

DRESSLER CRIMINAL LAW OUTLINE

I. INTRODUCTORY POINTS

A. Sources of Criminal Law.

1. Common Law.
2. Statutes Derived from Common Law.
3. Model Penal Code.
4. (Bill of Rights)

B. Criminal Law v. Civil Law

1. Criminal

- a. Defendant is punished (incarcerated)
- b. The criminal conviction itself says defendant is a moral wrongdoer. It is a condemnation by the community/ "a morality play." → (Moral blameworthiness)
 - Usually about things you are not supposed to do as opposed to things you must do
 -

2. Civil

- a. Defendant pays victim. (compensation)
- b. Defendant is not morally stigmatized. (tort claims)

C. Theories of Punishment.

1. Retributivism "Is it more about desert?"

- a. People should get what they deserve.
- b. Humans have free will. If they choose to do wrong, it is appropriate to punish them.
- c. Looks backwards. Only punishes to the extent of the wrongdoing.
- d. Justice for the victim

- **The moral desert of an offender is a sufficient reason to punish him or her which is a necessary condition of punishment**
- Wouldn't want to punish someone mentally ill bc they are not morally culpable
- Rests on moral culpability

2. Utilitarianism – "What good does it do?"

- Focuses on what punishing that particular person accomplishes
- a. All forms of pain are bad. Punishment is not good, but neither is crime.
Punishment is proper if imposition of pain will reduce the likelihood of future crimes.
 - b. Punishment is justified in so far as it produces some net social benefit. Forward Looking
 - c. Forms of utilitarianism.
 - i. General deterrence:
 - convince the general community to avoid criminal conduct in the future
 - ii. Specific deterrence:
 - deter the individual from committing additional crimes in the future
 - iii. Rehabilitation:

- help correct the offender, help to assimilate them back into society

D. Burden of Proof.

1. “Beyond a Reasonable Doubt.” This standard means that the fact-finder must have an abiding conviction of the defendant’s guilt.
 - rooted in common law, state cannot decide to have a lower standard.
2. The government must prove, beyond a reasonable doubt, **every element** of a crime. This is a constitutional requirement under 5th and 14th Amendment.

OWEN V. STATE

- A conviction based on circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence

II. COMPONENTS OF A CRIME

A. Actus Reus. The physical part of the crime.

- a. *A voluntary act* – grain of mens rea in it. Can be satisfied by an omission ONLY if there is a legal duty to act
- b. *That causes* (causation)
- c. *Social Harm*
 - i. Act: *some* bodily movement, muscular contraction
 - ii. An act is *voluntary* if it evidences in volition; the act is a *willed* act that follows from a mental decision by the actor.

B. Mens Rea. The mental part of the crime, or the state of mind of the defendant when he committed the crime.

- This is not motive

C. Five Elements of a Crime:

- (1) Actus Reus (Voluntary act) or omission
- (2) Social harm
- (3) Mens rea—A morally culpable state of mind.
- (4) Actual causation.
- (5) Proximate causation.

ACTUS REUS, - VOLUNTARY ACT

1. ACTUS REUS **VOLUNTARY ACT OR OMISSION**

- a. Voluntary Act: bodily movement, a muscular contraction
- b. An act is *voluntary* if it evidences in volition; the act is a willed act that follows from a mental decision by the actor.
 - This is the grain of mens rea

MARTIN V STATE 128

- Case about drunk driving. He was not voluntarily on the highway
 - An act necessarily means voluntary act – something *willed*

These are **NOT** voluntary acts:

- A reflex or convulsion;
 - A bodily movement during unconsciousness or sleep;
 - Conduct during hypnosis or resulting hypnotic suggestion;
 - A bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.
- MPC 2.01 – Does not define voluntary act but says that the conduct must include some type of voluntary act
 - Ex. PPL V. DECINA - did not take medicine and drove. Seizure. Voluntary act of driving...
 - Necessary but not a sufficient condition – showing the actus reus does not mean criminal liability

c. **Omission**: A legal duty to act (special relationship), not just a mere moral obligation. Only **responsible if**:

1. *Statute imposing a duty to act* – most clear. Ex. Would be reporting requirement of teachers and physicians
 2. *Special relationship*
 - a. Parent/child; husband/wife; master/seaman; student/teacher
 3. *Assumption of a contractual relationship to care (babysitter)*
 4. *Voluntary assumption of care that excludes others* → can't stop once you start. Cannot leave them secluded where it prevents others from rendering aid or reduces the chance EX. People swimming out and preventing others from saving. Simply swimming out and quitting does not fall under this category.
 5. *(Some States) Accidental creation of risk of harm to others* – starting a fire
- If there is an omission involved, FIRST QUESTION SHOULD BE IS THERE A LEGAL DUTY, IF NOT, NO CRIME.
 - If there is a duty to act, look at what is required, how far does the person have to go. LOOK AT THE SCOPE. There has to be some limits for imposing liability and is likely to be a narrow interpretation

BARBER V. SUPERIOR COURT 142

- Doctor case. Court focused on act v. omission. Said it was omission and there was no duty to act. But if it was an act, would have been guilty
- Afterwards, consult with family and withdraw the feeding and hydration – this is the main issue
 - Does characterize this as an act or omission? An omission! They compare it with the act of a lethal injection which is an affirmative act whereas this was just an omission to not feed
- If the court viewed removing the feeding tube as an act, (it caused his death and they knew it would cause his death) then they are guilty of homicide
- Even though it is an action, there is a stopping, no longer injecting patient with nutrition so it is actually an omission

- **MPC 2.01(3)(a) & (b)** – Omission satisfies conduct element of crime when
 - The statute defining the offense expressly states that failure to act is a crime, or
 - The defendant has a duty to act imposed by civil law

2. **SOCIAL HARM** – the intangible harm resulting from any crime including a community’s loss of a sense of security. The negation, endangering, or destruction of an individual, group, or state interest which is deemed socially valuable
- Every crime has conduct but some have a result as a requirement of a crime
 - Can consist of wrongful conduct, wrongful result, or both, and attendant circumstance elements.

Result Crimes → law punishes “**unwanted outcome/prohibited result**” [social harm] - murder
Conduct Crimes → (law prohibits specific behavior) defined in terms of **harmful conduct**, even where there may be no harmful result. – like drunk driving

- **CAUSATION** glues the voluntary act and social harm together but this isn't really a topic in conduct crime.

Attendant Circumstance: a condition that must be present, in addition to the prohibited conduct or result, to constitute the crime. [Burglary (the “at night”) element] part of actus reus of the offense

- It is not something anyone causes. It is a circumstance.
- A condition the prosecutor must prove in addition to the prohibited conduct or result
- Selling liquor to a **minor. Intoxicated**. “Drive an automobile while intoxicated.” **Automobile** is also attendant circumstance.
- May be a result of action taken in the past but must be present in order for the crime to occur – like drinking

Specific Intent Crimes: If you are accused of a specific intent crime, the prosecution must prove that when you committed the crime you had the requisite intent or mens rea. This intent (mens rea) will be listed in the statute that defines the crime. If you didn't act with this intent or mens rea, then you cannot be convicted of the crime. – Elemental approach

General Intent Crimes: A general intent crime only requires that you intend to perform the act. That is, you don't need any additional intention or mens rea. For example, assault is usually a general intent crime. You only need to intend your actions, not any particular result. Morally blameworthy for actions. – culpability approach

- **MUST PROVE**
 - **THAT THE D has a conscious objective or**
 - **that the d was consciously aware**
 - **to bring about the social harm of the offense**

3. **MENS REA**

Mens Rea: Mental state of actor at time he committed the actus reus.

Rationale for the mens rea: you have to prove state of mind because you don't want to punish people for things not intentional [retributivist]...

- utilitarian – hard to deter someone who never meant to do it.

Two Uses of the Mens Rea:

- (1) **Culpability Meaning:** the person who committed the act has some morally blameworthy state of mind. Broad view of mens rea, “guilty mind” (general intent crimes).
 - An individual will be found guilty for any criminal act that he committed while having any morally culpable or blameworthy state of mind.
- (2) **Elemental Meaning:** the person who committed the act has the particular state of mind, specified in the offense, or towards the social harm. (specific intent crime) More narrow view. Mental state is specified in definition of the charged crime. This is the MPC approach.
 - An individual is not guilty of an offense, even if he had a guilty state of mind, where the individual’s state of mind does not match the mental state specified in the definition of the charged crime.

