this rule is when the actor causing the killing is functioning as an agent of the other party
- Supported by two additional arguments:
 - (1) Killing is not within the res gestae of the offense since the killing was not in furtherance of the crime
 - (2) FMR has no effect when the killer is a non felon, since the felon has no control over the actions of the innocent person

[c] THE PROXIMATE CAUSATION APPROACH

[i] IN GENERAL

- Most courts apply the proximate causation theory of the FMR: a felon is liable for any death that is the proximate result of the felony, whether the shooter is a felon or a third party
- Justified on the ground that when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, and he should be held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act

[ii] LIMITED VERSION

- Should a court that permits the FMR take into consideration who was shot?
- Justified on the principle that when a non-felon kills a felon it is justifiable, whereas the death of a bystander shot by a non felon is an excusable homicide
 - Justified homicide: a proper or permissible killing

-Excused homicide: involves a wrongful result for which the actor is not morally accountable

[d] DISTINGUISHING FELONY MURDER FROM OTHER THEORIES (THE PROVOCATIVE ACT DOCTRINE)

-Even in an agency jurisdiction, a felon may be held responsible for the death of another at the hands of a third party if the basis for the charge is not FM, but is founded on the provocative act doctrine, which is a form of reckless homicide

§31.07 MANSLAUGHTER: PROVOCATION (SUDDEN HEAT OF PASSION)

-Under common law, and intentional homicide committed in the sudden heat of passion as the result of adequate provocation mitigates the offense to voluntary manslaughter

-Common law defense contains four elements:

- (1) The actor must have acted in heat of passion
- (2) The passion must have been the result of adequate provocation
- (3) The actor must not have had a reasonable opportunity to cool off
- (4) There must be a causal link between the provocation, the passion, and the homicide

[B] ELEMENTS OF THE DEFENSE

[1] STATE OF PASSION

-Defendant must be in a state of heated passion at the moment of the homicide

-Passion includes any violent, intense, high-wrought, or enthusiastic emotion

-Sufficiently broad to encompass a range of emotions including fear, jealousy, furious resentment, and wild desperation

[2] ADEQUATE PROVOCATION

[a] EARLY COMMON LAW CATEGORIES

-An amount of provocation as would be excited by the circumstances in the mind of a reasonable man

-Common law list of categories that meet this standard:

- (1) Aggravated assault or battery
- (2) Mutual combat
- (3) Commission of a serious crime against a close relative of the defendant
- (4) Illegal arrest
- (5) Observation of spousal adultery

-Provocative acts NOT considered adequate:

- (1) Trivial battery
- (2) Learning about (but not observing) adultery
- (3) Observation of the sexual unfaithfulness of a fiancé or other unmarried sexual partner
- (4) Words, no matter how insulting or offensive

[b] MODERN LAW

[i] IN GENERAL

-Most courts now hold that provocation should be an issue for the jury to decide

-No court could catalog all the facts and combinations which shall be held sufficient

-Jurors are instructed that provocation is sufficient to mitigate an intentional killing to manslaughter if the unlawful provocation would render any ordinary

prudent person for the time being incapable of that cool reflection that otherwise makes it murder

-Misdirected Retaliation Rule: provides that the defense may only be asserted if the defendant attempts to kill the person who performed the provocative act rather than the innocent bystander

[ii] THE NATURE OF THE REASONABLE PERSON

-More accurate to describe the objective character of the person as an ordinary person who sometimes acts out of uncontrolled emotion rather than reason

-Person is of average disposition, sober at the time of provocation, and of a normal mental capacity

-Two ways in which a defendant's personal characteristics come into play:

(1) In measuring the gravity of the provocation to the reasonable/ordinary person

(2) In assessing the level of self-control to be expected of a reasonable/ordinary person

[3] COOLING OFF TIME

-Defense of heat of passion is unavailable if a reasonable person would have cooled off in the time that elapsed between the provocation and the fatal fact

-Cooling off element of the provocation defense is typically left to the jury

[4] CAUSAL CONNECTION

-Even if the defendant is adequately provoked, the provocation defense is unavailable to a defendant whose motivation for the homicide is causally unrelated to the provocation

[C] RATIONALE OF THE DEFENSE

[1] PARTIAL JUSTIFICATION OR PARTIAL EXCUSE?: INITIAL INQUIRY

-Useful to focus initially on the role of the provocative act in stirring the defendant's homicidal conduct

-Does provocation serve as a partial justification or, instead, a partial excuse for a homicide

[2] JUSTIFICATION OR EXCUSE: A DEEPER LOOK

[a] THE ARGUMENT FOR PROVOCATION AS A PARTIAL JUSTIFICATION

-Various features of the defense, suggest that a provoked killing is partially justified

-Provokers deserved to be harmed, but homicide was an over response; therefore, the provoked actor was only partially justified in taking a life

-Another justificatory feature of the defense is the misdirected retaliation rule

[b] THE ARGUMENT FOR PROVOCATION AS A PARTIAL EXCUSE

-Provocation defense is a partial excuse and not a partial justification

-Essential to distinguish between the anger that the provoked party experiences and the homicidal act arising from it

-The anger or other emotion of a provoked defendant is justifiable, or at least, excusable; the homicide is unjustifiable, but partially excusable

[3] CRITICISM OF THE PROVOCATION DOCTRINE

-Utilitarian Criticism: defense is counter-utilitarian in that it diminished the general deterrence incentive of persons to learn self-control in provocative circumstances

- Voluntariness excuse argument is unsatisfactory; if persons truly lose their capacity for self control as the result of adequate provocation, it would seem that a full defense would be necessary
- Only way to justify the partial defense is to say that one maintains self-control but finds it harder to control because of anger
- Abolitionist Argument: provocation operates as a deeply sexed excuse for murder

§31.08 MANSLAUGHTER: CRIMINAL NEGLIGENCE

- Homicide is manslaughter when a person does an act, lawful in itself, but in an unlawful manner and without due causation and circumspection
- Involuntary manslaughter involves a gross deviation from the standard of care that reasonable people would exercise in the same situation
- Distinction based on the consciousness of the actor's risk taking
- One who is aware that she is taking a substantial and unjustifiable risk to human life, but proceeds anyway manifests an indifference to the value of human life that constitutes malice aforethought; one who should be aware of the risk, but is not, is negligent

§31.09 MANSLAUGHTER: UNLAWFUL-ACT (MISDEMEANOR MANSLAUGHTER) DOCTRINE

- An accidental homicide that occurs during the commission of an unlawful act not amounting to a felony constitutes involuntary manslaughter
- Scope of the doctrine:
 - Some jurisdictions permit prosecution for involuntary manslaughter for all offenses, even when the predicate offense is a minor misdemeanor traffic offense
 - Some courts limit the unlawful act misdemeanor doctrine to inherently dangerous misdemeanors

§31.10 CRIMINAL HOMICIDE: MODEL PENAL CODE

[A] IN GENERAL

- A person is guilty of criminal homicide under the MPC if she unjustifiably and inexcusably takes the life of another human being purposely, knowingly, recklessly, or negligently
- Code recognizes three forms of criminal homicide:
 - (1) Murder
 - (2) Manslaughter
 - (3) Negligent Homicide (which is not included under common law)

[B] MURDER

- A criminal homicide constitutes murder when the actor unjustifiably, inexcusably, and in the absence of a mitigating circumstance, kills another:
 - (1) Purposely or knowingly
 - (2) Recklessly, under the circumstances manifesting extreme indifference to the value of human life
- Under the code, there are no degrees of murder, however it is graded as a felony in the first degree, which means that it carries a minimum sentence from one to ten years, and a maximum sentence of death or life imprisonment
- MPC definition of murder abandons that common law element of malice aforethought
- FMR: code provides that extreme recklessness is non conclusively presumed if the homicide occurs while the actor is engaged in, or is an accomplice in, the commission, attempted commission, or flight from one of the dangerous felonies specified in the statute

[C] MANSLAUGHTER

[1] IN GENERAL

-A person is guilty of manslaughter if she:

(1) Recklessly kills another

(2) Kills another person under circumstances that would ordinarily constitute murder, but which homicide is committed as the result of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse

-Manslaughter is a felony in the second degree; it carries a minimum punishment of imprisonment from one to three years and a maximum sentence of ten years

[2] RECKLESS HOMICIDE

-A person who kills another recklessly is guilty of manslaughter

-Reckless manslaughter is a necessarily included offense of reckless murder; in any offense where the defendant is prosecuted for reckless murder, she is entitled to a jury instruction regarding reckless manslaughter and may be convicted of the lesser offense if the jury determines that her conscious risk taking, although unjustifiable and substantial, was not extreme enough to merit treatment as murder

-Liability for manslaughter under the code cannot be founded on criminal negligence

[3] EXTREME MENTAL OR EMOTIONAL DISTURBANCE

[a] IN GENERAL

-A person who would be guilty of murder because she purposely or knowingly took a life is guilty of the lesser offense of manslaughter if she killed the victim while suffering from an extreme mental or emotional disturbance (EMED) for which there is a reasonable explanation or excuse

-MPC provides that the defendant has the burden of producing evidence regarding this affirmative defense, after which the prosecution must disprove the evidence beyond a reasonable doubt

-EMED is intended to incorporate two common law doctrines:

(1) Sudden heat of passion

(2) Partial responsibility (diminished capacity)

-Subjective and objective components to the manslaughter provision

-Subjective: EMED; condition need not involve a state of mind so far from the norm as to be characteristic of a mental illness; enough that the defendant experienced intense feelings sufficient to cause a loss of control

-Objective: must be a reasonable explanation or excuse for the EMED

-Reasonable excuse for the EMED that caused the actor to kill, not a reasonable excuse for the homicide

[b] COMPARISON OF MODEL PENAL CODE TO COMMON LAW HEAT OF PASSION

-EMED manslaughter provision is much broader than the common law provocation defense

-A specific provocative act is not required to trigger EMED defense; all that must be proven is that the homicide occurred as a result of an EMED for which there is a reasonable explanation or excuse

-Even if there is provocation, it need not involve an injury, affront, or other provocative act perpetrated upon the defendant by the decedent

-Even if the decedent provoked the incident, it need not fall within any fixed category of provocations; and contrary to common law, words alone can warrant a manslaughter instruction

-No rigid cooling off rule

[D] NEGLIGENT HOMICIDE

- A criminally negligent homicide – involuntary manslaughter at common law – constitutes the lesser offense of negligent homicide under the code
- Offense is graded as a felony in the third degree, which carries a minimum sentence of one to two years incarceration, and a maximum sentence of five years

§16.01 DEFENSES: IN CONTEXT

- In criminal trials, the prosecution has the burden of producing evidence and persuading the fact finder beyond a reasonable doubt of the concurrence of four ingredients of criminal responsibility:
 - (1) A voluntary act (or omission when there is a duty to act) by the defendant
 - (2) The social harm specified in the definition of the offense
 - (3) The defendant's mens rea (strict liability aside)
 - (4) An actual and proximate causal connection between elements (1) and (2)
- Even if the prosecution proves the concurrence of these four elements, the defendant may seek to raise one or more defenses

§16.02 FAILURE OF PROOF DEFENSES

- A defense in which the defendant introduces evidence at his trial that demonstrate that the prosecution has failed to prove an essential element of the offense charged
- Prosecutor must shoulder the burden of disproving beyond a reasonable doubt a defendant's failure of proof claim

§16.03 JUSTIFICATION DEFENSES

- A justification defense is one that defines conduct otherwise criminal which under the circumstances is socially acceptable and which deserves neither criminal liability nor censure
- Justified conduct is conduct that is a good thing or the right and sensible thing to do

§16.04 EXCUSE DEFENSES

- An excuse defense differs from a justification defense in that where a justification claim generally focuses upon an act and seeks to show that the result of the act was not wrongful, an excuse centers on the actor and tries to show that the actor was not morally culpable for his wrongful conduct
- An excuse defense says that although the actor has harmed society, he should not be blamed or punished for that harm

§16.05 SPECIALIZED DEFENSES (OFFENSE MODIFICATIONS)

- Crime specific defenses have a common feature: they authorize acquittal of a defendant, even though his conduct satisfies the elements of the offense, when the underlying purpose for prohibiting the conduct is negated by the conditions that constitute the offense

§16.06 EXTRINSIC DEFENSES (NONEXCULPATORY DEFENSE)

- Justification, excuse, and offense-modification defenses are similar in this regard: these defenses relate to the culpability or dangerousness of the defendant or to the wrongfulness of his conduct
- Nonexculpatory defenses involve public policy factors extrinsic to substantive criminal law doctrine
- Each nonexculpatory defense serves an important public policy interest unrelated to the social harm committed by the actor or to his blameworthiness for causing
- Legislative recognition of such defense implies that the social interest served by the harm outweighs the utilitarian and/or retributive reasons for punishing the offender

§17.01 JUSTIFICATIONS AND EXCUSES: HISTORICAL OVERVIEW

- Historically: practical significance between justification and excuse; a justified actor was acquitted of the offense and an excused actor was subject to the same punishment as a convicted offender

-Justified and excused actors are treated the same by the criminal courts: each is acquitted of the offense and neither is punished for her conduct

§17.02 UNDERLYING THEORIES OF JUSTIFICATION

[A] SEARCHING FOR AN EXPLANATORY THEORY

- What makes ordinarily bad conduct justifiable?
- Are the justification defenses of self-defense, defense-of-habitation, and defense-of-property no more than a conglomeration of rules or is there a single moral theory that unifies the various justification defenses?