Mens Rea

I (Intentionally) Know (Knowingly) What (Willfully) Ninjas (Negligently) Really (Recklessly) Mean (Malice)

- o **Intentionally:** purpose and knowledge [practically certain to occur as a result of conduct]
- o **Knowingly:** practically certain to occur as a result of conduct
- o **Willfully:** intentional
- o **Negligently:** state of mind, vis a vie – risk taking; deviation from what a normal person would do. Subjectively unaware.
- o **Recklessly:** Aware, with conscious disregard
- o **Malice:** purposefully; recklessly causing the social harm of the offense
- o **If No Specific Mens Rea:** Then it is just understood to be “general moral blameworthiness”

2.02 Mens Rea in the Model Penal Code – 4 LEVELS OF CULPABILITY IN RELATION TO CONDUCT, RESULT, AND ATTENDANT CIRCUMSTANCES

*Abandons common law and pre code statutory mens rea and replaces them with:

Prisoners (Purposely) Knit (Knowingly) Really (Recklessly) Nice (Negligently)

- Four levels of culpability in relation to *conduct, result, and attendant circumstances*
 - **Purposely:** Most culpable. intentionally perform a certain action.
 - *Knowledge that the requisite legal circumstances exist (same as knowledge)*
 - Refers to attendant circumstances
 - *Conscious objective to perform an action of that nature or to cause such a result. It is the person’s goal*
 - Refers to result or conduct
 - **Knowingly:** It is meaningful to think of the actor’s attitude as different if he is simply aware that his conduct is of the required nature or that prohibited result is almost certain to follow from his conduct. Person is aware. Knowledge is ACTUAL knowledge, not what a reasonable person would think. This is a subjective standard.

refers to attendant circumstances

- Knowledge that the requisite legal circumstances exist (same as purpose)
 - Established if “a person is aware of a high probability of [the attendant circumstance’s] existence, unless he actually believes that it does not exist.”

refers to result or conduct:

- Don’t need a conscious objective to perform an action of that nature or to cause such a result. *It is enough if he is simply aware that his conduct is of the required nature or that the prohibited result is **practically certain** to follow from his conduct.*
 - **Recklessly**: Conscious risk creation; acting knowingly in that a state of awareness is involved, but the awareness pertains to the risk, so the probability of the prohibited result occurring is *less than substantial certainty*
 - The risk must be substantial and unjustifiable. [*Consciously disregards a substantial and unjustifiable risk*]
 - Whether a risk is substantial and unjustifiable is judged by a standard of conduct that a law abiding person would observe –
 - Must judge from the actor’s perspective, subjective component
 - Recklessness can apply to attendant circumstances – if you are aware that the person may be underage
 - Knowledge is practical certainty but recklessness does not require this. EX. texting and driving, it is not certainty, you cannot knowingly cause the risk but there is a substantial risk involved of the probability
 - **Negligently**: Does not involve a state of awareness. *Inadvertently* creates a substantial and unjustifiable risk of which you *ought* to be aware.
 - Like recklessness, look to the substantiality of the risk and the justification for it, and judge the conduct by the standard of care that would be exercised by a reasonable person. Subjectively *unaware*. [**Not aware** of a substantial and unjustifiable risk]
- Diff between negligence and recklessness – recklessness is conscious awareness of the risk, with negligence, you do not have to show awareness, you just have to show they SHOULD have known. It is the least culpable

HYPOTHETICAL -

- Bill wants to kill Margene but she is holding a baby. He wants the baby to survive.
 - Bill's intention to Margene is purposefully and his intention to the baby is knowingly
 - You will need to infer from the circumstances as to what their intent is
 - ****In the absence of a mens rea, apply “purposely, knowingly, or recklessly” *** NOT NEGLIGENCE**
 - If the statute says reckless but you prove knowledge or purpose, you’re good.

- Culpability provision applies to all material elements UNLESS a contrary intent plainly appears
- When ambiguous drafting of statute, it is construed against the drafter of the law
- Statutory Interpretation
 - What if a statute is silent as to a material element? - i.e. mens rea
 - The first three are sufficient but negligence to show the mens rea element
 - If a statute says recklessness but you prove knowledge or purpose then YOU ARE GOOD
 - At the very least when silent, you need to show recklessness
 - What if the statute prescribes culpability sufficient for offense, but doesn't distinguish among material elements?
 - The culpability provision applies to all material elements UNLESS a contrary intent plainly appears

WILFUL BLINDNESS – ONLY APPLIES TO ATTENDANT CIRCUMSTANCES

State v. Nations – where the girl was stripping and she never checked her ID.

- What does the statute say?
 - A person commits the crime of endangering the welfare of a child if.....he knowingly encourages, aids, or causes a child less than 17 to engage in any conduct.....
 - What is the mens rea of the statute?
 - Knowingly
 - Does it apply to conduct or attendant circumstances?
 - The attendant circumstance is child less than 17
 - Yes. Knowingly applies to the entire thing because it is as the beginning
- Claims she checked the ID but the child didn't even have an ID with her
 - This just shows that the D lied, but it does not show she had knowledge of the girl's age
- Prosecutor says that the D disregarded the high risk of the girl being underage- BUT THIS IS RECKLESS, NOT KNOWLEDGE
- **MPC on Knowledge** – established if the person is aware of a high probability of a fact's existence. MPC accepts recklessness as knowledge bc their definition of knowledge is a person is aware of a high probability of a fact's existence
 - In some jurisdictions, willful blindness MIGHT satisfy the knowledge requirement
 - When the person doesn't have actual knowledge but there is extreme recklessness as to the possibility of the attendant circumstance

STRICT LIABILITY

- A crime that does not contain a mens rea requirement regarding one or more elements of the actus reus.
- This applies to more regulatory/civil offenses like traffic tickets.
- In strict liability, your mens rea does not matter
- Typically, an element that does not require a mens rea element is the attendant circumstance
- If there is no mens rea element, you cannot have mistake of fact or mistake of law bc they are liable either way

What Courts Look At to Consider Strict Liability

1. The statutory crime is not derived from 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 is to be expected of a person (presume notice)
4. The penalty for violation is not severe. ** Majority draws on this
5. Conviction does not “gravely besmirch” – stigma

*The common law generally rejects strict liability crimes.

- Default is not strict liability unless it is a minor offense or it is VERY clear that this is what the leg. Intended

* The MPC generally requires a mens rea, unless a lesser crime deemed a “violation,” which carries no threat of imprisonment (Purposefully, Knowingly, Recklessly)

- What’s the MPC’s approach to strict liability?
- § 2.02 (1): with 1 exception, no conviction unless the prosecution proves some form of culpability re each and every material element of the offense.
- Can often look at the lang of the statute and if there are mens rea elements to certain parts and not to other parts of attendant circumstances, then probably intended strict liability
- Case with the retarded boy who had sex with someone. They did not look at his mental culpability bc it was strict liability and mens rea does not matter.

EX: Statutory rape crimes are a common and controversial strict liability

MISTAKE OF FACT - First look to see whether it is a common law or MPC jurisdiction

Mistake of Fact: occurs when a Δ is unaware of, or mistaken about, a fact pertaining to an element of the offense.

- Treats as mens rea element

Common Law

1. **Specific intent Crimes:**

- a. Rule: a Δ is not guilty of an offense if his mistake of fact negates the specific intent portion of the crime; if it negates the mens rea requirement. [You DON’T have to show reasonableness].
- b. Common law does not care if the mistake is reasonable or not.

-Include intent or purpose to do some future act or achieve some further consequence beyond conduct or result that constitutes the actus reus

Larceny: “with intent to permanently deprive the owner of his or her property”

Burglary: “with the intent to commit a felony inside”

OR

-Provide that the actor must be aware of a statutory attendant circumstance

2. **General Intent Crimes:**

a. A Δ is not guilty of an offense if his mistake of fact was reasonable but he is guilty if his mistake of fact was unreasonable

- Forcible rape is general intent – what if there is a mistake of consent. Consent is an attendant circumstance of rape
- There is no intent stated and it is not strict liability so you may look at MPC standard of intent and the minimum of recklessness – substantial risk
- But what if no MPC approach
 - LOOK AT THE REASONABLENESS OF THE MISTAKE
 - This is diff from the recklessness standard bc that requires awareness – as a defendant you would want the reckless standard instead
- If shot a deer, thinking it was a human, you have a mistake of fact. You intended to kill a deer, but did NOT intend to kill a human. (Negates the mens rea.)
-
- In both, mistake of fact has to be in good faith. If specific intent it doesn't matter if it is wildly unreasonable to think that (as long as it was in good faith)
-
- If general intent, then there has to be reasonable. Rape is general intent crime.
- Ex: Common law rape
- Mistake of fact determined reasonable by judge/jury

MPC Approach

1. Does away with the difference between general intent and specific intent offenses – USES ELEMENTAL APPROACH
2. Most crimes are specific intent minus a few strict liability
 - a. Unless stated, requires knowingly, purposely, or recklessly
3. No showing of reasonableness is required
 - a. **MPC Rule: no guilt if in good faith**