[B] PUBLIC BENEFIT THEORY

- Conduct is not justified unless it is performed in the public's interest, and in most cases was limited to the actions of public offenders
- Three circumstances where homicides are justifiable:
 - (1) When a public officer was commanded to take a life
 - (2) When a public officer, though no commanded to do so, took a life in order to advance the public welfare
 - (3) When a private party took a life in order to prevent the commission of a forcible, atrocious felony
- Considered justifiable because society benefits from the actor's conduct; benefit to society is not incidental to some self-interested goal of the actor, it is the underlying motivation for the actor's conduct

[C] MORAL FORFEITURE THEORY

- A person's conduct is justified as long as it does not result in a socially undesirable outcome
- People possess certain moral rights or interests that society recognizes though its criminal laws
- Forfeiture of a right must be distinguished from its waiver
- Moral forfeiture doctrine is frequently called upon to explain why an aggressor or fleeing felon may justifiably be killed

[D] MORAL RIGHTS THEORY

- Conduct may be justified on the ground that the actor has a right to protect a particular moral interest
- Moral rights theory works in a positive sense to provide the actor with an affirmative right to protect her threatened moral interest
- Critics: the principle filters out shades and nuances and transforms all situations into black and white relief because the theory focuses on the innocent person whose rights are being threatened rather than on the interest of the wrongdoer

[E] SUPERIOR INTEREST (OR LESSER HARM) THEORY

- Conduct authorized when the interest of the defendant outweighs those of the person she harms (interests of the parties are balanced)
- SIT is consistent with the utilitarian goal of promoting individual conduct that reduces overall harm and weighing moral rights and identifying the superior one

§17.03 UNDERLYING THEORIES OF EXCUSE

[A] SEARCHING FOR AN EXPLANATORY THEORY

- Is there a single principle that determines when the law will abstain from blaming a person who has caused social harm and, as a result, not hold her legally accountable in a criminal prosecution?

[B] DETERRENCE THEORY

- Excuses are recognized in the criminal law because they identify the circumstances in which conduct is undeterrable; punishment of the actor is wrong because it is inefficacious
- Abolition of excuses might be socially useful; the pain inflicted on the undeterrable actor might be outweighed by the prevention of harm caused by the law's imposition of a stricter form of liability

[C] CAUSATION THEORY

- Persons should not be blamed for conduct if it was out of their control
- Not evident that the causation principle conforms with our moral intuitions
- Problem: acceptance of the causal principle of excuses could threaten to lead society down a road where nobody can be punished for their wrongful conduct

[D] CHARACTER THEORY

- Some theorists treat a person's moral character as central to the concept of deserved punishment
- Punishment should be proportional to a wrongdoer's moral desert, and that desert should be measured by the actor's character

[E] FREE CHOICE THEORY

- A person may properly be blamed for her conduct, if, but only if she had the capacity and fair opportunity to function in a uniquely human way, i.e., freely to choose whether to violate the moral/legal norms of society
- Free choice exists if, at the time of the wrongful conduct, the actor has the substantial capacity and fair opportunity to;
 - (1) Understand the facts relating to her conduct
 - (2) Appreciate that her conduct violates society's mores
 - (3) Conform her conduct to the dictates of the law
- A person lacking the substantial capacity in any of these regards has some internal disability and fails to meet the human function of free choice
- Critics: too narrow; free choice is defined only at the moment of the criminal act

§17.04 JUSTIFICATION DEFENSES AND MISTAKE OF FACT CLAIMS

[A] GENERAL RULE

- Two questions arise when a defendant asserts a justification defense and yet also claims mistake of fact:
 - (1) Is a defendant entitled to be acquitted if she was mistaken regarding the facts that would justify her conduct?
 - (2) If she is entitled to be acquitted, should the law describe her conduct as justified or excused?
- A defendant is entitled to be acquitted on the basis of self defense if her mistake of fact regarding the threat was reasonable; however she will be convicted of some form of criminal homicide if her mistake was unreasonable
- Defendant is justified in using deadly force if, at the time of the homicide, she had reasonable grounds for believing, and she did believe, that she was in imminent danger of death or grievous bodily injury, and that deadly force was necessary to repel the threat, although it turned out later that these appearances were false

[B] CRITICISMS OF THE GENERAL RULE

- Considerable debate about the propriety of treating such a mistaken actor's conduct as justifiable, rather than excusable
- Argue that the rule confuses the difference between justifications, which go to the propriety of the defendant's act, and excuses, which relate to the blameworthiness of the actor
- Critics maintain that a reasonable-but-mistaken actor is morally blameless, and therefore, should be excused; but it is wrong to suggest that the act of killing an innocent person, one who does not pose a threat to the life of the actor, is justifiable

[C] DEFENSE OF THE GENERAL RULE

- Criminal law does not demand ideal behavior from people; all the law can expect is that people make a conscientious effort to determine the true state of affairs before acting
- If an actor does this, then her conduct is justifiable, although the result of the conduct may be tragic
- A person can be justified in acting on the basis of reasonable, but mistaken appearances

§17.05 JUSTIFICATION V. EXCUSE: WHY DOES IT MATTER?

[A] IN GENERAL

- If both reasons acquit the defendant, why should anyone care about the difference?
- Drafters of the MPC were skeptical that lines could be drawn between justification and excuse, and that even if they could, increased complexity of the statutory system would have outweighed the benefits from drawing distinctions

[B] SENDING CLEAR MORAL MESSAGES

- Criminal law represents a moral compass that can assist people in deciding which of various potential paths they should take
- People should take justifiable rather than wrongful-but-excused paths; if the law does not clearly label these paths, then it has failed to provide adequate guidance
- If the justification/excuse distinction is ignored or misapplied, the law may inadvertently express a moral falsity by characterizing improper-but-excusable conduct as proper, or vice versa

[C] PROVIDING THEORETICAL CONSISTENCY IN THE CRIMINAL LAW

- Appreciation of the justification/excuse distinction can help lawmakers coherently define criminal defenses

[D] ACCOMPLICE LIABILITY

- Because excuses relate to a condition that is peculiar to the actor, such defenses are generally considered to be non delegable, and thus, unavailable to an accomplice

[E] THIRD PARTY CONDUCT

- Generally, justifications are universalized, whereas excuses are individualized

[F] RETROACTIVITY

- If X constitutes a defense when D acts, but that defense is repealed before D's trial, should D be entitled to assert X as a defense at her trial
- Answer depends on whether X was a justification or an excuse defense
- D should be entitled to raise any justification defense recognized at the time of her conduct
 - Justification defense defines conduct that society wishes to encourage or at least permit
- Excuse defenses are not directives to would be actors regarding the permissibility of particular conduct; excuses identify the circumstances under which a person ought to be relieved of criminal responsibility for her conduct because she is undeterrable or is not morally to blame for her wrongful conduct

[G] BURDEN OF PROOF

- A legislature may allocate to the defendant the burden of persuasion regarding any justification or excuse defense
- The government should carry the burden of persuasion regarding justification defenses, but that the defendant should be required to persuade the fact finder regarding excuses
- With excused conduct, all of the elements of the crime have been proven and it has been determined that the conduct was unjustifiable
 - Under these circumstances, it is fair to expect the defendant to persuade the jury that she is not to blame for her wrongful conduct

§22.01 NECESSITY: BASIC NATURE OF THE DEFENSE

-Choice of evils defense

-Defense is most often invoked successfully when an actor encounters the following dilemma: as a result of some natural force, he must choose between violating a relatively minor offense on one hand, and suffering substantial harm to person or property on the other hand

-Generally speaking, necessity may be characterized as a residual justification defense; it legitimizes technically illegal conduct that common sense, principles of justice, and/or utilitarian considerations convince us is justifiable, but which is not dealt with

-Necessity defense serves as a supplement to legislative judgment

§22.02 GENERAL RULES

-Although there is no single accepted definition of necessity, inclusion of the choice of evils defense in the MPC has helped to clarify

-A person is justified in violating a criminal law if the following six conditions are met:

(1) Actor must be faced with a clear and imminent danger

(2) The defendant must expect, as a reasonable person, that his action will be effective in abating the danger that he seeks to avoid; there must be a direct causal relationship between his action and the harm to be averted

(3) There must be no effective legal way to avert the harm

(4) The harm that the defendant will cause by avoiding the law must be less serious than the harm that he seeks to avoid

(5) Lawmakers must not have previously anticipated the choice of evils and determined the balance to be struck between competing values in a manner in conflict with the defendant's choice

(6) Defendant must come to the situation where he has to make a choice of evils through clean hands

-Three potential limitations:

(1) Some states limit the defense to emergencies created by natural forces

(2) The necessity defense may not apply in a homicide defense

(3) Some states limit the defense to protection of persons and property

§22.03 CIVIL DISOBEDIENCE

-A non violent act, publicly performed and deliberately unlawful, that has as its purpose to protest a law, government policy, or action of a private body whose conduct has serious public consequences

-Direct or indirect disobedience:

-Direct: involves protesting a particular law by breaking it or by preventing its execution

-Indirect: involves the violation of a law that is not the object of the protest

-Courts continue to reject the argument that a defendant is entitled to assert a necessity defense in cases of indirect civil disobedience

-Opponents of the defense believe that recognition of a defense would undesirably erode the principle of traditional disobedience

§22.04 NECESSITY AS A DEFENSE TO HOMICIDE

[A] THE ISSUE

-Assuming that all of the requirements for a necessity defense are otherwise satisfied, may a person justifiably kill an innocent person in order to save the lives of a greater number of innocent people

[B] REGINA V. DUDLEY AND STEPHENS

-Based on this case, many commentators have concluded that the common law does not recognize the defense of necessity in homicide prosecutions

[C] WHAT DOES DUDLEY AND STEPHENS REALLY SAY?

- Some commentators believe that the case did not categorically reject the defense of necessity in homicide cases
- It is plausible that a court might justify a homicide of an innocent person in necessitous circumstances

[D] RECONSIDERING THE MORAL ISSUE

- A utilitarian might argue that killing an innocent person IS justified if it would save the lives of many others
- Rule Utilitarians seek to devise rules that will result in a net reduction of harm over time

§22.05 MODEL PENAL CODE

- MPC recognizes a choice of evils defense; a person's conduct is justified if:
 - (1) He believes that his conduct is necessary to avoid harm to himself or another
 - (2) The harm to be avoided by his conduct is greater than that sought to be avoided by the law prohibiting his conduct
 - (3) No legislative intent to exclude the conduct in such circumstances plainly exists
- Code does not resolve whether the balancing of harms should be determined by the judge, as a matter of law, or should be submitted to the jury for its evaluation
- Code rejects the common law immanency requirement
- Under the code, a person does not automatically lose the defense because he was at fault in creating the necessitous situation
- Code provides that the defense is unavailable if the actor is prosecuted for a crime of recklessness or negligence and acted reckless or negligently
- Code provision is one of general applicability; all forms of necessity qualify

§18.01 SELF DEFENSE: GENERAL PRINCIPLES

[A] OVERVIEW

- Every state recognizes a defense for the use of force, including deadly force, in self-protection
- If the legislature were to abolish the defense of self-defense, it would most likely violate the constitution

[B] ELEMENTS OF THE DEFENSE

- At common law, a non-aggressor is justified in using force upon another if he reasonably believes such force is necessary to protect himself from imminent use of unlawful force by the other person
- Deadly force is only justified in self-protection if the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of deadly force by the aggressor
- Self-defense, as with other justification defenses contains:
 - (1) A necessity component
 - (2) A proportionality requirement
 - (3) A reasonable belief rule that overlays the defense

[C] THE NECESSITY COMPONENT

- Necessity rule provides that force should not be used against another person unless, and only to the extent that it is necessary
- Imminent threats only; controversial element of the defense
- A person may not use deadly force if some non-deadly force will suffice
- In some jurisdictions, a person may not use deadly force against an aggressor if he knows that there is a safe avenue of retreat

[D] THE PROPORTIONALITY REQUIREMENT

- Provides that a person is not justified in using force that is excessive in relation to the harm threatened

- A person may use non-deadly force to repel a non-deadly threat, and may also use non-deadly force against a deadly threat
- Never permitted to use deadly force against a non-deadly attack, even if deadly force is the only way to prevent battery

[E] THE REASONABLE BELIEF COMPONENT

- A self-defense claim contains a subjective and objective component
- FIRST, the jury must determine that the defendant subjectively believed that he needed to use deadly force to repel an imminent unlawful attack
- SECOND, the defendant's belief in this regard must be one that a reasonable person in the same situation would have possessed
- The defense is unavailable to one whose self-defense belief, although genuine, is unreasonable
 - The unreasonably mistaken actor loses his self-defense claim and is guilty of murder

§18.02 DEADLY FORCE: CLARIFICATION OF THE GENERAL PRINCIPLES

- A person who is not an aggressor is justified in using deadly force on another if he reasonably believes that such force is necessary to protect himself from imminent use of unlawful deadly force by the other party

[A] DEADLY FORCE: DEFINITION

- Force likely or reasonably expected to cause death or serious injury; the actor's state of mind in regard to the likely outcome is irrelevant
- Other jurisdictions DO include a mental state element in the definition; thus deadly force is force intended to cause death or serious injury

[B] THE NON AGGRESSOR LIMITATION

[1] DEFINITION OF AGGRESSOR

- An aggressor has no right to a claim of self-defense
 - One whose affirmative unlawful act is reasonably calculated to produce an affray foreboding injurious or fatal consequences
- Three features of the concept of aggression:
 - (1) A person is an aggressor even if he merely starts a non-deadly conflict
 - (2) It is INCORRECT to state that the first person who uses force is always the aggressor
 - (3) The issue of whether a defendant lost the right of self-defense in a conflict ordinarily is a matter for the jury to decide, based on proper instruction to the jury

[2] REMOVING THE STATUS OF AGGRESSOR

- Initial aggressor in a conflict may purge himself of that status and regain the right of self-defense
- Issue always is: who was the aggressor at the time of the defensive – in this context – deadly force was used?

[a] DEADLY AGGRESSOR

- A deadly aggressor is a person whose acts are reasonably calculated to produce fatal consequences
- The only way such a person may regain the right of self-defense is by withdrawing in good faith from the conflict and fairly communicating this fact, expressly or impliedly, to the victim

[b] NONDEADLY AGGRESSOR

- Most courts provide that when the victim of a nondeadly assault responds with deadly force, the original aggressor immediately regains his right of self-defense

- Another approach is that the initial aggressor does not have an automatic right of self-defense

[C] NECESSITY REQUIREMENT: THE SPECIAL ISSUE OF RETREAT

[1] EXPLANATION OF THE ISSUE

- General rule is that self-defense is measured against necessity
 - Thus, a person under attack should only respond with nondeadly force, if such lesser force will reasonably prevent the threatened harm
- If an innocent person is attacked, and if he has only two realistic options – use deadly force or retreat to a place of safety – must he choose the latter option?

[2] CONTRASTING APPROACHES

- Jurisdictions are split on the issue of whether an innocent person must retreat if this can be done in complete safety
- Majority of jurisdictions apply a “no retreat” rule: a non aggressor is permitted to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to which he can retreat in complete safety
- Justified on various grounds:
 - (1) It is claimed that the law should not denounce conduct as criminal when it accords with the behavior of reasonable men; the “manly” thing to do is to hold one’s ground and hence society should not demand what smacks of cowardice
 - (2) “Right” should never give way to “wrong”, yet the doctrine of retreat demands this of those in the right
 - (3) The no retreat rule sends a positive, utilitarian message to criminals that they threaten innocent persons at their own risk
- Minority of jurisdictions reject these arguments and provide that an innocent person threatened by deadly force must retreat rather than use deadly force if he is aware that he can do so completely safely
 - Based on the principle that all human life, even that of the aggressor, is valuable

[3] THE CASTLE EXCEPTION TO THE RETREAT RULE

- Castle exception exists in jurisdictions that ordinarily require a person to retreat to a known place of safety before using deadly force
- Doctrine provides that a non aggressor is not ordinarily required to retreat from his dwelling even though he knows he could do so in complete safety, before using deadly force in self-defense
- Justified on two grounds:
 - (1) A home dweller is permitted to kill to protect the sanctity of his home
 - (2) The home, as castle, is viewed as a person’s final sanctuary from external attack

[D] NATURE OF THE THREAT: IMMINENT, UNLAWFUL DEADLY FORCE

[1] IMMINENT

- At common law, a person who wished to use force in self-defense must reasonably fear that the threatened harm is imminent
- Force is said to be imminent if it will occur immediately or at the moment of danger
- Force is not immediate if an aggressor threatened to harm another person at a later time
- Defenses of the immanency requirement
 - Self-defense is uniquely justified by the fact that the defender is responding to aggression; in the absence of imminence, there is no aggression

-The imminence requirement is defended on political theory grounds; the basic idea is that the state claims a monopoly on force, under which no individual or non-state group is permitted to resort to force without the states authorization

[2] UNLAWFUL FORCE

-A person may not defend himself against the imposition of lawful force (justified force)
-Two versions of an “imperfect” defense of self defense, which results in a conviction of manslaughter:

- (1) Some courts provide that a nondeadly aggressor who is the victim of a deadly response must retreat to a place of known safety before using deadly force, if he fails to do so, his right of self defense is considered imperfect
- (2) One who kills another because he unreasonably believes that factual circumstances justify the killing, is guilty of manslaughter

§18.04 DEADLY FORCE IN SELF-PROTECTION: RATIONALE FOR THE DEFENSE

[A] SELF-DEFENSE AS AN EXCUSE

-Use of force in self defense constitutes an excuse, rather than a justification
-FIRST, under the causation theory of excuses, an innocent person is not responsible for the condition that caused him to commit the crime: but for the aggressor’s actions, the defendant would not have committed the crime
-SECOND, a character theorist would point out that it is the aggressor, and not the innocent person acting in self defense, whose actions manifest a bad moral character
-THIRD, choice theory supports an excuse for self defense

[B] SELF-DEFENSE AS A JUSTIFICATION

[1] UTILITARIAN EXPLANATIONS

-Killing in self defense may be socially desirable, and that if someone must die in a deadly conflict, it is better that it is the aggressor, whose anti-social nature is manifested by his conduct, is the victim
-Rules of self-defense will function over time to preserve life because the permission to kill provided to innocent people will operate as a sanction against unlawful aggression

[2] NON-UTILITARIAN EXPLANATIONS

-Many theories used to justify the use of deadly force in self-defense:

- (1) A defensive killing is justifiable because the aggressor, by his culpable act of threatening an innocent person’s life, forfeits his right to life; as a result, the aggressor’s death constitutes no cognizable social harm
- (2) The idea of physical security as one of the natural rights of mankind has a long history; when an aggressor breaches an implicit contract among autonomous agents to respect the living space of all others, he creates a state of war between himself and the person wrongfully threatened, which justifies the innocent person vindicating his autonomy by taking the aggressor’s life
- (3) The right of an innocent person to life is morally superior to an aggressor’s right to life
- (4) Self-defense is sometimes justified as a form of private punishment of a wrongdoer, in which the individual being threatened acts in the place of the state in inflicting on wrongdoers their just deserts

§18.05 SELF-DEFENSE: SPECIAL ISSUES

[A] THE REASONABLE-BELIEF STANDARD: MORE REFLECTIONS ABOUT THE REASONABLE PERSON

[1] THE ISSUE

- The right of self-defense is not based on objective reality, but neither is it based solely on the actor's subjective impressions
- A person may defend himself if he subjectively believes that deadly force is required AND a reasonable person would also believe that it is appropriate under the circumstances
- Who is the reasonable person to whom the defendant is compared?
- Courts have sometimes permitted total subjectivization of the reasonable person; the accused's actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees the world similarly

[2] THE LAW

- In general, the law provides that the fact finder should hold the accused to the standard of a reasonable person in the actor's situation
- While most courts have rejected the wholesale subjectivization of the reasonable person standard, modern juries are entitled to consider more than physical movements

[B] BATTERED WOMAN SYNDROME

[1] ISSUE OVERVIEW

- Women kill much less frequently than men do, and when they do kill, their target is often an abusive husband or domestic partner
- Many have introduced the defense of battered woman syndrome in an attempt at exculpation
- Cases can be divided into three categories:
 - (1) Confrontational Homicides: cases when a woman kills her partner during a battering incident
 - (2) Non-confrontational Homicide: a woman kills her partner while asleep or during a lull in violence
 - (3) Third Party Homicide: woman has hired a third party to kill and then pleads self-defense at the trial

[2] JURY INSTRUCTIONS ON SELF DEFENSE

- In confrontational cases, an instruction is almost always given on self-defense
- Majority opinion is that an instruction of self-defense is unjustified in cases of non-confrontational homicide

[3] EVIDENTIARY ISSUES

[a] PRIOR ABUSE BY THE DECEDENT

- Now routine for a court to permit a battered woman to introduce evidence of the decedent's prior abusive treatment in support of the claim of self-defense
- Relevant to show that the actor reasonably feared the defendant

[b] EXPERT TESTIMONY REGARDING BATTERED WOMAN SYNDROME

- In typical homicide prosecutions of a battered woman, defense counsel is apt to seek to introduce expert testimony regarding battered woman syndrome, including testimony that the defendant suffers from the condition and acted pursuant to it
- Testimony is inadmissible in a criminal trial unless three conditions are satisfied:

- (1) The subject matter is beyond the average lay-person
- (2) The witness has sufficient skill and experience in the field that his testimony will aid the jury in its search for the truth
- (3) The state of the pertinent art or scientific knowledge permits a reasonable opinion to be asserted by an expert

[4] NONCONFRONTATIONAL BATTERED WOMAN SELF-DEFENSE: SOME REFLECTIONS

- Utilitarian defense says that the killing of an abuser on the ground that he constitutes an ongoing danger to the woman and to other persons; and his death results in a net social benefit
- Non-utilitarian justification is that even when he is not an imminent threat, justification may be found in the principle of moral forfeiture
- Another defense is that the state cannot deny the opportunity for self defense and ask its citizens to die rather than protect themselves

[C] RISK TO INNOCENT BYSTANDERS

- A defendant's right of self-defense transfers from the intended to the actual victim
- The right to act in self-defense should not be absolute, at least when a defender's conduct jeopardizes multiple innocent bystanders
- The death of an innocent bystander is unjustified, because he is not guilty of any culpable act that would merit loss of his life

[D] RESISTING AN UNLAWFUL ARREST

- May D defend his actions (of violence) on the ground that he has a right to resist the unlawful arrest?
- An arrest may be unlawful for various reasons:
 - An arrest is unlawful if the officer uses excessive force in effectuating it
- Common law rule is that a person may use as much force as is reasonably necessary short of deadly force, to resist an illegal arrest
- Much more difficult than it was in the past to resist an unlawful arrest

§18.06 MODEL PENAL CODE

[A] GENERAL RULES

[1] FORCE, IN GENERAL

[a] PERMISSIBLE USE

- A person is justified in using force upon another person if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force by the other individual on the present occasion
- Divergent from common law in two ways:
 - (1) Drafted in terms of the actor's subjective belief in the need to use force; his belief need be reasonable
 - (2) Code substitutes the phrase "immediately necessary on the present occasion" for the common law immanency requirement
 - Authorized self-protective force sooner than may be allowed at common law

[b] IMPERMISSIBLE USE: RESISTING AN UNLAWFUL ARREST

- A person may not use force to resist an arrest made by a police officer, even if the arrest is unlawful

-Does not prohibit use of force by an arrestee who believes that the officer intends to use excessive force in effectuating the arrest

[2] DEADLY FORCE, IN GENERAL

[a] DEADLY FORCE: DEFINITION

-3.11(a) provides that deadly force is force for the purpose of causing or that the actor knows to create a substantial risk of causing death or serious bodily injury
-Courts applying the code have generally held that a mere threat (without the purpose) to cause death or serious injury is not deadly force

[b] PERMISSIBLE USE

Deadly force is unjustifiable unless the actor believes that such force is immediately necessary to protect himself on the present occasion against:

- (1) Death
- (2) Serious bodily injury
- (3) Forcible rape
- (4) Kidnapping

[c] IMPERMISSIBLE USE

-Even if deadly force is otherwise permitted, the code prohibited its use in two key circumstances

[i] DEADLY FORCE BY AGGRESSORS

-Code prohibits the use of deadly force by a person who, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter

[ii] RETREAT

-Code comes down on the side of those who favor retreat
-A person may not use deadly force against an aggressor if he knows that he can avoid the necessity of using such force with complete safety by retreating
-Exception: retreat from home or office is required if:
 (1) The actor was the initial aggressor and wished to regain his right of self-protection
 (2) Even when not the aggressor, if he is attacked by a co-worker in their place of work

[iii] SUMMARIZING THE MPC DEADLY FORCE RULES

-FIRST, if D did not start the unlawful conflict, he may use deadly force against V if he believed that such force is immediately needed on the present occasion to combat an unlawful assault by V assuming that one of the following situations exists:
 (1) D has retreated and V continues to pursue him
 (2) D knows of no safe place to retreat
 (3) Even if D could have retreated, if D is in his home place of work and V is not in his place of work
-SECOND, if D did start the unlawful conflict, but did so without the purpose of provoking a deadly conflict
-THIRD, D may not kill V in self-defense if he started the conflict with the intent to cause death or great bodily harm unless he withdraws from the conflict

[B] MISTAKE OF FACT CLAIMS AND MODEL PENAL CODE JUSTIFICATION DEFENSES

- Common law rule is that a person is justified in acting on the basis of reasonable, albeit erroneous appearances
- MPC recognized an imperfect defense, but it takes a two step process to get to this point
- All of these defenses is subject to the provisions of section 3.09, which provides that when the defendant is reckless or negligent in regard to the facts relating to the justifiability of his conduct, the justification defense is unavailable to him

[C] JUSTIFICATION DEFENSES AND RISKS TO INNOCENT BYSTANDERS

- If a person justifiably uses force against an aggressor, but uses such force in a reckless or negligent manner in regard to safety of an innocent bystander, the justification defense, which is available to the person in regard to the aggressor, is unavailable to him in a prosecution for such recklessness or negligence as to the bystander
- However, convictions in this regard are difficult to obtain; in order to show that a defendant acted recklessly or negligently as to a bystander, the prosecution must show that he took an unjustifiable risk to others in protecting himself, because unjustifiability is an element in the definition of both recklessness and negligence

§23.01 DURESS: GENERAL PRINCIPLES

[A] OVERVIEW

- Duress or coercion is a common law defense to criminal conduct
- Although often condemned as too narrowly defined, society has retained the defense

[B] ELEMENTS OF THE DEFENSE

- A person will be acquitted of any offense except murder if the criminal act was committed under the following circumstances:
 - (1) Another person threatened to kill or grievously injure the actor or a third party, particularly a near relative, unless she committed the offense
 - (2) The actor reasonably believed that the threat was genuine
 - (3) The threat was “present, imminent, and impending” at the time of the criminal act
 - (4) There was no reasonable escape from the threat except through compliances with the demands of the coercer
 - (5) The actor was not at fault in exposing herself to the threat
- A person will not be acquitted unless she acts as a result of a very specific type of threat
 - FIRST, the threat must come from a human being
 - SECOND, the coercer must threaten to cause death or serious bodily harm
 - THIRD, the deadly force threatened must be imminent
 - FOURTH, the threat must typically be directed at the defendant or a family member
- Even if all the elements are present, the duress defense is unavailable to a defendant if she was at fault for finding her in the coercive situation
- If the elements ARE met, the coerced actor will be acquitted of the non-homicide offense for which she was prosecuted

[C] DURESS: JUSTIFICATION OR EXCUSE?