- A defense if MOF negates mens rea required to establish a material element of the offense, OR
- The law provides that a state of mind established by the MOF constitutes a defense
- *But* MOF defense NOT available if the D would be guilty of another offense had the situation been as he supposed.
- But the MOF then reduces the grade of the offense to what he would have been guilty of had the situation been what he thought it was

MISTAKE OF LAW

Mistake of Law: Occurs when Δ is unaware of or mistaken about the law under which she is charged with violating

- Narrow exception

Common Law Approach

Ignorance of the law is not an excuse (even if reasonable), **EXCEPT**

1. Reasonable reliance exception [relying on an erroneous law] – if you are relying on an official statement or an official interpretation of the law who has authority to do it
2. Constitutional exception
3. Knowledge of the law is an element of the offense exception – tax law. For you to be guilty of tax evasion you must know you are actually breaking the law
4. Different-law mistake exception – case like Dwight where he misunderstood the effect of his deputization which was an element of the kidnapping law. He understood the kidnapping law fine though

MPC Approach

Closely tracks the common law

- Sometimes it is hard to figure out whether ? of law or ? of fact
 - You file for divorce, you thought your divorce is final, and you get married – This is a mistake of fact
 - You believe you have authority of custody, you misunderstood – this is where it gets tricky. It can be a mistake of law
 - If she thought she could take it anytime you want – mistake of law
 - But if she misunderstands the custody agreement – then it is probably a mistake of fact. YOU THOUGHT YOU WERE AUTHORIZED. This is different from Morrero
 - **Marrero involved a mistake about the scope of the same law for which he was being prosecuted**

4. **CAUSATION 2.03**

*Usually only present in result crimes

- If it is a conduct crime, DO NOT WORRY ABOUT CAUSATION, bc there is no result involved.

- - Diff from torts bc Criminally accused have more at stake so a closer link required between conduct and resulting harm. Diff goals and implications for the actor

ACTUAL CAUSE

Common Law Approach

Actual cause (cause in fact; but for)

-But for the Δ 's voluntary act, would the social harm have occurred WHEN AND AS IT DID. When part is an important element. There can be multiple actual causes.

If no, then the Δ is an actual cause of the result

- Actual cause is necessary but not a sufficient condition of liability
- Only identifies candidates to be held liable, you must then go through a proximate cause analysis

PROXIMATE CAUSE – act that is the direct cause of harm

Common Law Approach

Proximate cause (legal cause)

- i. **Intervening cause** [superseding] could break the causal change and negate proximate causation but it does not necessarily have to. May be foreseeable. Does not nec. Cut off the chain of causation
 - When the D's crim act sets other things in motion and must figure out if D is the proximate cause
 - Intervening cause: another but-for cause, after the Δ ' but-for cause, that calls in the causal chain, leading to social harm.
 - Pattern:
 - a. Δ gravely harms V [actual cause]
 - b. Another force intervenes as a second actual cause
 - c. Intervening cause aggravates V's injuries or accelerate V's injuries or accelerates V's inevitable harm [death.
- ii. **Superseding cause**: An "intervening" cause is also "superseding" cause when it breaks the causal chain as to the defendant and thereby negates any finding

of proximate causation as to the defendant. May be unforeseeable and cuts off the chain.

SIX factors for determining proximate cause

- a. **De minimis contribution to the social harm** - some wrongdoers have too small a causal role to justify punishment. Hit someone and they require stitches and on the way to the hospital, they were killed in a car accident.
- b. **Foreseeability of the intervening cause.** Ex. Receiving neg. medical care
 - iii. Two types of intervening causes
 1. *Responsive IC*: An act that occurs in response to a Δ 's wrongful act. Usually NOT a superseding cause UNLESS response was both unreasonable and abnormal. Like if the doctor was sick. Like a bystander
 - Jumping out of window in response to a break in or receiving negligent medical treatment
 2. *Coincidental IC*: Act does not occur in response to Δ 's wrongful act. Puts the victim in the wrong place at the wrong time. Will break chain of cause UNLESS it is foreseeable
 - Murdered by someone at the hospital.
 - iv. Rules
 1. RIC does not negate crim responsibility, unless response was unforeseeable and highly abnormal
 2. CIC does negate crim responsibility, unless CIC was foreseeable
- c. **Δ 's mens rea [intended consequences doctrine]**
 - i. Δ intended that the intervening cause would lead to the social harm or if an unexpected intervening cause produces the same intended harm
 - ii. If intentional wrongdoer gets what they wanted in the gen manner they wanted it, cannot escp liability even if unforeseeable event intervened. Mother trying to kill son with poison.
- d. **Dangerous forces that come to rest (apparent safety doctrine)**
 - i. ASD: court no longer follows D active force once it has reached and stopped at a place of apparent safety
- e. **Free, deliberate, informed human intervention**
- f. **Omission [rarely ever breaks causal chain]**

MPC → Applies the but-for test; Does not expressly list these factors, but you see similar in 2.03(1)

MPC 2.03

- Actual cause – cause is an antecedent but for which the result is question would not have occurred
- No need for substantial factor test in cases of concurrent sufficient causes
 - MPC TEST What matters is whether result would have occurred when and *as it did*
- Proximate cause – MPC treats matters of PC as relating to actor's culpability
- Deciding whether an intervening cause rises to superseding cause, you must judge the quality of the intervening cause
 - MPC TEST – say all the issues boil down to is mens rea

- Requisite culpability lacking unless the result, including the way in which it occurred was “NOT TOO REMOTE OR ACCIDENTAL to have a just bearing on the actor's liability or on the gravity of the offense”

Concurrence Of The Elements: The defendant must possess the requisite the mens rea during the commission of the actus rea. Motive is not an element of the crime, but it can be used as an evidentiary tool

- Temporal Concurrence:** The defendant must possess the requisite mens rea at the same moment that her voluntary conduct causes the social harm
- Motivational Concurrence:** The defendant’s conduct that causes the social harm must have been set into motion or impelled by the thought process that constituted the mens rea of the offense
 - Ex. person who accidentally kills someone and later says they’re glad they did it.

CRIMES

Murder 1	Murder 2	Manslaughter	Criminal Negligent Homicide
Intent/express malice AND Premeditation/deliberation	Intent/express malice NOT premeditation OR Implied malice (reckless plus)	Intent BUT provocation (“heat of passion”) OR No intent but reckless (conscious disregard of risk)	NO INTENT NOT conscious of risk

- Homicide: Intentional Killings: In General

- Common Law

- Criminal Homicide: Killing another human being, but w/out justification or excuse

- Two Types:

- **Murder:** Unlawful Killing of a human being by another being w/ *malice aforethought*

- Malice aforethought**

- **Four Types of Intent:**

- 1. *Intent to kill*

- Willfully, deliberately, premeditated

- Killing is done after a period of time for prior consideration... **any** interval of time, btw the **forming** of the intent to kill and the **execution** of that intent, which is of sufficient duration for the accused to fully be conscious of that he intended, is sufficient to support a conviction of first degree murder.

- 2. *Intent to cause grievous bodily injury to another person where death result*

- 3. Depraved heart - *Extreme recklessness disregard for the value of human life. Wanton and willful disregard for an unreasonable human risk*

- 4. Felony murder - *Intent to commit a felony, during which a person is killed. Strict liability*

- Homicide Statutory Reformulations (Two Types of Murder)

- First degree murder:

- Murder committed in some statutorily-specified manner
- Any “willful, deliberate, and premeditated” killing
- Any homicide that occurs during the commission of certain other felonies (felony murder)
 - Some jurisdictions will use felony murder
- Second degree murder:
 - All other forms of murder:
 - Intentional killings not willful/deliberate/premeditated
 - Intent to inflict grievous bodily harm killings
 - “Depraved Heart” killings
 - Felony Murder (some jurisdictions)
- **Manslaughter**: killing of a human being by another human being w/out malice aforethought
 - Voluntary manslaughter: **heat of passion killings**
 - Heat of passion killings
 - Partial Defense:
 - in the absence of this partial defense, voluntary manslaughter cases would all be charged as second degree murder.
 - intent to kill can be found
 - **Common Law** – Provocation mitigates the offense to voluntary manslaughter if:
 - 1. Must be adequate provocation at *the moment of the homicide*
 - 2. The actor must have acted in the heat of passion
 - 3. Defendant must not have had a *reasonable opportunity to cool off between provocation and killing*
 - 4. there must be a *causal link* between the *provocation, the passion, and the homicide*
 - Standard for “**adequate provocation**”
 - Must **be calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason**
 - Words alone cannot be legally adequate provocation unless they are accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm –
 - where words are recognized as potentially adequate provocation are INFORMATIONAL WORDS as opposed to insulting words - I slept with your wife v. your mama is a hoe
 - MODERN VIEW OF PROVOCATION
 - Shifting away from rigid categories to case specific jury questions: Provocation is sufficient to cause an ordinary man to lose control of his actions and his reason”
 - Mutual combat can suffice, aggravated battery.