- Duress is sometimes characterized as a subspecies of the justification defense of necessity
- It may seem that a coerced party always commits the lesser of two evils and is therefore justified in acceding to the threat; but it is not true that every common law example of duress involves a lesser evils situation
- Duress as a justification for criminal activity does not conform to our common moral intuitions
- Most often, courts and states that draw distinctions between justifications and excuses treat duress as an excuse defense

§23.02 RATIONALE OF THE DEFENSE (AS AN EXCUSE)

[A] UTILITARIAN ARGUMENTS

- FOR: when a person is in thrall to some coercive power the threat of criminal punishment is ineffective
- AGAINST: recognition of the defense dangerously undermines the moral clarity of the criminal law and invites fraud

[B] RETRIBUTIVE ARGUMENTS

- Founded on the principle that a coerced actor does not deserve to be punished for her actions
- False explanations that justify this principle:
 - A coerced actor lacks the requisite mens rea to be convicted of an offense
 - A coerced party should be excused because commission of the alleged offense was no longer the voluntary act of the accused
 - It is not precisely correct to say that person is excused for violating the law because she lacked free will

§23.03 DISTINGUISHING DURESS FROM NECESSITY

- The necessity defense applies when a person is faced with a choice of two evils and then must decide whether to commit a crime or an alternative act that constitutes a greater evil, and the person makes the right choice
- Duress applies even when the coercer's threats overwhelm the actor's will so that she makes the wrong choice and perpetrates a greater evil
- When a person commits the lesser of two evils, nobody should be subject to prosecution for the outcome because the outcome is socially desirable

§23.04 DURESS AS A DEFENSE TO HOMICIDE

[A] GENERAL RULE

- Duress is not a defense to an intentional killing
- Imperfect duress defense: reduces the offense of the coerced actor to manslaughter
- Jurisdictions split on whether duress may be raised in a felony murder prosecution

[B] IS THE NO-DEFENSE RULE SENSIBLE?

- Utilitarian perspective: the basis for the defense – that a threat of future punishment will not deter an actor confronted by an immediate deadly threat – applies to coerced murders as it does to coerced thieves, robbers, and assaulters
- Whether a person who accedes to a deadly threat should be excused for her actions
- Nonconsequentialist argument: murder is a crime against god; human laws can never excuse such a crime
- Retributive argument: question should be whether a coerced person who unjustifiably violates the moral principle necessarily, unalterably, and unfailingly deserves to be punished as a murderer
- At minimum, a person who kills under duress should have the offense mitigated to manslaughter

§23.05 ESCAPE FROM INTOLERABLE PRISON CONDITIONS

[A] THE ISSUE

- When a person escapes from prison, the escapee may defend her conduct on the ground that she fled due to intolerably prison conditions
- Sometimes this claim is based on a defense of duress, other times the justification defense of necessity is used

[B] THE LAW

- At a policy level, courts are concerned that if an inmate who flees due to alleged intolerable prison conditions avoids conviction, other inmates will be emboldened to escape
- Courts almost always place restrictions on the defense; requirement that the escapee make an effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force

[C] NECESSITY VERSUS DURESS

[1] THE CONCEPTUAL PROBLEM

- Neither necessity or duress neatly covers all intolerable prison condition cases

[2] WHY THE NATURE OF THE DEFENSE IS SIGNIFICANT

[a] THE MESSAGE OF ACQUITTAL

- Duress and necessity defenses send different messages
- Acquittal on the basis of necessity implies that it is right for a prisoner to escape confinement in specified circumstances
- Acquittal on the grounds of duress implies only that the escapee should not be blamed for fleeing

[b] ABILITY TO OBTAIN ACQUITTAL

- A necessity claim may be harder to prove than a claim of duress
- With necessity, the prisoner must convince the jury that her flight from confinement was a lesser evil than what was facing her behind bars
- In duress cases, juries are not asked to balance evils; neither prison discipline nor the inmate's prior criminal record is material

[c] LIABILITY OF THOSE WHO ASSIST IN THE ESCAPE

- Line between necessity and duress may be critical in determining the criminal responsibility of persons who assist escapees
- An excuse defense is personal to the actor suffering from the condition

[d] LIABILITY OF THOSE WHO RESIST THE ESCAPE

- If the proper defense to escape is duress, X is justified in preventing D from committing the wrongful act of escaping
- If D's escape is justifiable, there are two solutions:
 - Either the law must recognize incompatible justifications or it must deny X the right to use force to resist escape

[3] CONCLUDING COMMENT

- No reason to try to fit all prison escape cases within just one defense category
- An inmate should be allowed to raise a claim of duress, instead of, or in conjunction with, the necessity claim

§23.06 SITUATIONAL DURESS: BRIEF OBSERVATIONS

[A] THE SIMPLEST CASE: NECESSITY AS AN EXCUSE

- Situational duress is where the coercer is a natural force, not a person, and no one can be subjected to the law's application
- Society's interest in punishing someone for the offense means not recognizing a situational defense
- Argument for recognizing this defense is that natural forces can be as compelling as human ones, and the situational duress excuse should apply in the same cases as with human coercion

[B] GOING BEYOND NATURAL THREATS

- Some believe that the law should recognize new defenses such as “brainwashing” and “rotten social background” to deal with particular situations of excuse
- Critics argue that allowing these defenses would undermine the basic principle of criminal law; that people act under their own free will

§23.07 BATTERED WOMEN UNDER DURESS

- How should the law deal with a battered woman who commits a violent crime or even participates in a crime spree as a result of domination by her abuser?
- Legal obstacles to women using the duress defense in abuse claims:
 - FIRST, the abuser may order or expect the woman to commit a crime or assist him in its commission, without using an immediate coercive threat
 - SECOND, under ordinary duress principles a person is not excused for committing a crime if they could have escaped the situation
 - THIRD, the defense is unavailable to those who are at fault for in exposing themselves to the risk
- Key issue is whether the defendant will be permitted to introduce expert testimony regarding battered woman syndrome to buttress her duress claim
- Courts are more likely to permit the syndrome evidence to support subjective claims by the battered woman that to support the claim that her fear of imminent harm, where no threat was issued, was reasonable

§23.08 MODEL PENAL CODE

[A] GENERAL RULE

- Duress is an affirmative defense to unlawful conduct by the defendant if:
 - (1) She was compelled to commit the offense by the use or threatened use of unlawful force by the coercer upon another person
 - (2) A person of reasonable firmness in her situation would have been unable to resist the coercion
- Defense is unavailable if the actor recklessly placed herself in a situation in which it was probable that she would be subjected to coercion

[B] COMPARISON TO THE COMMON LAW

[1] IN GENERAL

- Code’s duress defense is broader than common law in various respects:
 - FIRST, it abandons the common law requirement that the defendant’s unlawful act may be a response to an imminent deadly threat
 - Under the MPC, the defendant may plead duress as a result of non-deadly and non-imminent threats, or even as the result of prior use of non deadly force as long as a person of reasonable would have committed the offense in the defendant’s circumstance
 - SECOND, the defense is one of general applicability, so the defense may be raised in murder prosecutions
 - THIRD, the code does not require that the imperiled person be the defendant or a member of their family
- Similar to the common law in two significant ways:
 - FIRST, the defense is limited to threats or use of unlawful force; therefore it does not apply to coercion arising from natural sources
 - SECOND, in conformity with the law, the code does not recognize the defense when any interest other than bodily integrity is threatened

[2] ESCAPE FROM INTOLERABLE PRISON CONDITIONS

- Under the code, the defense applies also if the coercer's use of unlawful force causes a coerced party to perform any criminal act, even one not ordered by the coercer
 - Thus this defense under the code applies to prison escape defenses
- Code provides that a coerced act may also be justified under 3.02, the code's choice of evils provision

[3] SITUATIONAL DURESS

- Because the duress defense only applies to human threats, situational duress claims are based on compelling natural circumstances and fall outside the scope of the claim
- Brainwashing defense may apply under the code because a victim could claim coercion on the ground that prior force by a captor rendered her subconsciously fearful of more force if she did not accede to the suggestion that she commit a crime

[4] BATTERED WOMEN AND THE NATURE OF THE PERSON OF REASONABLE FIRMNESS

- Helpful features of the code for battered women:
 - FIRST, there is imminency requirement and a victim may defend herself on the basis of an earlier threat by the abuser
 - SECOND, a person who has suffered from prior abuse may be able to excuse her conduct when she commits a crime at the suggestion of her abusive partner
- Code intends for the standard of a person of reasonable firmness to remain objective, and therefore it does not require that conduct is measured against a person who has never been abused

§27.01 CRIMINAL ATTEMPTS: AN OVERVIEW TO INCHOATE CONDUCT

- When a person commits a crime, it is the result of a six stage process:
 - (1) The actor conceives the idea of committing a crime
 - (2) She evaluates the idea, in order to determine whether to proceed
 - (3) She fully forms the intention to go forward
 - (4) She prepares to commit the crime
 - (5) She commences commission of the offense
 - (6) She completes her actions and ultimate goal
- Until the third step occurs, the person does not require mens rea, and the law will not punish them; even after this, she will not be punished if there is no actus reus
- The middle step activity is considered inchoate: imperfect or incomplete conduct
- Two types of attempt:
 - Complete but imperfect: occurs when the actor performs all of the acts that she set out to do, but fails to attain her criminal goal
 - Incomplete: occurs when the actor does some of the necessary acts to achieve the criminal goal, but she quits or is prevented from continuing

27.02 GENERAL PRINCIPLES

[A] HISTORICAL BACKGROUND

- General offense of attempt not recognized until 1784; at common law attempt was a misdemeanor, regardless of the nature of the offense

[B] DEFINITION OF ATTEMPT

- Until the MPC, most states did not punish attempt
- A criminal attempt occurs when a person, with the intent to commit an offense, performs some act done towards carrying out the intent; the action must constitute a substantial step, beyond mere preparation, towards the commission of the offense

-Substantial step requirement: any conduct that has reached the fifth stage of criminality described in 27.01; conduct that has passed the preparatory stage and moved to the point of perpetration of the target offense

[C] PUNISHMENT OF ATTEMPTS

-Attempt to commit a felony is graded as a felony, but typically treated as a lesser offense than the substantive crime

[D] RELATIONSHIP OF AN ATTEMPT TO THE TARGET OFFENSE

-A criminal attempt is an adjunct crime; it cannot exist by itself, but only in connection to another crime, the so-called target or substantive offense

-Most jurisdictions provide that a person is guilty of a criminal attempt when, with the intent to commit a crime, the person engages in conduct which constitutes a substantial step towards the commission of that crime whether or not his intention is accomplished

(1) In a prosecution for a crime of intent, a jury may instead return a guilty verdict for the lesser offense of an attempt to commit a substantive crime

(2) In every case where an attempt is charged, proof of the commission of the target offense establishes the attempt

[E] ASSAULT: ATTEMPT IN DIFFERENT CLOTHING

[1] ASSAULT VERSUS ATTEMPT

-Early criminal law defined an assault as an attempted battery; today most states have broadened the offense to include the tort version assault: intentionally placing another in reasonable apprehension of imminent battery

-Today at common law, a simple assault is a misdemeanor; aggravated assaults (assaults with the attempt to kill) are felonies

-Although at common law assault is an attempted battery, the law pertaining to criminal attempts does not apply to assaults

-A person may be convicted of an attempt even if consummation of the target offense is factually impossible

[2] ATTEMPTED ASSAULT

-Can a person be convicted of attempted assault?

-Most courts do not recognize the offense of attempted assault; if such double inchoate offenses were permitted, a person might be convicted on the basis of innocent conduct

[F] INCHOATE CRIMES IN DISGUISE

-Some common law and statutory offenses, although defined as if they were complete crimes, are inchoate offense in disguise

-Other offenses of a statutory nature include such double or triple inchoate crimes as possession of burglar's tools, stalking, and child luring

§27.03 SUBJECTIVISM AND OBJECTIVISM

-Many incomplete attempts appear to be harmless; however there is a social harm whenever a person negates, endangers, or destroys an individual, group or state interest that is socially valuable

-Subjectivists assert that in determining guilt and punishment, the criminal law in general and attempt law specifically should focus on the actor's mens rea, which speak to her dangerousness and bad character, rather than focus on actus reus, which may or may not be present

-Objectivists believe that conduct should not be punished unless its criminality is objectively discernable at the time it occurs

§27.04 PUNISHING ATTEMPTS: WHY, AND HOW MUCH

[A] RATIONALE FOR PUNISHING ATTEMPTS

[1] UTILITARIAN ANALYSIS

- A person may assume that if she is successful in her conduct, she will avoid detection, so she will be willing to risk the penalty for the targeted crime
- On the other hand, she may figure that if she fails in her attempt it will be because she executed the crime poorly, in which case her poor execution may result in arrest
- Applying subjectivist theories, anyone who attempts to commit a crime is dangerous and therefore her incapacitation is justified
- Criminal attempt laws serve a valuable preventative law enforcement purpose: if there were no inchoate offense in a penal code, police officers would lack legal authority to stop criminal activities before they are consummated

[2] RETRIBUTIVE ANALYSIS

- Punishment makes sense under retributive theory because:
 - Culpability Retributivists: a person who shoots but misses her intended victim is as morally culpable as one who succeeds in her endeavor
 - Harm Retributivists: focus on the harm of disturbing the order of things ordained by law

[B] LESS OR EQUAL PUNISHMENT

[1] OVERVIEW TO THE ISSUE

- An attempt to commit a felony is considered a less serious crime and is punished less seriously than the target offense
- In general, subjectivists favor equal punishment, objectivists do not

[2] UTILITARIAN ANALYSIS

- Utilitarian advocates of equal punishment argue that a person who attempts to commit a crime is no less dangerous than one who succeeds in that attempt
- A better argument is that mitigated punishment provides an encouragement to repentance and remorse, and reduced punishment serves as an incentive to desist before completing the attempt

[3] RETRIBUTIVE ANALYSIS

- Culpability retributivists generally believe that failed attempts should be punished as severely as an accomplished crime
 - Luck should have no role in setting the punishment of the wrongdoer
- Harm retributivists reason that punishment should be apportioned according to culpability AND harm

§27.05 MENS REA OF CRIMINAL ATTEMPTS

[A] GENERAL RULE

- A criminal attempt involves two intents:
 - (1) The actor must intentionally commit the acts that constitute the actus reus of an attempt
 - (2) The actor must perform these acts with the specific intention of committing the target crime

[B] RESULT CRIMES

[1] IN GENERAL

- A result crime is an offense defined in terms of a prohibited result

-For crimes of this nature, the rule is that a person is not guilty of an attempt unless her actions in furtherance of the prohibited result are committed with the specific purpose of causing the unlawful result

[2] RATIONALE OF INTENT REQUIREMENT

- Why does the law not punish unintentional attempts?
- Should the law be changed to permit a person to be convicted of an attempt as long as she acts with the same level of culpability regarding the prohibited result as would be sufficient to convict her for the completed offense?
- Affirmative: the policies underlying the target offense should apply to criminal attempts
- Negative: one who intends to commit an offense, takes substantial steps in that direction, but fails in the commission or is required to desist, remains a threat

[3] SPECIAL HOMICIDE PROBLEMS

[a] ATTEMPTED FELONY MURDER

-Almost all states have held that attempted felony murder is not a cognizable offense; the offense of attempted murder requires a specific intent to kill: the defendant's intent to commit a felony does not substitute for the intent to kill

[b] ATTEMPTED MANSLAUGHTER

- A person who intentionally kills another in sudden heat of passion, as the result of adequate provocation, is guilty of voluntary manslaughter
 - If a person in such an emotional state attempts to kill the provoker, but fails, the actor may properly be convicted of attempted voluntary manslaughter
- A person may not be convicted of attempted involuntary manslaughter, when the latter offense is based on a mens rea of criminal negligence or recklessness

[C] CONDUCT CRIMES

- Crimes whose actus reus are defined in terms of conduct rather than injurious results
- No logical reason why a person should not be convicted of an attempt to commit such a conduct crime, as long as she possesses the specific intent to engage in the conduct which, if performed, constitutes the substantive offense

[D] ATTENDANT CIRCUMSTANCES

- What mens rea regarding an attendant circumstance is regarded for the offense of attempt?
- Commentators agree that the ordinary specific intent requirement of attempt law should not apply to attendant circumstances
- Some favor the proposition that a person should be convicted of a criminal attempt if she is reckless with regard to any attendant circumstance
- Others would not impose a special mens rea requirement regarding attendant circumstances in attempt prosecutions

§27.06 ACTUS REUS OF CRIMINAL ATTEMPTS

[A] POLICY CONTEXT

- Difficulty in drawing a line between noncriminal preparation and a criminal attempt is that courts are torn by competing policy considerations
 - Desire of the courts to ease the burden on police vs. if courts authorize too early police intervention, innocent persons may improperly be arrested
- Subjectivists favor an actus reus test of attempt that allows for early attachment of guilt

-Objectivists think the actus reus element has independent significance because they do not believe that society should use its coercive power against inchoate conduct unless the actor has caused social harm

[B] THE TESTS

[1] GENERAL OBSERVATIONS

- Two categories of attempt tests:
 - Those that focus on how much remains to be done before the crime is committed
 - Those that consider how much has already occurred
- Factors that come into play for policy considerations:
 - (1) Whether the act in question appears to be dangerously close to causing the tangible harm, so that police intervention cannot realistically be delayed
 - (2) The seriousness of the threatened harm
 - (3) The strength of the evidence of the actor's mens rea

[2] LAST ACT TEST

- Attempt occurs at least by the time of the last act, but no jurisdiction requires that it reach this stage on all occasions
- An actor's dangerousness can be identified well before the last act and social harm can occur and criminality can be discerned by the final act

[3] PHYSICAL PROXIMITY TEST

- While an actor's conduct need not reach the last act, it must be proximate to the completed crime, in that it must approach sufficiently near to it to stand as either the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made

[4] DANGEROUS PROXIMITY TEST

- 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 is very great
- Three considerations in considering proximity:
 - (1) Nearness of the danger
 - (2) The greatness of the harm
 - (3) The degree of apprehension felt

[5] INDISPENSIBLE ELEMENT TEST

- In determining proximity, some courts emphasize any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control

[6] PROBABLE DESISTNACE TEST

- Centers on how far the defendant has already proceeded
- Fact finders will try and determine the point of no return of an ordinary person in the actor's shoes

[7] UNEQUIVOCALITY TEST

- Res Ipsa Loquitur test: an act does not constitute an attempt until it ceases to be equivocal; an attempt occurs when a person's conduct unambiguously manifests her criminal intent
- In harmony with the objectivist goal of reserving criminal liability for those whose conduct manifests criminality and as a consequence, causes social apprehension

§27.07 DEFENSE: IMPOSSIBILITY

[A] THE ISSUE

- The actor presumably has the required mens rea and has done everything in her power to commit the target offense, but in each case, the desired outcome is predestined to fail; it was impossible for the actor to succeed in consummating the offense
- Should a person be convicted for an attempt that cannot succeed?

[B] GENERAL RULE

- Factual impossibility is distinguished from legal impossibility
- At common law, legal impossibility is a defense; actual impossibility is not

[C] FACTUAL IMPOSSIBILITY

[1] IN GENERAL

- Exists when a person's intended ends constitute a crime but she fails to consummate the offense because of an attendant circumstance unknown or beyond her control
- Actor is mistaken regarding some fact relating to the actor, the victim, or the method of commission; had the circumstances been as the actor believed them to be, the crimes would have been consummated

[2] INHERENT FACTUAL IMPOSSIBILITY

- Applies if the method to accomplish the crime was one that a reasonable person would view as completely inappropriate to the objectives sought
- Objectivists: if conduct is harmless and would appear so to a person of normal understanding, no societal apprehension will occur and punishment is unjustified
- Subjectivists: the actor is no less morally blameworthy because she has chosen an inherently impossible way to consummate the offense

[D] LEGAL IMPOSSIBILITY

[1] INTRODUCTORY COMMENTS

- Two different categories that have been identified by courts as implicating legal impossibility; failure of the courts to distinguish between the two creates confusion
- Neither version of legal impossibility should be identified as such; overwhelming trend is to abolish legal impossibility as a defense

[2] PURE LEGAL IMPOSSIBILITY

- Arises when the law does not proscribe the goal that the defendant sought to achieve; the person thinks they are committing a crime but there is no legal punishment for it
- The actor's conduct is prohibited, but cannot legally constitute the offense charged
- Legality principle provides that we should not punish people, no matter how culpable or dangerous, for conduct that does not constitute the charged offense at the time of the action

[3] HYBRID LEGAL IMPOSSIBILITY

[a] IN GENERAL

- Exists if the actor's goal is illegal, but commission of the offense is impossible due to a factual mistake regarding the legal status of some attendant circumstance that constitutes an element of the offense
- Factual mistakes relate to the legal status of the defendant's conduct

-Ultimately any case of legal impossibility may reasonably be characterized as factual impossibility

[b] MODERN APPROACH: ABOLITION OF THE DEFENSE

-Most states have abolished the defense on the subjectivist ground that an actor's dangerousness is plainly manifested

-Objectivist objections:

-FIRST, some cases of hybrid legal impossibility involve objectively innocuous conduct

-SECOND, when conduct is objectively innocent, there exists a significant risk of enforcement error or abuse

§27.08 DEFENSE: ABANDONMENT

-Once a person crosses the line from preparation to preparation of an offense, may the actor avoid conviction for the attempt if she abandons her criminal conduct before consummation of the target offense?

-Most courts will not recognize abandonment as a defense to attempt, and when it is recognized, it applies only to the extent that the defendant voluntarily and completely renounces her criminal purpose

-Voluntary: when there is a legitimate change of heart

-Not voluntary: if the actor is motivated by unexpected resistance or some factor that increases the likelihood of arrest

-A person may not claim abandonment once a person has performed the last necessary act or has already caused serious harm to the victim

-Once the social harm has occurred, a person should no more be able to avoid conviction for the harm caused than if a thief were to repent for her actions and return property

-Jurisdictions that recognize the defense do so on subjectivist ground

-FIRST, the defense encourages desistance by the attempter

-SECOND, by voluntarily and completely abandoning an offense, an actor demonstrates that she possesses a less dangerous character than an ordinary attempter

§27.09 MODEL PENAL CODE

[A] INTRODUCTORY COMMENTS

-MPC's approach to criminal attempts is subjectivist

-Defines a criminal attempt in a manner that makes amenable to the corrective process those persons who have manifested a propensity to engage in dangerous criminal activity

[B] CRIMINAL ATTEMPT: IN GENERAL

[1] ELEMENTS OF THE OFFENSE

-Criminal attempt under the code contains two elements:

(1) The purpose to commit the target offense

(2) Conduct constituting a substantial step toward the commission of the target offense

[2] EXPLAINING SUBSECTION (1)

-5.01(1), which defines criminal intent, reads:

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 that would constitute the crime if the attendant circumstances were as he believes them to be

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 result without further conduct on his part

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in the course of conduct planned to culminate in his commission of the crime

-To analyze an attempt issue, it is necessary to ask two questions:

(1) Does the case involve a complete or incomplete attempt?

(2) If the case involves a complete attempt, is the target offence a result crime or a conduct crime?