Provocation test:

1. Subjective element is actual inflamed passions
2. Objective element is reasonableness of the emotional reaction

- Question is not whether it was reasonable to kill but look at whether it was reasonable to be THAT upset.

- WHO IS ORDINARY?
- Average disposition
- Sober at time of provocation
- Normal mental capacity

TWO WAYS TO CONSIDER ACCUSED PERSONAL CHARACTERISTICS?

How do they relate to the adequacy of provocation? – severity of provocation.

1. Whether **gravity of provocation** would be sufficient to cause a reasonable person to lose self control. usually more subjective and can consider characteristics and facts
 - How do they affect the accused's level of self control? –
 - How would a person at your age and gender react. No need to consider personal characteristics. More objective.
 - Example: preggo lady who is tripped. Preggo is relevant for gravity of provocation but it would not be relevant to her ability of self control
 - PROVOCATION IS AN AFFIRMATIVE DEFENSE. It is an excuse. There is a reasonable explanation for the emotional disturbance given the facts as they perceive them to be

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- Deliberate – with a view to make a choice. to reflect. Quality of thought
- Premeditate – thinking of a plan to execute what you just deliberated. Quantity of thought. Formed a plan in his mind
- theoretically you can have premeditation without deliberation but this is rare
Deliberation and premeditation may be inferred from actions
 - Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder
- Willful means “a specific intent to kill”
- Some jnx treat all of these three as a single mental state amounting to an intent to kill but other jnx who treat them as separate elements, look to the above definitions
- There must be substantial evidence that the defendant premeditated and deliberated the killing, no matter how heinous the facts may otherwise be
- Why do states have a willful-deliberation-premeditation formula?
- To distinguish between more (murder one) and less (murder two) culpable offenses
- Note that MPC does away with this distinction**
- If there is a distinction between first and second degree murder, premeditation and deliberation are not lumped together.

Midgett v. State - case with the child abuse. Says there was insufficient evidence of premeditation and deliberation bc the intent was to just further the abuse, not to necessarily kill. Was actually second degree murder

State v Forest - case with the killing of his father in the hospital. Judge looked at Among the circumstances to be considered to determine whether the Defendant acted with premeditation and deliberation required for first-degree murder are:

- (1) lack of provocation by the victim
- (2) ; (2) conduct and statements of the defendant before and after the killing;
- (3) (3) threats and declarations of the defendant before and during the killing;
- (4) (4) ill-will between the parties;
- (5) (5) the dealing of lethal blows after the victim was rendered helpless; and
- (6) (6) evidence of the killing being done in a brutal manner.

- **Looked at the fact that he only carried a gun at work and didn't work that day, he cocked the gun back four times, his statements after saying he wanted to put his father out of misery.**

- Involuntary manslaughter:

- Unintentional killings that result from an act, lawful in itself but done in an unlawful manner, and w/out due caution
- Unintentional killings that occurs during the commission of some unlawful act not a felony ("misdemeanor manslaughter")

- MPC

- A person is guilty of criminal homicide if, w/out excuse or justification she takes the life of another human being purposely, knowingly, recklessly, or negligently
 - (Prisoners Knit Really Nice.)
- Three Forms of Criminal Homicide:
 - **Murder**
 - Killing another person w/out excuse or justification:
 - Purposely or knowingly
 - Recklessly, under circumstances manifesting "extreme indifference to the value of human life" AKA extreme recklessness
 - Murder differs from common law: no degrees; abandons language of malice aforethought
 - **Manslaughter**
 - an unlawful killing of a human being by another human being without malice aforethought.
 - Intentional killing done with provocation or heat of passion
 - Voluntary Manslaughter
 - **Extreme Mental or Emotional Disturbance**
 - Criminal homicide constitutes manslaughter when
 - 1. A homicide which would otherwise be murder is committed under the influence of EED for which there is reasonable explanation or excuse.
 - Standard of reasonableness: The *reasonableness* of such explanation or excuse shall be determine from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be
 - 1. ask whether they acted under EED – THIS IS WHOLLY SUBJECTIVE

- 2. Was there a reasonable explanation for that EED? – This is a jury question of fact and there is an objective aspect to it
- Manslaughter if the D acted while suffering from EMED for which there is a reasonable explanation of excuse

PROVOCATION V. EEED

- MPC APPROACH EEED is broader than CL provocation defense
- No need for a specific provocative act
- If there is a provocation, need not fall into a fixed category
- No rule about cooling off period
- Differences b/w Common Law & MPC
 - a specific provocative act is not required to trigger EEED defense
 - EEED allows for more subjectivity in assessing what counts as adequate provocation
 - the victim need not have committed the provocation upon the defendant: could be mistaken, even if defendant strikes out an innocent person.
 - no fixed categories of adequate provocation and words count
 - no rigid cooling-off period (no suddenness requirement)

First question:

1. Was D as a factual matter, extremely emotionally disturbed? – This is wholly subjective. Doesn't need to be anger
2. Was there a reasonable explanation or excuse for that EEED? – This is a jury question but there is an objective aspect to it

- It is to be determined from the viewpoint of a person in the D's situation under circumstances as the D believed them to be, however wacky

- Negligent homicide

- UNINTENTIONAL KILLINGS:

- Unjustified Risk-Taking

COMMON LAW

Factor #1 Degree of Risk	Factor #2: Justification for risk	Factor #3: Awareness of risk	Mens Rea	Liability
Unreasonable risk of injury to another person	Unjustifiable	Not aware	Civil negligence (“ordinary negligence”)	Civil liability
High degree of risk of serious bodily injury or death to another person	Unjustifiable	Not aware	Criminal negligence (“gross negligence”)	Manslaughter (involuntary)

High degree of risk of serious bodily injury or death to another person	Unjustifiable	Aware (“conscious disregard”)	Recklessness (“depraved heart,” “Abandoned and malignant heart,” “extreme recklessness”)	Murder (2 nd degree, where distinguished)
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a. How States Treat Homicide Today: 3 Models

- i. States that follow the early PA model: divide murder into 1st and 2nd degree, plus manslaughter
- ii. States that modify early PA model: divide murder into 1st, 2nd, 3rd degree, plus manslaughter
 1. 2nd degree is felony murder
 2. what was 2nd degree murder is now 3rd degree murder
- iii. States that follow the MPC: eliminates degrees of murder and divides criminal homicide into murder, manslaughter, and negligent homicide

MPC

Degree of Risk	Justification for risk	Awareness or risk	Mens Rea	Liability
Substantial	Unjustifiable	Not aware	Negligently	Negligent homicide (MPC 210.4(1))
Substantial	Unjustifiable	Aware	Ordinary Recklessly	Manslaughter (MPC 210.3(1)(a))
Substantial “under circumstances manifesting extreme indifference to the value of human life.”	Unjustifiable	Aware	Extreme Recklessly “Implied Malice...which is recklessness PLUS”	Murder (MPC 210.2(1)(b))

- **In order to distinguish between ordinary recklessness and extreme you must look at how great the risk and how unjustifiable the risk was.** A person going 90 in a school zone while texting is extreme.
- Implied malice – when the killing is not intentional but it is still malice. Stat definition requires a killing by one with an abandoned and malignant heart
- **STANDARD:** Malice is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows his conduct endangers the life of another and who acts with conscious disregard for life
 - Must focus on the D’s awareness of the risk created by his or her behavior
 - Implied malice requires awareness of the risk
 - Involves a high degree of probability that it will result in death

- MPC says crim. Neg. homicide is just like involuntary manslaughter but you do not need to prove an awareness of the risk
 - This can come up when parents do not take their kid to hospital. Based on an omission. This is a duty case

Felony Murder: (that follows unlawful conduct) a FELONY + A KILLING = A MURDER

- One is guilty of murder if a death results from conduct during the commission or attempted commission of any felony
- Elements of Felony Murder – Must be a causal connection between the killing and the felony. Once you have proven the predicate felony, then it is strict liability for the homicide, even if it was unforeseeable.
 - Predicate Felony: (the thing that triggers the FMR) Actus reus + Mens Rea – MUST PROVE THIS.
 - Homicide: Actus Reus