[C] MENS REA

-A person is not guilty of criminal attempt unless it was her purpose to engage in the conduct or to cause the result that would constitute the substantive offense

-Two exceptions to the requirement of purpose:

-FIRST, (1)(b) expressly and (1)(c) implicitly provide that a person is guilty of attempt to cause a criminal result if she believes the result will occur

-SECOND, the commentary to 5.01 explains that the prefatory phrase “acting with the kind of culpability otherwise required for the commission of a crime, means that the mens rea of purpose of belief does not necessarily encompass the attendant circumstances of the crime

[D] ACTUS REUS

[1] IN GENERAL

-In a departure from the common law, the MPC shifts the focus of attempt law from what remains to be done, to what the actor has already done

-Must have committed a substantial step in the commission of the crime

-Indicates that conduct is not a substantial step unless it strongly corroborates the defendant's criminal purpose

-Subsection (2) provides a list of recurrent factual circumstances in which an actor's conduct, if strongly corroborative of her criminal purpose, shall not be held insufficient as a matter of law

[2] ATTEMPT TO AID

-Under 5.01(3) a person may be convicted of a criminal attempt, although a crime was neither committed nor attempted by another if:

(1) The purpose of her conduct is to aid in the commission of the offense

(2) Such assistance would have made her an accomplice in the commission of the crime under the code's complicity statute if the offense had been committed

-Rationale: a person who attempts to aid in the commission of the offense is as dangerous as one who successfully aids

[E] DEFENSES

[1] IMPOSSIBILITY

[a] IN GENERAL

- 5.01(1) is designed to abolish the defense of legal impossibility

-Conforms with subjectivist principles

[b] PURE LEGAL IMPOSSIBILITY

-Although the code does not expressly so provide, the American Law Institute did not intend to abolish the defense of pure legal impossibility

[2] RENUNCIATION (ABANDONMENT)

-Code recognizes an affirmative defense of renunciation of criminal purpose

-A person is not guilty of an attempt if:

(1) She abandons her effort to commit the crime or prevents it from being committed

(2) Her conduct manifests a complete and voluntary renunciation of her criminal purpose

-Renunciation is not complete if it is wholly or partially motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another similar objective or victim

-Not voluntary if it is partially or whole motivated by circumstances not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or make more difficult the accomplishment of the criminal purpose

[F] GRADING OF CRIMINAL ATTEMPTS AND OTHER INCHOATE CRIMES

[1] IN GENERAL

-Code provides that, with one exception, attempt, solicitation, and conspiracy are offense of the same grade and degree, and are subject to the same punishment as the offense attempted, solicited, or that is the object of the conspiracy

-Only exception relates to felonies of the first degree, which are crimes that carry a maximum penalty of life imprisonment

-An attempt to commit a felony of the first degree constitutes a felony in the second degree, the maximum penalty of which is 10 years

[2] SPECIAL MITIGATION

-MPC grants a judge the authority to dismiss a prosecution of an inchoate offense, or impose a sentence for a crime of a lower degree if the actor's conduct was so inherently unlikely to result in a crime that she nor her conduct represents a danger to society

§24.01 INTOXICATION AND THE CRIMINAL LAW: AN OVERVIEW

[A] INTOXICATION: DEFINITION

-A disturbance of mental or physical capacities resulting from the introduction of any substance into the body

[B] INTOXICATION LAW IN ITS SOCIAL AND HISTORICAL CONTEXT

-Most jurisdictions view intoxication as a harm to society and prevent actors from avoiding criminal responsibility

[C] INTOXICATION CASES: ISSUES TO CONSIDER

-Three questions to consider when a defendant is intoxicated at the time of an alleged crime:

(1) How did the defendant become intoxicated?

(2) In what way does the defendant claim that his intoxication affected his culpability?

(3) What type of offense is the defendant charged?

[D] INTOXICATION CLAIMS: RELATIONSHIP TO OTHER DEFENSES

- Under limited circumstances an intoxication defense is recognized when an actor becomes temporarily insane as a result of the introduction of drugs, alcohol, or other substances into the body
- In some states, the defense of diminished capacity and intoxication operate similarly, except that the former defense applies when the actor suffers from mental illness rather than intoxication
- Claims of intoxication and mistake of fact frequently overlap

§24.02 VOLUNTARY INTOXICATION: GENERAL PRINCIPLES

[A] DEFINITION OF VOLUNTARY INTOXICATION

[1] IN GENERAL

- Intoxication is voluntary if the actor is culpable for becoming intoxicated
- Such culpability exists if the person knowingly ingests a substance that he knows or should know can cause him to become intoxicated, unless the substance was prescribed medication or he was coerced to ingest it
- Once an actor voluntarily ingests a known intoxicant, courts are unsympathetic to claims that the substances had an unexpected effect

[2] ALCOHOLISM, DRUG ADDICTION, AND VOLUNTARY INTOXICATION

- Common law treats intoxication resulting from alcoholism or drug addiction as voluntary
- In general, an irresistible compulsion or disability to consume intoxicants does not render the ensuing intoxication involuntary; the law treats this the same
- As a matter of constitutional law, a state may not punish a person for the status of being addicted to narcotics or being an alcoholic, but they may be punished for the conduct resulting from intoxication

[B] GENERAL RULES

[1] NO EXCUSE

- Although it is true that self-induced intoxication never excuses wrongdoing, the condition that intoxication causes may serve as an exculpatory basis in very limited circumstances
- However, in general, the no excuse rule is a good starting point because voluntary intoxication never excuses criminal conduct

[2] WHEN VOLUNTARY INTOXICATION MAY BE EXCULPATORY

- FIRST, in most jurisdictions, a person may be acquitted of certain offenses if, as the result of self-induced intoxication, he did not harbor the state of mind provided for in the definition of the offense
- SECOND, there is limited authority for the proposition that one who acts in a state of unconsciousness brought on by voluntary intoxication may seek to avoid conviction on this ground
- THIRD, a person who suffers from long-term intoxication-induced fixed insanity may be acquitted

§24.03 VOLUNTARY INTOXICATION: MENS REA

[A] IN GENERAL

- Most common intoxication defense is a failure of proof claim, that as a result of the actor's intoxication, he lacked the mental state required by the definition of the offense
- Traditional common law rule is one that distinguished between general intent and specific intent crimes

[B] TRADITIONAL COMMON LAW RULE

[1] OVERVIEW

- Common law draws a distinction between general intent crimes and specific intent crimes

[2] GENERAL INTENT OFFENSE

- Voluntary intoxication is not a defense to general intent crimes
- General intent referred to an offense for which the only mens rea requirement was a culpable state of mind consistent with this meaning of mens rea, the voluntary act of impairing one's mental faculties with intoxicants was morally blameworthy
- In modern language, self-induced intoxication typically constitutes reckless conduct; the effect of drugs and alcohol on the body is well known and the law can safely assume that when an ordinary person chooses to ingest intoxicating substances, he knows that he will suffer temporary impairment of his powers of perception and judgment

[3] SPECIFIC INTENT OFFENSE

- Voluntary intoxication is a defense to specific intent crimes; a person is not guilty of an offense if, as a result of intoxication at the time of the crime, he was incapable of forming or did not form, the specific intent required in the definition of the offense

[4] CRITICISM OF THE TRADITIONAL APPROACH

[a] WHY DRAW A DISTINCTION

- Anomaly with the present law; in a modern penal code in which mens rea terms are expressly set out in the definition of offenses, nothing commends this dual approach

[b] SHOULD THE DEFENSE BE ABOLISHED?

- Most critics of the current law would resolve the anomaly by disallowing any mens rea based voluntary intoxication defense
- Based on the proposition that the aim of the law is to protect the innocent from injury by the sick as well as the bad, therefore it follows that the intoxication defense is detrimental to the welfare and safety of the citizenry
- Those who favor the defense disagree with the moral perception argument; even if the actor is dangerous, this does not prove that they possess the required state of mind in the definition of the offense

[C] SPECIAL PROBLEMS: INTOXICATION AND HOMICIDE

- In almost all states a defendant may introduce evidence that because his mental faculties were clouded by intoxicants, he did not premeditate and deliberate the killing; in such circumstances the defendant is entitled to have his crime reduced to second degree murder
- Defendant's intoxication may also arise as an issue in a felony murder prosecution

§24.04 VOLUNTARY INTOXICATION: VOLUNTARY ACT

- Occasionally a person may become so intoxicated that he is rendered unconscious, in which his body may move in an automatic manner and cause harm to others; if so, a defendant may seek to avoid conviction by asserting the general principle of criminal responsibility that a person may not be convicted of a crime unless his conduct includes a voluntary act
- Some courts will allow this claim, others will not, depending on how they bring in the mens rea requirement

§24.05 VOLUNTARY ACT: INSANITY

[A] TEMPORARY INSANITY

-Based on the voluntary ingestion of intoxicants, a defendant may not claim temporary insanity, in contrast to mental illness, where the defendant is entitled to such a claim

[B] FIXED INSANITY

-Habitual use of intoxicants can result in a substance induced mental disorder that persists even when the actor is not under the influence of intoxicants

-Law distinguishes between mental impairment that does not extend beyond the period of voluntary intoxication, for which there is no defense, and insanity resulting from long term use of drugs and alcohol

-For fixed insanity, the defendant may assert a traditional insanity defense; although the defense is usually asserted when the defendant was not intoxicated at the time of the offense, the insanity applies even if the actor was intoxicated at the time of the crime

-Laws willingness to recognize this defense is defended on the theory that it would constitute an impossible task to trace the chain of causation back to the original misconduct of abusive drinking or narcotics use

§24.06 INVOLUNTARY INTOXICATION

[A] DEFINITION

-Involuntary intoxication if the actor is not to blame for becoming intoxicated

-Characterized as involuntary in four circumstances:

(1) If the person is coerced to ingest to ingest the an intoxicant

(2) If the person ingests an intoxicant by innocent mistake

(3) If the actor unexpectedly becomes intoxicated from a prescribed medication

(4) Pathological Intoxication: a temporary psychotic reaction which is triggered by the consumption of alcohol by a person with a pre-disposing mental metabolic disturbance; only applies if the actor had no reason to know he was susceptible to such a reaction

[B] GENERAL RULE

-A person who is involuntarily intoxicated is entitled to acquittal in all the circumstances in which voluntary intoxication is a defense

-A defendant is also excused for his conduct if, as the result of involuntary intoxication, he is temporarily insane

§24.07 MODEL PENAL CODE

[A] GENERAL RULE

-Code distinguishes three types of intoxication

(1) Self-induced intoxication

(2) Pathological intoxication

(3) Intoxication that is not self induced

-An actors condition at the time of the crime may exculpate him in two circumstances:

-FIRST, any form of intoxication is a defense to criminal conduct if it negates an element of the offense

-SECOND, pathological intoxication and intoxication that was not self induced are affirmative defenses, if the intoxication caused the actor to suffer from a mental condition comparable to that which constitutes insanity under the code

[B] NEGATION OF AN ELEMENT OF AN OFFENSE

[1] MENTAL STATE

[a] IN GENERAL

-The code does not distinguish between general intent and specific intent offenses; thus with one exception, a person is not guilty of an offense, if, as the result of intoxication, he lacked the state of mind required in respect to an element of the crime

[b] EXECPTION TO THE RULE

-Code recognizes one exception to the rule; relates to recklessness

-Ordinarily, a person acts recklessly as defined by the code if he consciously disregards a substantial and unjustifiable risk that the material element of the offense exists or will result from his conduct

-HOWEVER, the code provides that if a person due to self induced intoxication is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial in a prosecution for which recklessness establishes criminal liability

[2] VOLUNTARY ACT

-Code provides that a person is entitled to acquittal if his intoxication negates any element of the offense

-Under the code, a person is not guilty of an offense unless his conduct includes a voluntary act

-Conduct during unconsciousness is involuntary, therefore a person who is unconscious may raise an involuntariness claim

[C] INTOXICATION AS AN AFFIRMATIVE DEFENSE

-Code recognizes an affirmative defense based on intoxication if, at the time of his conduct:

(1) The actor suffered from pathological intoxication or intoxication that was not self induced

(2) The actor's condition qualifies under the American Law Institute's Test of insanity

-If the criteria for the defense are satisfied, the actor's defense is that of intoxication rather than insanity; though the code expressly provides that intoxication is not a mental disease

§30.01 COMPLICITY: OVERVIEW TO ACCOMPLICE AND CONSPIRATORIAL LIABILITY

-Circumstances under which a person who does not personally commit a proscribed harm may be held accountable for the conduct of another person with whom he has associated himself

-A person may be held accountable for the conduct of another person if he assists the other in committing an offense

-A person may be held accountable for the conduct of a co-conspirator who commits a crime in furtherance of their agreement

-Primary Party: the person who personally commits the physical acts that constitutes an offense

-Secondary Party: any person who is not the primary person but who is associated with him in commission of an offense

§30.02 ACCOMPLICE LIABILITY: GENERAL PRINCIPLES

[A] GENERAL RULES

[1] DEFINITION OF AN ACCOMPLICE

A person is an accomplice in the commission of an offense if he intentionally assists P to engage in the conduct that constitutes the crime

-The term assists generally means any form of conduct including aiding, abetting, encouraging, assisting, soliciting, advising, and or procuring the commission of the offense

[2] CRIMINAL RESPONSIBILITY OF AN ACCOMPLICE: DERIVATIVE LIABILITY

-An accomplice is not guilty of an independent offense of aiding or abetting, instead, as the secondary party, he derives his liability from the primary party with whom he has associated himself

-In general, the accomplice may be convicted of any offense committed by the primary party with the accomplice's intentional assistance

[B] THEORETICAL FOUNDATIONS OF ACCOMPLICE LIABILITY

-Two ways to defend accomplice liability:

-FIRST, accomplice liability is analogous to civil agency law; a person may be held accountable for the actions of another if he consents to be bound by the actions of his agent, whom he vests with authority for this purpose

-SECOND, accomplice liability may be perceived in terms of forfeited personal identity

§30.03 ACCOMPLICE LIABILITY: COMMON LAW TERMINOLOGY

[A] PARTIES TO A FELONY

[1] GENERAL COMMENTS

-Common law has created two categories of parties to a crime: principals and accessories

[2] PRINCIPLE IN THE FIRST DEGREE

[a] IN GENERAL

-The person who, with the requisite mens rea:

(1) Physically commits the acts that constitute the offense

(2) Commits the offense by use of an innocent instrumentality or innocent human agent

[b] INNOCENT INSTRUMENTALITY RULE

[i] IN GENERAL

Provides that a person is the principle in the first degree if, with the requisite mens rea required for the commission of the offense, uses a non human agent or non culpable human agent to commit the crime

[ii] DIFFICULTIES IN APPLICATION OF THE RULE

-Nonproxyable Offense: an offense that can only be perpetrated by a designated class of persons

[3] PRINCIPLE IN THE SECOND DEGREE

-One who is guilty of an offense by reason of having intentionally assisted in the commission of the crime in the presence, either actual or constructive, of the principle in the first degree

-A person is constructively present if he is situated in a position to assist the principle in the first degree during the commission of the crime

[4] ACCESSORY BEFORE THE FACT

-Same as the principle in the second degree except he is not actually or constructively present when the crime is committed

- The person who solicits, counsels, or commands the principle in the first degree

[5] ACCESSORY AFTER THE FACT

- The person who, with the knowledge of another's guilt, intentionally assists the felon avoid arrest, trial, or conviction
- At common law, an accessory after the fact was derivatively liable for the original felony, although he did not assist in its commission
- Today, nearly all jurisdictions treat accessoryship after the fact as an offense separate from, and often less serious than the felony committed by the principle in the first degree

[B] PRINCIPLES VERSUS ACCESSORIES: PROCEDURAL SIGNIFICANCE

[1] GENERAL COMMENTS

- Procedural devices and differences serve to protect many accomplices from the fate suffered by principles in crimes

[2] JURISDICTION

- At common law, a principle was prosecuted in the jurisdiction in which the crime was perpetrated
- An accessory has to be tried in the jurisdiction in which the accessorial acts occurred

[3] RULES OF PLEADING

- At common law, an indictment had to state correctly whether the party charged was a principle or an accessory
- If the roles were reversed the conviction could still stand, but if there was no principle, then the accessory would be acquitted

[4] TIMING OF THE TRIAL OF ACCESSORIES

- At common law, principles and accessories could be tried jointly or separately
- Under no circumstances could the accessory be tried in advance of the principle; consequently, if the principle could not be tried, the accessory could not be tried

[5] EFFECT OF THE ACQUITTAL OF A PRINCIPAL

- An accessory could not be convicted of a crime unless and until the principle was convicted
- If the principle was acquitted in a separate trial, the accessory could not be prosecuted; if they were prosecuted jointly, the accessory could not be convicted if the jury failed to convict the principle

[6] DEGREE OF GUILT OF THE PARTIES

- The common law rule was that an accessory could not be convicted of a more serious offense than the principle
- One exception: an accessory could be convicted of a higher degree of homicide than the principle

§30.04 ACCOMPLICE LIABILITY: ASSISTANCE

[A] TYPES OF ASSISTANCE

[1] IN GENERAL

- An accomplice is a person who, with the requisite mens rea, assists the primary party in committing an offense
- There are three forms of assistance:
 - (1) Assistance by physical conduct

- (2) Assistance by psychological influence
- (3) Assistance by omission

[2] PHYSICAL CONDUCT

-Most straightforward cases of assistance involve physical conduct, where the accomplice does some sort of action to assist in the crime

[3] PSYCHOLOGICAL INFLUENCE

- Assistance by psychological influence occurs if a person incites, solicits, or encourages, a person to commit a crime
- While mere presence alone is insufficient to justify conviction as an accomplice, presence coupled with very little else can justify finding of accomplice liability based on psychological encouragement

[4] ASSISTANCE BY OMISSION

- In general, neither failure to inform police authorities of an impending crime nor failure to attempt to stop the crime that was occurring will establish accomplice liability
- The result is different if the ommitter had a legal duty to intervene

[B] AMOUNT OF ASSISTANCE REQUIRED

[1] IN GENERAL

- A person is not an accomplice unless his conduct or omission in fact assists in the commission of the offense
- Thus if assistance is not needed, or assistance fails, the person is not an accomplice
- Once it is determined that the person has assisted, any degree of aid provided suffices, no matter how trivial

[2] ACCOMPLICE LIABILITY AND THE DOCTRINE OF CAUSATION

[a] THE LAW

- A secondary party is accountable for the conduct of the primary part even if his assistance was casually unnecessary to the commission of the offense
- The absence of the causation requirement is consistent with the underlying rationale of accomplice liability
 - Since S is an accomplice and forfeits his personal identity in the criminal transaction, it is no longer relevant whether S's assistance caused the harm; it is enough that he assisted someone else who cause the harm

[b] CRITICISM OF THE LAW

- The requirement of a causal relationship between a person's conduct and social harm for which he is being punished is a fundamental feature of criminal responsibility
- Causality serves two important functions:
 - FIRST, it guarantees that criminal liability will be personal rather than vicarious
 - SECOND, causation is a tool by which to calibrate the appropriate level of a wrongdoer's punishment
- The element of causation liability also serves the same valuable purposes in the field of accomplice liability
 - FIRST, a person whose connection to a crime is exceedingly remote can be ensnared as an accomplice
 - SECOND, accomplice law can result in disproportionate punishment
- At common law, accomplices are treated alike in terms of punishment

- The accomplice whose assistance was sine qua non factor in the harm caused by the primary party should be punished proportionally to the harm that he and the primary party intentionally caused

§30.05 ACCOMPLICE LIABILITY: MENS REA

[A] IN GENERAL

- Courts state that a person is an accomplice in the commission of an offense if he intentionally aids in the primary party to commit the offense charged
- Broken down into dual intents:
 - (1) The intent to assist the primary party
 - (2) The intent that the primary party commits the offense charged
- Two states of mind:
 - (1) The intent to assist the primary part engage in the conduct that forms the basis of offense
 - (2) The mental state required for commission of the offense, as provided in the definition of the substantive crime

[B] SIGNIFICANT MENS REA ISSUES

[1] THE FEIGNING ACCOMPLICE

- To be an accomplice, a person must not only the purpose that someone else engage in the conduct which constitutes the particular crime charged, but the accomplice must also share in the same intent which is required for commission of the substantive offense

[2] PURPOSE VERSUS KNOWLEDGE: THE MEANING OF INTENT

- The mens rea of accomplice liability is usually described in terms of intention; with the crime of conspiracy, there is debate regarding whether a person should be characterized as an accomplice if he knows that his assistance will aid in a crime but lacks the purpose that the crime be committed
- Most courts hold that a person is not an accomplice unless he holds the criminal intent of the principle; there must be a community of purpose in the unlawful undertaking

[3] LIABILITY FOR CRIMES OF RECKLESSNESS AND NEGLIGENCE

- It is logically impossible for a person to be an accomplice in the commission of a crime of recklessness or negligence
- One cannot intend to act recklessly or negligently, however courts will allow liability in these cases as long as the secondary party has:
 - (1) The intent to assist the primary party to engage in the conduct that forms the basis of the offense
 - (2) The mental state required for commission of the substantive offense

[4] ATTENDANT CIRCUMSTANCES

- Does the intent requirement of accomplice liability apply to attendant circumstances?
 - As long as the secondary party acts with the purpose of assisting the principle in the conduct that constitutes the offense, he should be deemed an accomplice if his culpability as to the attendant circumstance would be sufficient to convict him as a principle
 - The mens rea policies regarding the substantive offense should control the accomplice's situation

[5] NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

-At common law, a person encouraging the commission of a crime may be held criminally liable not only for that crime but for any offense that was a natural and probable consequence of the crime aided and abetted

-To apply this doctrine, the court should ask:

(1) Did P commit the crime?

(2) If yes, did S intentionally assist in the commission of that offense?

(3) If yes, did P commit any other crimes?

(4) If yes, were these crimes, although not contemplated and desired by S, reasonably foreseeable consequences of the first crime?

§30.06 LIABILITY OF THE SECONDARY PARTY ON RELATION TO THE PRIMARY PARTY

[A] GENERAL PRINCIPLE

-Problems arise when the primary party is acquitted of the offense; does an acquittal imply that a crime was not committed? Not necessarily

-The actus reus of the offense was committed but P did not have the requisite mens rea; or all of the elements of the offense of the crime were proven but P has a valid claim of defense to his conduct

[B] LIABILITY WHEN THE PRIMARY PARTY IS ACQUITTED

[1] PRIMARY PARTY AS AN INNOCENT INSTRUMENTALITY

-If D coerces X to commit a theft by threatening X's life, X will be acquitted of larceny on the basis of duress. X was D's innocent instrumentality

-D was the principle in the first degree, and D's guilt is not founded on accomplice liability principles

[2] ACQUITTAL ON THE BASIS OF A DEFENSE

[a] JUSTIFICATION DEFENSES

-In the absence of wrongdoing by the principle, there is no crime to impute to the accomplice

[b] EXCUSE DEFENSES

-When the primary party is acquitted on the basis of an excuse defense, his acquittal should not bar a successful prosecution of a secondary party who the excuse does not extend

-Excuse means the actions were wrongful but he was not responsible for them because of the excusing condition

[3] ACQUITTAL ON THE BASIS OF LACK OF MENS REA

[a] IN GENERAL

-It is one thing to impute a crime to the accomplice, then measure the culpability on the basis of each person's mens rea; it is another to derive criminal liability from a person who has committed no offense

[b] SPECIAL PROBLEM: THE FEIGNING PRIMARY PARTY

-Liability of a putative accomplice to a crime whose purpose for participation with the primary party was to ensnare the latter in criminal activity

-Can the converse occur? Yes

[C] LIABILITY OF AN ACCOMPLICE WHEN THE PRIMARY PARTY IS CONVICTED

- At common law, there is no bar to convicting an accessory before the fact or a principle in the second degree of a lesser offense or degree of offense then is proven against the primary part, if the secondary party's culpability is less than that of the primary actor
- May the second party be convicted of a more serious offense? At common law, no

§30.07 LIMITS TO ACCOMPLICE LIABILITY

[A] LEGISLATIVE EXEMPTION RULE

- A person may not be prosecuted as an accomplice in the commission of a crime if he is a member of the class of person from whom the statute prohibiting the conduct was enacted to protect

[B] ABANDONMENT

- A person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor can avoid accountability for the subsequent criminal acts of the primary party
- Accomplice must communicate his withdrawal to the principle and make bona fide efforts to neutralize the effect of his prior assistance

§30.08 CONSPIRATORIAL LIABILITY: THE PINKERTON DOCTRINE

[A] ACCOMPLICE VS CONSPIRATORIAL LIABILITY

- Conspiracy liability: complicity based solely on a conspiratorial relationship
- Many jurisdictions hold that a person, simply because he is a party to a conspiracy, may be held responsible for the actions of his partners in crime
- An agreement between two or more persons to participate in the commission of a crime is key to a conspiracy and therefore to conspiratorial liability
- Accomplice liability requires proof that an actor at least indirectly participated in a crime; an agreement to do so is not needed

[B] RULE OF CONSPIRATORIAL LIABILITY

- A party to a conspiracy is responsible for any criminal act committed by an associate if it:
 - (1) Falls within the scope of the conspiracy
 - (2) Is a foreseeable consequence of the unlawful agreement

[C] COMPARISON OF LIABILITY

- Accomplice and conspiracy liability often completely overlap
- Critics of the Pinkerton doctrine assert that the law loses all sense of just proportion if simply because of the conspiracy each conspirator is held accountable for thousands of additional offenses of which he was completely unaware and did not influence at all

§30.09 MODEL PENAL CODE

[A] FORMS OF LIABILITY

[1] IN GENERAL

- Under the MPC, a person is guilty of an offense if he commits it by his own conduct or by the conduct of another person for which he is legally accountable, or both

[2] ACCOUNTABILITY THROUGH AN INNOCENT INSTRUMENTALITY

- Code adopts the principle that one is guilty of an offense if he uses an innocent instrumentality to commit the crime

-A person is legally accountable for the conduct of an innocent or irresponsible person if he:

(1) Has the mental state sufficient for commission of the offense

(2) Causes the innocent or irresponsible person to engage in the criminal conduct

-The innocent instrumentality doctrine applies only if D causes C to engage in the conduct in question

[3] MISCELLANEROUS ACCOUNTABILITY

-A person may be held accountable for another person's conduct if the law defining an offense so provides

[4] ACCOMPLICE LIABILITY

-A person is legally accountable for the conduct of another person if he is an accomplice of the other in the commission of the criminal offense

-FIRST, it is a form of liability independent of the innocent or irresponsible person doctrine described in 2

-SECOND, accomplice liability is dependant on the relationship of the parties in the commission of a specific offense

[5] REJECTION OF CONSPIRATORIAL LIABILITY

-MPC rejects the Pinkerton doctrine of liability because they believed there was no better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise

[B] NATURE OF AN ACCOMPLICE

[1] CONDUCT

[a] IN GENERAL

-S is an accomplice of P in the commission of an offense if, with the requisite mens rea:

(1) Solicits P to commit the offense

(2) Aids, agrees to aid, or attempts to aid P in the planning or commission of the offense

(3) Has a legal duty to prevent the commission of the offense, but makes no duty to do so

[b] ACCOMPLICE LIABILITY BY SOLICITATION

-Accomplice liability exists if S's conduct would constitute ceremonial solicitation

[c] ACCOMPLICE LIABILITY BY AIDING

-Code dispenses with the many common law and statutory terms used to describe the conduct that may constitute assistance in the commission of an offense and replaces them with the single word aids

[d] ACCOMPLICE LIABILITY BY AGREEING TO AID

-S is an accomplice of P if he agrees to aid P in the planning or commission of an offense

-Met if S tells P he will help to plan, agrees to provide an instrumentality for the offense; true even if he does not fulfill his promise

[e] ACCOMPLICE LIABILITY BY ATTEMPTING TO AID

[i] IN GENERAL

-Code provides that S may be held accountable as an accomplice of P in the commission of an offense if he attempts to aid in the planning or commission of the crime, even if his aid proves ineffectual

[f] ACCOMPLICE LIABILITY BY OMISSION

-One cannot be an accomplice in the commission of an offense by failing to act

[2] MENTAL STATE

[a] IN GENERAL

-A person is an accomplice if he assists with the purpose of promoting or facilitating the commission of the offense

[b] LIABILITY FOR CRIMES OF RECKLESSNESS AND NEGLIGENCE

-Under what circumstances, if any, is a person an accomplice in the commission of a crime of recklessness or negligence?