PEOPLE V FULLER 309

- Stealing tires. Pred felony was burglary. High speed chase and crashed. Not dangerous to human life. They wanted after FM rather than depraved heart bc FM was first degree in this jnx, where depraved heart was second. WHETHER FM IS FIRST OR SECOND DEGREE DEPENDS ON JNX...MUST LOOK AT THE STATUTE
- In this case.burglary said the door had to be LOCKED. If it was unlocked, no burglary, therefore, no FMR.
- MPC 2.10-2-1-B – Crim homicide constitutes murder when it is committed recklessly under circumstances manifesting extreme indifference to value of human life
- The indiff is presumed if the actor is engaging in a felony, MPC is not exactly strict liability bc you have to show the extreme recklessness but again, it is presumed, the jury does not have to actually accept the recklessness and indifference
- Why have the felony murder rule at all?
 - Deterrence – careful when committing a felony. Kind of instructs robbers to use caution when committing a felony to avoid someone dying so they are not on the hook for felony murder – best argument.
 - Deterrence is also kind of silly bc people aren't really thinking in these situations
 - Transferred intent – felons intent to commit a felony transfers to more serious social harm of homicide
 - Easing prosecutor's burden of proof – Use FM doctrine to avoid having to prove mens rea even when there was malice
 - Sanctity of human life – commission of a felony involving death is more serious. Showing that there is a diff between felony with no death and a felony with death so they are arguing
- Once you have proven the predicate felony, it is strict liability for the homicide
 - Must check jnx to see if it would be first or second degree

- MPC says it is not exactly strict liability, there is a presumption of extreme recklessness but the jury does not need to accept this

- **Modern Limitations on Felony Murder Rule**
 - The “inherently dangerous felony” limitation -THIS ONLY COMES UP IF THERE IS NO LIST OF SPECIFIC PREDICATE FELONIES. Do not want to trigger this for EVERY felony.
 - whether the felony by its very nature cannot be committed without creating a substantial risk that someone will be killed
 - the predicate felony should be inherently dangerous
 - 1. In-the-abstract-test: court ignored particular facts of the case, and considers only the elements of the offense as defined by statutes, asking if crime “by its very nature cannot be committed without creating a substantial risk that someone will be killed.” Ex. Include shooting, arson, gross negligent discharge of firearm. Not inherently dang – practicing med without license, false imprisonment, child endangerment
 - Even though he committed in in an inherently violent way, the standard is in the abstract and we do not look at the facts of the case
 - Unless it is listed in the statute, the predicate felony has to be inherently dangerous. Meaning, there is no way to do it safely
 -
 - 2. Facts-of-the-Case-test: court considers facts and circumstances of the particular case to determine whether felony as it was committed was inherently dangerous. – not really used.
 - PEOPLE V HOWARD – case where he was pulled over and committed diff traffic violations then killed someone. Even though the stat said willful or wanton, no FMR bc there was ways to commit the felony that were not inherently dangerous like driving without registration in subsection B. Even though he committed it in an inherently dang way, THE STANDARD IS ABSTRACT, and you DO NOT look at the facts of the case
 - The independent felony limitation (Merger Rule)
 - If the predicate felony is a part of the homicide then it merges and you can’t apply the felony murder
 - The predicate felony must be independent of the homicide, otherwise the felony merges with the homicide, there is no independent felony, and the FMR does not apply
 - No merger where predicate felony committed with collateral and *independent felonious design*
 - Merger limitation intended to prevent bootstrapping, enhance deterrence
 - Only 3 Jurisdictions don’t have Felony Murder
 - If you can be found guilty of certain predicate felonies that are listed in state statutes, you can be found guilty of First Degree Murder
 - Either on state statute
 - Ex. Arson, Rape, Carjacking, Robbery, Burglary, Mayhem, Kidnapping, Train Wrecking, Etc...
 - If not on the list, but inherently dangerous can be found guilty of second degree murder
 - Policy
 - Retributivist has the biggest problem with the felony murder rule
 - charge a person with something they didn’t do
 - charge a person with a crime they didn’t intend to commit.

BASIC RULE: unless it is listed in the statute, for it to be predicate felony, it has to be inherently dangerous BUT it cannot merge with the homicide

- Meth lab example – Dangerous and does not merge with homicide

- If you shoot someone, aggravated batt with firearm but there is no independent felonious design
- If it merges, no felony murder
- If it isn't inherently dang, no felony murder

Rape

- Common Law
 - The carnal knowledge of a woman, forcibly and against her will
 - Actus Reus
 - **Conduct:** vaginal intercourse
 - **Attendant Circumstances:**
 - Force: Actual or threat of serious bodily harm
 - Non-consent
 - Resistance requirement:
 - Proxy for force and non-consent given evidentiary challenges.
 - Evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force OR that she was prevented from resisting by threats to her safety. --> Focus is on the victim
 - Used as a tool for the court to determine whether there was force or non-consent.

STATE V ALSON - bf and gf in an abusive relationship. There was a requirement of force. Said there was none. Gen fear of him is not sufficient and their abusive past is independent. Him grabbing her arm or saying he will fix her face had nothing to do with him trying to have sex with her. The statute said "by force AND against the victim's will"

RUSK V. STATE – they met at the bar, Took her keys, had sex. Stat required by force or threat of force, against the will, and without consent. Must show the victim resisted and was overcome by force or prevented resistance bc of REASONABLE fear. Argue that there can be no force unless there is resistance. In order to show force, you need to show resistance. Lower court defined resistance physical. They look at the victims mind to see if she consented or not. Court of appeals said the reasonableness of the victims apprehension is a question of fact for the jury

- Requirement of "strong resistance" eroded, but not eliminated
- No longer require V to resist her attacker "to the utmost," but instead require "earnest resistance" or resistance sufficient to establish that sex was without consent and by force
- Still relevant even where not required
- Mens Rea
 - If none stated, therefore a general intent crime. **Can show recklessness, would be a conscious disregard of a substantial risk that the person did not consent**
 - Morally blameworthy state of mind
- Critical questions:

- Why does proof of this crime focus on the victim's response?
- What if victim's response is passivity/numbing/freezing rather than resistance
- What if resistance increases risk of harm?
- Why require force at all? Isn't nonconsent enough?

COMMONWEALTH V BERKOWITZ

- The dorm rape case. Required sexual intercourse by forcible compulsion. State argued that any forced used to complete the act was forcible compulsion but the court said the leg. Did not criminalize nonconsensual intercourse therefore the evidence of force was insufficient to support the conviction
- **There is not a requirement of resistance but there is a requirement of forcible compulsion**
- **they look at factors such as age, mental and physical conditions, atmosphere and setting, whether in position of authority, whether victim was under duress etc.**
- evidence of verbal resistance is only sufficient when coupled with forcible compulsion or coercion or actual physical violence
- Forcible compulsion is much broader than just physical force
- Under this, resistance was not a determinative issue, it is just a factor to consider
- **Forcible compulsion**
 - **not only physical force but also moral, psychological, or intellectual force used to compel a person to engage in sex against that person's will or by threat of such forcible compulsion that would prevent resistance by a person of reasonable resolution**
 - **person of reasonable resolution -**
 - **must look at the totality of circumstances for each case**

MTS

- Case with living at the home and consented to heavy petting.
 - **What does statute require?**
 - **sexual penetration with another person with the use of physical force or coercion – covers it more broadly. covers certain types of actus reus like oral sex and victims like men**
 - **ISSUE : whether the element of physical force is met simply by an act of non consensual penetration involving no more force than necessary to accomplish that result**
- They are saying the absence of no is not consent, YOU MUST SAY YES ...they shift and go towards the absence of a yes is no consent.
- They say if there is no consent, then force is implicit. They change the question of force into a question of consent.
 - **if the D applies any amount of force against a person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration**
- What did the court hold?
 - Permission must be affirmative and freely given
 - Physical force in excess of that inherent in the act of sexual penetration is not required
- **Possible Areas of Reform**
 - **(1) Conduct:**
 - **Vaginal Intercourse**

- **(2) Attendant Circumstances**
 - **Force:** actual, or threat of serious bodily harm
 - Mere act could be “force”
 - **Non-Consent**
- Drop or Diminish resistance requirement but still require force and non-consent
 - “reasonable resistance”
- Still need force and non- consent
- Redefine force
 - Mental/Psychological force
 - Physical Force
 - violent force
 - **mere act could qualify as necessary force**
 - New Federal definition (for reporting purposes): penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, w/out the consent of the victim

Theft - Conduct Crime

The involuntary and unlawful transfer of property

- **Common Law Larceny**
 - The trespassory taking and carrying away of the personal property of another with the intent to **permanently** deprive the possessor of the property.
 - The actus reus includes the attendant circumstance of it being property of another
 - *Elements:*
 - 1. Trespassory Taking → caption
 - 2. Carrying away → asportation – movement need only be slight
 - Mens rea → “with the intent to permanently deprive the possessor of the property”
 - Basic Analysis:
 - Larceny involves the Trespassory taking of personal property from the possession of another person. (Caption component)
 - “Trespassory taking” -- Caption
 - What the common law means by **possession:**
 - A person has possession of property (“takes” property) when she has sufficient control over the property to use it in a reasonably unrestricted manner
 - Actual – in your hand
 - Constructive – control over it but not in your immediate control
 - Taking or transferred possession
 - A(possessor)--> B(posses)
 - Could either be lawful or unlawful
 - If it’s lawful: Non-trespassory taking (caption)
 - If it’s unlawful: Trespassory taking
 - Lawful possession (non-trespassory “taking”) does not turn on ownership; rather, turns on consent to take

- Three questions to determine whether a trespassory taking exists:
 - (1) Who initially had possession of the allegedly stolen property?
 - MUST BE THE VICTIM
 - (2) Whether and to whom possession transferred?
 - MUST TRANSFER TO THE DEFENDANT
 - (3) Whether such transferred possession occurred lawfully or trespassorily? Must occur trespassorily (i.e. w/out consent of victim)
- **Custody/possession'**
 - Once person has lawful custody of property they cannot be found guilty of larceny
 - One has physical control over it, but the right to use it is substantially restrained by the person in constructive possession of it
 - Embezzlement usually makes this moot
 - Distinction emerged because no larceny if lawful possession.