-2.06(4) provides that when causing a particular result is an element of a crime, a person is an accomplice in the commission of the offense if:

(1) He was an accomplice in the conduct that caused the result

(2) He acted with the culpability, if any, regarding the result that is sufficient for the commission of the offense

-This is a step by step process:

-FIRST, determine P's potential responsibility

-SECOND, ask whether S was an accomplice in the conduct that caused the result

[c] ATTENDANT CIRCUMSTANCES

-The code does not address the issue of attendant circumstances

[d] NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

-The code rejects the common law natural and probable consequences doctrine; as a result, the liability of an accomplice does not extend beyond the purposes that he shares

[C] LIABILITY OF THE ACCOMPLICE IN RELATION TO THE PERPETRATOR

-MPC provides that an accomplice in the commission of an offense may be convicted of a crime, upon proof of its commission of another person, regardless of whether the person is convicted, acquitted, or not prosecuted

-Code expressly provides that a person who is legally incapable of committing an offense personally may be held accountable for the crime if it is committed by another person for whom he is legally accountable

[D] LIMITS TO ACCOMPLICE LIABILITY

-2.06(6) states that unless the code provides, a person is not an accomplice in the commission of an offense if any of three circumstances exist:

-FIRST, S may not be convicted as an accomplice if he is the victim of the offense

-SECOND, S is not an accomplice of P if S's conduct is inevitably incident to the commission of the offense

-THIRD, the code establishes a defense of abandonment; a person is not an accomplice in a crime if he terminates his participation in the crime and

(1) Neutralizes his assistance

(2) Gives timely warning to the police

(3) In some manner attempts to prevent the commission of the crime

§33.01 RAPE: GENERAL PRINCIPLES

[A] DEFINITION: COMMON LAW

- Carnal knowledge of a woman forcibly and against her will
- Statutory rape: carnal knowledge with a woman under the age of 10

[B] STATUTES: TRADITIONAL AND REFORM

- Traditional (non-reformed) statutes focus on forcible rape of the female, and without her consent
- Gender specific: only males are capable of rape and only women are victims of the crime
- Many states now prohibit nonforcible but nonconsensual forms of sexual intercourse

[C] GRADING OF THE OFFENSE

- Today rape is treated as a very serious offense punishable by life imprisonment to a substantial number of years in prison

§33.02 STATISTICS REGARDING RAPE

- 155,000 women, age 12 or older were victims of consummated or attempted forcible rapes each year between 1973 and 1987
- 2005: 130,140 completed or attempted rapes
- Age and race have an impact on the chances of being raped

§33.03 SOCIAL ATTITUDES REGARDING RAPE

[A] SOCIAL HARM OF RAPE

[1] THE ORIGINAL PERSPECTIVE

- Rooted in the ancient male conceptions of property; a virgin was a valuable commodity and as a consequence, rape was a property offense

[2] THE MODERN PERSPECTIVE

- Today viewed as a crime of violence and a privacy/autonomy offense

[B] PERCEPTIONS OF THE SERIOUSNESS OF THE OFFENSE

[1] IN GENERAL

- View of the social harm depends on that individual's perception of the seriousness of the crime

[2] BLAMING THE VICTIM

- To some extent, both men and women tend to blame the victim for rape
- Significant weight is assigned to the character, respectability, and behavior of the female victim

[3] VICTIM'S RELATIONSHIP TO THE RAPIST

- Historically, people and the law treated stranger rape as a much more serious crime than acquaintance rape; today the law does not generally recognize a distinction

§33.04 RAPE: ACTUS REUS

[A] IN GENERAL

- Sexual intercourse constitutes rape if it is committed:
 - (1) Forcibly
 - (2) By means of certain forms of deception
 - (3) While the female is asleep or unconscious

(4) Upon a female incompetent to give consent

[B] FORCIBLE RAPE

[1] TRADITIONAL LAW

[a] IN GENERAL

- A successful prosecution for forcible rape requires proof that the female did not consent to the intercourse and that the sexual intercourse was secured by force
- Intercourse secured by a non physical threat does not ordinarily constitute forcible rape

[b] LACK OF CONSENT

- Three consent issues exist here:
 - FIRST, the attitudinal version of consent necessarily can result in miscalculation by the male: he may honestly believe she wants sex when she does not, raising mens rea issues
 - SECOND, yes may not always mean yes because consent, to be legally valid, must be voluntarily; even if it is externalized, permission must be given freely
 - THIRD, even if voluntary consent is granted, it may be withdrawn

[c] FORCE AND RESISTANCE

- If the perpetrator used or threatened to use extreme force – force likely to cause serious injury or death – the element of force is uncontroversially satisfied
- The resistance requirement has been expressed in different ways:
 - Resist the attacker until overpowered or resist the attack in every way possible

[d] FORCE OF FORCE VERSUS THREAT OF FORCE

- Forcible rape prosecutions may be based on a threat of serious force rather than its infliction; the threat may be verbal or non verbal
- Required that the prosecution prove the female's subjective apprehension of serious harm and some conduct by the male that places her in reasonable apprehension for her safety

[2] THE LAW IN TRANSITION

[a] RESISTANCE REQUIREMENT

- Common law developed a resistance requirement in forcible rape cases
 - Sharply criticized because not all women will react that way, and it can be dangerous to do so

[b] FORCE: CHANGING ITS DEFINITION (OR ABOLISHING THE REQUIREMENT)

- Belief that the common law definition of rape, which requires proof of force and lack of consent should be abandoned

[C] FRAUD

- At common law, a seducer is not a rapist; that is, a male may use any non forcible sales technique, no matter how deceptive, to obtain the consent of a female for sexual intercourse and escape criminal punishment

§33.05 RAPE: MENS REA

- Ordinarily denominated as a general intent offense in non MPC jurisdictions; thus a defendant need not possess an intention that sex be nonconsensual
- It is enough that he possessed a morally blameworthy state of mind regarding the female's lack of consent
- A person is not guilty of rape if he entertained a genuine and reasonable belief that the female voluntarily consented to intercourse with him

§33.06 MARITAL IMMUNITY RULE

[A] THE IMMUNITY AND ITS RATIONALES

[1] THE RULE

- 1736: A husband cannot be guilty of rape committed by himself upon his lawful wife

[2] RATIONALES

[a] CONSENT/PROPERTY RATIONALE

- General understanding of marital partners today is that each person consents generally to have sex with the other, subject to the right to refuse on particular occasions
- More accurate explanation of common law marital immunity rule is that the wife is the virtual property of the husband and thus the husband possessed the unlimited right of sexual access to her

[b] PROTECTION OF THE MARRIAGE

- Defenders of marital immunity argue that it is needed to protect against governmental intrusion
- Protecting woman's right to safety is more important

[c] PROTECTION OF THE HUSBAND IN DIVORCE PROCEEDINGS

- If a husband could be prosecuted for rape by his wife, she might use this threat as leverage in property settlement negotiations in divorce; UNPERSUASIVE ARGUMENT

[d] LESS SERIOUS HARM

- Some contend that the problem with rape is that it forces the woman to have sex with someone she would not want this type of intimate relationship with; still an imposition on autonomy

[B] BREAKDOWN OF THE RULE

- Rule was abolished in England in 1991; 24 states in the US have abolished the rule

§33.07 PROVING RAPE AT TRIAL

[A] CORROBORATION RULE AND CAUTIONARY JURY INSTRUCTIONS

- At common law, the testimony of the complainant was sufficient to uphold a conviction for rape
- Minority of states instituted a corroboration requirement; defendant could not be convicted of rape upon the uncorroborated testimony of the alleged victim

[B] RAPE SHIELD STATUTES

- Two basic principles determine the admissibility of proffered evidence
 - FIRST, no evidence is admissible unless it is relevant
 - SECOND, subject to limited exceptions, relevant evidence is admissible
- Evidence is relevant if it has the tendency to prove or disprove any debated factual issue

- Three classes of evidence regarding the complainant might be proffered:
 - (1) Her prior consensual acts with the accused
 - (2) Her prior consensual acts with persons other than the accused
 - (3) Her reputation for lack of chastity
- Rape shield laws have been enacted to deny a defendant the opportunity to cross examine the complainant concerning her prior sexual conduct or her reputation

§33.08 MODEL PENAL CODE

[A] SEX OFFENSES, IN GENERAL

- 213 of the MPC sets out the sexual offense recognized by the code: rape; gross sexual imposition; deviate sexual intercourse; corruption of minors; sexual assault; indecent exposure

[B] RAPE

[1] IN GENERAL

- A male is guilty of rape if, acting purposely, knowingly, or recklessly regarding each of the initial material elements of the offense, has sexual intercourse with a female under any of the following circumstances:
 - (1) The female is less than 10
 - (2) The female is unconscious
 - (3) He compels the female to submit by force or by threat
 - (4) He administers or employs drugs
- The code recognizes a partial marital exception: the preceding conduct does not constitute rape if the female is his spouse, unless the parties are living under a formal decree of separation
- Rape is a felony in the first degree in either of two circumstances:
 - (1) The defendant inflicts serious bodily injury upon the female or another
 - (2) The female was not a voluntary social companion who had previously permitted social liberties

[2] COMPARISON TO COMMON LAW

- Different from common law in various regards:
 - FIRST, it is gender specific
 - SECOND, rape is defined in terms of the male's acts of aggression or overreaching rather than in the negative terms of the female's lack of consent
 - THIRD, the definition of rape is broader than the common law

[C] GROSS SEXUAL IMPOSITION

- Guilty of gross sexual imposition if he has sex with a female in any of three circumstances:
 - (1) If the female submits as the result of a threat that would prevent resistance
 - (2) With knowledge that, as a result of mental illness, she is unable to appraise her conduct
 - (3) If he knows that the woman is unaware that a sexual act is being committed on her or she mistakenly thinks it is her husband

[D] PROVING A SEXUAL OFFENSE

- MPC adheres to the corroboration requirement

§25.01 INSANITY: AN OVERVIEW

- Controversial for various reasons:
 - FIRST, offered in unusual cases
 - SECOND, suffers from the conceptual intermingling of psychiatry and the law

§25.02 INSANITY DEFENSE: PROCEDURAL CONTEXT

[A] COMPETENCY TO STAND TRIAL

[1] GENERAL RULE

-The criminal trial of an incompetent defendant violates the due process clause of the constitution

-A person is incompetent if she:

(1) Lacks the capacity to consult with her attorney to a reasonable degree of understanding

(2) Lacks a rational as well as factual understanding of the proceedings

-Constitutionally required because an incompetent person is unable to provide needed assistance to their attorney

[2] PROCEDURES FOR DETERMINING COMPETENCY

-A defendant's competency to stand trial is treated as an issue for the judge, not for the jury

-Whenever the issue is raised, defendant is required to submit to a psychiatric examination

[3] EFFECT OF AN INCOMPETENCY FINDING

-If it is determined that the defendant is incompetent, criminal proceedings must be suspended until she is competent; if the condition is based on a permanent condition, a criminal trial may never be held

-Incompetency finding usually results in defendant being committed to a mental facility

[B] PRE TRIAL ASSERTION OF THE INSANITY PLEA

-Many states require notice prior to trial that a defendant will plea incompetency, with the purpose to provide adequate time to provide a rebuttal

[C] JURY VERDICTS

-In most states, a fact finder may return one of three verdicts in a criminal trial where the defendant pleads insanity: not guilty, not guilty by reason of insanity, or guilty

-Not guilty by reason of insanity means that all elements of the crime were proved, including the mens rea, and that the defendant's non insanity defenses were rejected, but that the accused was insane at the time of the crime

[D] BIFURCATED TRIAL

-In a bifurcated system, all aspects of the case except the defendant's sanity are litigated; at the completion of this phase, the fact finder deliberates and returns a verdict of guilty or not guilty

-If the verdict is not guilty, the defendant is acquitted and the trial is over; if the defendant is found guilty, the next part of the trial is conducted where the sole issue is the accuser's insanity

[E] BURDEN OF PROOF

-Insanity is an affirmative defense; the defendant has the initial burden of producing evidence regarding her mental condition in order to raise the insanity defense