BASICAL ANALYSIS:

- 1. Who initially possessed the property
- 2. Then, it decides, whether, when, and to whom possession was transferred
- 3. If D did take possession from another, the issue is whether the possession occurred trespassorily or lawfully
 - Was the taking of possession consensual?
- 4. If you give possession consensually then you go and sell it or run away with it, this is not larceny. The taking of possession is technically not trespassory
 - Employer/ employee; bailor/ bailee relationships
 - **employer/employee:** custody when employers give employees property
 - when employee receives property from a third party for the employer -- embezzlement
 - **Bailor/bailee:** possession of container; custody of contents
 - Think of possession as a bouncing ball
 - As the property is bouncing around, ask yourself who has possession?
 - Must determine the difference between possession and custody
 - Temporary and limited authorization to use property?
 - Get it from employer to use in a job?
 - Employer has constructive possession
 - Get it enclosed in a container as a bailee?
 - UPS guy from amazon – he has possession of the box but mere custody of its contents
 - why only custody of the contents – bc when you open the box and take the book, that is when you take possession. You must break bail. That is not a consensual taking.

Hypo – test drive a car. Dealer comes with but I am driving. Dealer has constructive possession and I have custody. He gets out and I drive away, that is a nonconsensual taking of possession, it is larceny. But what about if they let you drive it on your own and you just drive off, you took possession and later formed intent to take it

- Who has possession – it would be consensual possession
- There is no bailee/employee relationship
- The possessor has limited and temporary authorization BUT...the right to use it is not substantially restricted by the dealer in constructive possession (comes from the definition of custody) so it is possession and not custody

- The possession was transferred consensually so it is not larceny

- Doctrine of Continuing Trespass
 - applies in cases where the original taking is trespassory
 - trespassory taking at every point in time.
 - so even if the initial taking was trespassory but he did not have the mens rea to permanently deprive, but if at a later point he intends to permanently deprive there is a continuing trespassory taking so still larceny
- Larceny By trick (Caption by Fraud)
 - Fraud
 - a knowing misrepresentation of the truth, concealment of a material fact to induce another person to act to his or her detriment.
 - Owner intends to part with the property but not for good
 - Rule: If you take possession of a piece of personal property through fraud, your relationship to that personal property is of custody
 - Can it be a *trespassory* taking if its consensual ?
The answer is yes!
 - When he took possession of the horse, in order to get to possession, he had to lie. What this case says that if you are lying or tricking someone into possession, it is not really consensual
 - Gen rule is the intent to steal required for conviction of larceny is an intent to deprive the owner *permanently* of possession of property
 - Can show intent even though the defendant's primary purpose in taking the property is not to deprive the owner permanently of possession
 - 1. when the defendant intends to sell the property back to owner
 - 2. when the defendant intends to claim a reward for finding the property
 - 3. when the defendant intends to return the property to its owner for a refund
 - He is still depriving the store of the value of the property

- **Embezzlement** – entrusted with something, given possession consensually and converted to own use
 - First statute that allowed a person who had lawful possession
 - Receive property from 3rd party for their employer, instead of delivering the item, they steal it.
 - Eventually Embezzlement was extended not only to apply to employer/employee relationship.
 - The fraudulent conversion of personal property over which one has lawful possession with the intent to defraud
 - [AR] Lawful possession
 - [AR] Fraudulent conversion

- [AR] Entrustment (often, but not always)
- [MR] Intent to defraud at time of conversion
- G to C, at this point G still has possession bc C is acting as an employee. G has constructive possession and C has custody
- C hands the money to B, an employee of the bank. Possession goes from G to B
 - But B is an employee, just like C
 - The difference is B never gave his employer the possession
 - B put the note in his pocket so the employers never had any type of control over it
 - The court could have just said that bc B was acting in capacity as an employee, bank had possession BUT THEY DID NOT
 - B never lied to the servant about anything, there is no trickery
 - the passing of the note from C to B was consensual
 - therefore, no trespassory taking and it cannot be larceny
 - If he put it in the bank drawer and then took it, it would be larceny

● False Pretenses

- Knowingly and designedly obtaining title to the property of another by means of the untrue representations of fact with intent to defraud.
 - Elements
 - 1. False representation (this can be implied)
 - 2. That representation was made with the intent to defraud the owner of his property
 - 3. That the owner was in fact defrauded in that he parted with his property in reliance upon the representation – does not need to be the only thing they rely on
- Nondisclosure is not enough to create a false representation, unless there is a duty to disclose.
- The act of fraud is allowing you to obtain title, this is not true with Larceny by trick
- Larceny by trick is when D obtains possession of but not title to another's property by fraud or trickery
- False rep occurs when obtain BOTH possession AND **title** to property
- The misrepresentation must point to an ACT unless there is a statute saying there is a duty to act with misrepresentation
- Work through problems on 927, answers on TWEN.

Inchoate Crimes → Attempt – SPECIFIC INTENT CRIME

- Overview of Inchoate Crimes
 - Conspiracy
 - intend that the object of the conspiracy be achieved
 - Inchoate Crime: Target Crime
- AR: Lacey (last act test) Plays (physical proximity test) Darts (dangerous proximity test) In (indispensable test) Panties (probable desistance test) & Underwear (unequivocality test)
 - **The last act test:**
 - A criminal attempt only occurs when the person performed all of the acts necessary to commit the target offense
 - **The physical proximity test:**
 - The act must stand as either the first or some subsequent step in a direct movement toward the commission of the offense after preparations have been made

- Ex. buys a gun and hides behind a bush
 - Criticism: the line here is still between 4 & 5. May not be able to protect people in certain situations
- **The dangerous proximity test**
 - Similar to the proximity test, but more flexible, taking account of several factors:
 - (1) the nearness of the danger
 - (2) the greatness of the harm
 - (3) the degree of apprehension felt
- **The indispensable element test**
 - Attempt applies after defendant has secured every indispensable aspect of the crime
 - Criticism: whether all indispensable elements are there and nothing in here about the degree of the harm.
- **The probable desistance test**
 - A court will find an attempt when in the ordinary course of events w/out interruption from an external source the defendant reached a point where it was unlikely that he would have voluntarily desisted from his efforts to commit the crime, judged by when an ordinary person would reach a point of no return
- **The unequivocal test**
 - An attempt occurs when a person's conduct, standing alone, unambiguously manifests her criminal intent.
 - Idea is watching acts on video with sound muted
- MR:
 - Dual mens rea requirement
 - These elements are going to be different from the target crime both the AR and MR
 - Intent #1
 - The defendant must intentionally commit the act that constitutes the actus reus of an attempt. (i.e., the "substantial step") (**In other words, defendant must intentionally perform the act that brings defendant into proximity of committing the substantive offense -- the "substantial step"**)
 - Intent #2
 - **The defendant must commit these acts with the intent to commit the target crime**
 - Because of this you cannot intend to commit and unintentional crime, cannot be convicted of attempted involuntary homicide
 - **MPC: 5.01 Criminal Attempt**
 - A person is guilty of an attempt to commit a crime if acting with the kind of culpability otherwise required for commission of the crime, he:
 - (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
 - (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result w/o further conduct on his part; or
 - (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
 - MPC 5.01 -

- Definition of attempt
 - A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, (attendant circumstances) he...
 - b. when causing a particular result is an element of the crime, does... anything with the purpose of causing or with the belief that it will cause such a result without further conduct on his part
 - Purpose or knowledge is sufficient
 - Actus reus issues arise when the action of attempting is incomplete, there still needs to be another step to attempt the crime. He put the bomb in the building and has not pressed the button yet
 - we do not want to wait until he tries to press it and hope it doesn't work until we can charge him with something
 - the more serious the crime, the sooner we want to be able to charge them
 - WHERE DOES PREPARATION AND PERPETRATION BEGIN?
 - There is no solid test
 - But factors to look at:
 - whether the act comes dangerously close to causing tangible harm
 - Seriousness of threatened harm
 - feel more comfortable
 - strength of evidence of actor's mens rea
- strength of mens rea can put into context otherwise innocent actions
- t his matters a lot
 - physical proximity
 - often do not have direct evidence of the mens rea
 - the less action, the less behavior you have to infer mens rea
- **common law focuses on what you have left to do**
 - objectivist approach
 - less concerned about mens rea
 - an observer watching this person, does it appear they are attempting to commit the crime
- **MPC focuses on what you have already done 5.01**
 - Subjectivist approach
 - ex. attempting to graduate law school.
 - What that person thought
 - broadens liability for attempt
 - Substantial step test
 - Focuses on what's already been done rather than what's still left to do
 - have the done enough where you are pretty sure they meant to commit this crime
 - WHAT IS A SUBSTANTIAL STEP
 - MPC 5.01(2)
 - conduct must strongly corroborate the actor's criminal purpose
 - provides a list of circumstances that "shall not be held insufficient as a matter of law"
 - if the examples are present, a judge cannot say as a matter of law, it cannot be a substantial step, a jury question
 - Not necessarily required. It is the jury would have to find that the substantial step corroborates the mens rea
 - Ex.
 - lying in wait
 - possession of materials to commit offense
 - following victim

the crime

where the crime is to be committed

- soliciting others to commit
- scoping the place out
- trying to lure the victim in
- unlawfully entering the place

■ half of jnxs have adopted this test

- **Stages of a Crime:**

- Stage 1: Conceiving the idea of committing a crime
- Stage 2: Evaluating the idea
- Stage 3 (Mens Rea): Forming intention to go forward with crime.
- Stage 4 (Actus Reus): Preparing to commit the crime
- Stage 5 (Perpetration) Commencing w/ commission of crime
- Stage 6: Completing the Crime
 - Stages 4, 5, and 6 are Inchoate Crime
 - Most jurisdictions require 4 & 5Aa

- **Attempt**

- occurs when a person with the intent to commit an offense performs some substantial step towards carrying out that intent
 - **Incomplete Attempt**
 - Defendant does some of the acts necessary to achieve the criminal goal, but quits or is prevented from moving forward before taking the final acts to complete the crime
 - **Complete Attempt**
 - Defendant performs all the acts that she set out to do to commit the crime, but fails to attain the criminal goal.

● **Attempt instruction requires intent to commit offense of BUT murder instruction included alternative mental states – besides intent to cause death**

inconsistent

- so the jury is getting these instructions that D argues they are

attempted murder

- He argues they are inconsistent
- Appellate court says it requires intent to cause result – they agree
- the lesser mental states (that would suffice for murder) don't cut it for

bodily harm

- They would suffice for murder but not attempted – like causing great

with murder if you were not trying to kill anyone

- Attempted murder is a specific intent crime – how can you be charged

murder

- Murder is a general intent – 3 types of mind sets BUT

■ Cannot have extreme recklessness in attempted

■ this is with the result crimes

manslaughter

- Imagine – driving drunk, cause accident, and caused accident – probably

charged with “attempted manslaughter”

■ but if you get pulled over before, you cannot be

Abandonment – Relevant only after actor has crossed the line from prep to perp

Must completely and voluntarily renounce crim purpose. Cannot stop while cop is watching

- **Solicitation**

- Occurs when a person invites, requests, commands, hires, or encourages another to engage in conduct constituting any felony or a misdemeanor relating to obstruction of justice or breach of peace, with the intent that the other person commit the solicited crime
- Solicitation is attempted conspiracy
 - The offense of solicitation is complete when the solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit the offense
 - It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice
- When the person solicited agrees to participate in a concerted action w/ the person soliciting to commit a crime, then CONSPIRACY is formed
 - When an overt act is committed by any of the persons involved, the crime of conspiracy is complete
- Under MPC solicitation applies to any crime
- Actus Reus:
 - invite/request/command/hire/encourage another person to carry out a target crime
- Mens Rea:
 - Must intend to invite/request/command/hire/encourage (most controversial)
 - Must intend to have act carried out
- MPC 5.02
 - A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages, or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission
 - Punishment is same as the target crime
 - Expressed defenses under the MPC

- **Conspiracy**

- An agreement between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means (+ an overt act)
 - Actus Reus:
 - An agreement to commit an unlawful act, or series of acts. (+, in some jurisdictions, an overt act)
 - The agreement can be implied; it need not be express. When implied, can be established through circumstantial evidence of a mutual understanding.
 - The parties to an agreement do not need knowledge of all the details; they only need to be aware of its essential nature
 - Where an overt act is required, any act is sufficient no matter how minor, if in pursuance of the conspiracy.
 - Mens Rea DUAL REQUIREMENT
 - Intend to agree, or conspire AND
 - The intent to commit the offense, which is the object of the conspiracy
 - Conspiracy is the Stage 4 of the crime (Preparing to commit the crime)

- Under the Common Law there is no MERGER RULE for Conspiracy. You can be found guilty of the crime and conspiracy to commit the crime.
 - Punishment
 - Early Common Law
 - Misdemeanor
 - Today
 - Punished more than a misdemeanor
 - **MPC Differences 5.03**
 - A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
 - Agrees with such other person or person that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime, OR
 - Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
 - Requires an overt act (except for a felony of 1st or 2nd degree)
 - Punishment same or conspiracy as target crime (unless target crime is 1st degree felony-- punishment is 2nd degree)
 - Merger rule applies
 - Cannot be convicted of target offense and conspiracy
 - Agreement only to criminal act (not lawful act)
 - **Pinkerton Doctrine (conspiratorial liability)**
 - Where a conspiracy forms and the substantive offense (target crime) is committed by one of the conspirators in furtherance of the conspiracy, and is reasonably foreseen as a necessary or natural consequence of the unlawful agreement, the other conspirators will be guilty for the substance offense. (MPC rejects)
- Two Types of Conspiracies
 - Bilateral v. Unilateral
 - Bilateral:
 - Two parties agree to conspire
 - Unilateral
 - one party agrees to conspire, but the other party only faintly agrees
 - Earlier version:
 - If any two or more persons conspire or agree together to do any illegal act they shall be deemed guilty of a conspiracy.
 - Amended version:
 - A person commits conspiracy when, with intent that an offense be committed, he agrees w/another to the commission of that offense
- Defenses for Conspiracy
 - Impossibility
 - Abandonment
 - Wharton's Rule
 - An agreement by two persons to commit an offense that by definition requires the voluntary concerted criminal participated of two persons, cannot be prosecuted as a conspiracy UNDER THE COMMON LAW.

- MPC rejects this.
 - Two exceptions:
 - 3rd Party Exception:
 - If more than the minimum number of people necessary to commit the offense agree to do so
 - If two persons involved in the conspiracy are not the two people involved in committing the target offense.
- **Accomplice Liability**
 - **Definition**
 - A person is guilty as an accomplice in the commission of an offense if she intentionally assists* another person to engage in the conduct that constitutes the crime.
 - Charged with the same crime as a principle actor.
 - Idea behind accomplice liability was **vicarious liability** you would be responsible because of your relationship to the person. (ex: family or married, mere status or relationship) not enough for liability
 - **Derivative liability**: person is being held liable for another person's act but you have also taken an act
 - Generally the accomplice can be held liable for any offense that the principle actor did if they had the intent to help.
 - **The elements**
 - Actors
 - Principle in the First degree
 - person who physically commits the crime
 - Principle in the Second degree
 - this person is helping during the actual commission of the crime.
 - A person who intentionally assisted in the commission of the crime in the presence, either actual or constructive, of the principle in the first degree.
 - Accessory Before the Fact
 - providing assistance but not present during the commission of the crime
 - a person who intentionally assisted in the commission of the crime, but who is not actually or constructively present when the crime is committed. This person often counsels or commands the principal in the first degree re. the crime.
 - Accessory After the Fact
 - A person who helps the felon escape or hinders their capture.
 - A person who, with knowledge of another's guilt, intentionally assists the felon to avoid arrest, trial, or conviction
 - separate and lesser offense.
 - Actus Reus
 - Give assistance or encouragement to the crime of another, or fail to perform a legal duty to prevent it.
 - Mens Rea -- dual intent
 - intent to assist the primary party to engage in the conduct that forms the basis of the offense. Typically: (1) assistance by physical conduct; (2) assistance by psychological influence; (3) assistance by omission (when the person has a legal duty to act)
 - The mental state required for the commission of the offense as defined for the substantive crime.
 - In most cases an accomplice is also a conspirator

- Basis for a Conspirator is the agreement to carry out act, but assistance is not required.
 - Accomplice liability requires proof of existence, but agreement to do so is not necessary.
 - MPC 2.06. Liability for Conduct of another; Complicity
 - A person is an accomplice of another person in the commission of an offense if:
 - with the **purpose** of promoting or facilitating the commission of the offense, he:
 - solicits such other person to commit it; or
 - aids or agrees or *attempts to aid* such other person in planning or committing it.
 - common law does not recognize attempting to assist.
 - Men's rea
 - Intent: knowledge v. purpose
 - Case law is mixed
 - Majority rule: person is not an accomplice unless def shares the criminal intent of the primary party.
 - Knowledge is not enough, common law and MPC Agree
 - Principle in the first degree is on liability when they intend with purpose and the accomplice intends the same
 - Liability for crimes of recklessness and negligence (Riley)
 - Riley v. State: two people show up and shoot guns recklessly into a group and no one is killed but a few are injured. Prosecution can't decide who shot the gun that injured people, so they charge them both with first degree assault as the principal or the same as a theory under accomplice liability.
 - Could Riley be held as an accomplice to a crime that had the men's rea of negligence or recklessness?
 - MPC on a accomplice liability
 - MPC 2.06
 - When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, *if he acts with the kind of culpability of any with reposed r to that result that is sufficient for the commission of the offense*
 - To satisfy second of dual mens rea requirements has to match the same mens rea as the principal actor.
 - MR1: intent to assist the primary party to engage in the conduct that forms the basis of the offense
 - MR2: the mental state -- intent, recklessness, or negligence, as the case may be -- required for the commission of the offense as defined for the substantive crime.
 - Natural and probable consequences doctrine
 - This doctrine is found in the common law and most jurisdictions today (rejected by MPC)
 - It says that an accomplice to a crime may be held criminally liable not only for the target crime, but for any other offense that was a natural and probable consequence of the target crime.

- We're substantive offenses reasonably foreseeable when conducting the target crime.
 - A crime is a natural and probable consequence if it was a reasonably foreseeable consequence
 - The accomplice need not share the principal's mental state for the crime under this doctrine
- Actus rea
 - Mere presence (VT)
 - What if you're just there when someone commits a crime?
 - VT CASE
 - VT's his friends, had stolen guns and camcorder and sells the camcorder to a pawnshop. Vt was present for the takings, the boys accidentally recorded a conversation about Stealing.
 - "Passive behavior, such as mere presence-- even continuous presence-- absent evidence that the def. affirmatively did something is not enough for accomplice liability
 - Accomplice liability and trivial assistance (Wilcox; Helmenstein)
 - Wilcox v. Jeffrey
 - Wilcox is charged as an accomplice to an illegal jazz performance, because he met him at the airport and applauded the illegal show, and encouraged and assisted. The court found this was enough.
 - Some sort of duty to act for most bartenders.
 - Causation
 - A person is not an accomplice unless her conduct in fact assists in the commission of the offense.
 - However Under MPC attempting to assist is still encouraging.
 - Once a fact finder determined that the defendant assisted, the degree of aid or assistance is immaterial- even a trivial amount is sufficient
 - An accomplice is liable even If her assistance is causally unnecessary to the commission of the offense.
 - Attempting to aid (Genoa)

Defenses

- A set of conditions which, if proven, prevent conviction or result in conviction for a lesser offense.
 - Total Defense: Acquittal (or no conviction in first place) (i.e., self-defense)
 - Partial Defense: Conviction for a lesser offense (i.e., heat of passion--voluntary manslaughter)
- Overview of Defenses
 - **Negative Defense (Failure of Proof Defense)**
 - Fails to establish one of the elements of the crime beyond a reasonable doubt
 - Elements not satisfied, therefore not culpable
 - Traditional defenses → affirmative defenses
 - Actus reus + mens rea - conviction for crime (NOPE)
 - Assumes we have satisfied BRD the AR and MR of the crime.
 - **Affirmative Defenses**

- Justification – gov’t carries burden of proof
 - A set of conditions which prevent convictions because the otherwise criminal act was the right or permissible action in this instance
 - Focuses on the situation. The social harm has been negated.
 - Reflects society’s judgment that certain conduct is tolerable and desirable
 - Normally frowned upon but under these circumstances, you did the right thing.
 - Ex. Necessity defense.
- Excuses – D carries burden of proof
 - A set of conditions which prevent convictions because the actor, while committing an otherwise criminal act, is not morally blameworthy
 - Excuses are focused on the actor
 - Where society considers it morally unjust to punish and stigmatize wrongdoers
 - Self defense is usually a justification but is sometimes an excuse
 - Ex. Where a child had the gun and the adult shot them or Halloween where there is a cop and someone points a gun and officer shoots them
- **Self-Defense**
 - Definition:
 - A non-aggressor is justified in using force upon another if she reasonably believes such force is necessary to protect herself 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
 - You cannot defend yourself against unlawful conduct YOU started
 - What are the elements of self defense?
 - Threat – actual or apparent- of the use of deadly force against the defender
 - Threat was unlawful and immediate
 - Actual AND reasonable believe of peril or death or serious bodily harm
 - Response to threat necessary to deflect threat
 - Necessity Component
 - Force should not be used against another person unless, and only to the extent that, it is necessary
 - Common Law Elements
 - (1) clear and imminent danger
 - (2) reasonable belief that action will abate the danger
 - (3) no adequate alternative
 - (4) harm caused not disproportionate to harm avoided AND;
 - (5) none of the following apply--Defendant did not cause danger; defense not limited to naturally-caused emergencies; legislature not balanced harms otherwise; and no exemption for homicides
 - 1. The act charged must have been done to prevent a significant evil
 - 2. There must have been no adequate alternative
 - 3. The harm caused must not have been disproportionate to the harm avoided
 - Harm must be GREATER than than the evil or harm sought to be avoided
 - This is left to the jury

- MPC
 - Broader in 3 ways:
 - (1) no imminence requirement;
 - (2) no automatic loss of defense b/c of fault;
 - (3) not limited to emergencies from natural causes (as in some states under common law)
- **Corollary #1: Imminence Rule**
 - Use of force in self defense is permissible only where the threat of force is about to be realized in time (moments away)
 - it is so imminent there is no chance at any other kind of self help.
 - proxy for necessity, if harm is imminent it is more likely to be necessary.
- **Corollary #2: Provocation Rule**
 - The right to use deadly force in self-defense is not available to someone who provokes a conflict or is the aggressor in it, unless the defendant first withdraws from the conflict in good faith and informs the other parties to the conflict of that withdrawal by words or acts
- **Corollary #3: Retreat Rule and (Castle Doctrine)**
 - A person cannot invoke the doctrine of self-defense where that person had some means to safely retreat and avoid the harm. (Most states don't follow this rule)
 - Most states follow the Stand your Ground statutes
 - Exception:
 - Castle Doctrine
 - A non-aggressor (victim) is not ordinarily required to retreat from his dwelling even though he knows she can do so in complete safety before using deadly force in self-defense.
- when to use force
- no duty to retreat under the castle doctrine with the idea that if someone comes into "your castle" you do not have to retreat, and you stand your ground.
- **Proportionality Component**
 - A person is not justified in using force that is excessive in relation to the harm threatened.
 - How much force you can use
 - Non-deadly force/threat:
 - Non-deadly force (never deadly force even if only way to prevent harm)
 - Deadly force/threat
 - Non-deadly or deadly force
 - Defense of property:
 - A person may use non-deadly force against a would be dispossessor if she reasonably believes such force is necessary to prevent imminent, unlawful dispossession of property
 - Defense of Habitation (house):
 - A person may use deadly force if she reasonably believes such force is necessary to prevent an imminent and unlawful entry of her dwelling
- **Reasonable Belief**
 - Subjective prong: person must believe that she needed to use (deadly) force to repel

- Objective prong: person's belief must be one a reasonable person in the same situation would have possessed.

Reasonable person: what can juries consider:

Reasonable person in the actor's situation

- D's relevant knowledge about the aggressor
- parties physical attributes
- D's prior experiences that could provide a reasonable basis for believing the other person intended to harm D or that deadly force was necessary

- Defense of Others
 - Available on behalf of any third party
 - Generally applies where third party could have claimed defense OR
 - where third party would apparently been justified in using force in self-defense.
 - Applies only to **unlawful** conduct, so abortion would not count

Excuses

- **Duress**

- Common Law
 - (1) An immediate (imminent) threat of death or serious bodily injury;
 - (2) A well-grounded fear that the threat will be carried out;
 - (3) No reasonable opportunity to escape the threatened harm;
 - (4) Defendant not at fault for creating situation
- MPC
 - General Rule: Duress is an affirmative defense if:
 - Defendant was compelled to commit the offense by the use or threatened use of unlawful force by the coercer upon defendant of another person OR:
 - A person of reasonable firmness in defendant's situation would have been unable to resist.
 - This definition is broader
 - No mention of imminent or immediate threat
 - No Denial of the defense in the case of homicide
 - MPC and how it treats the duress
 - Can be something less than death or serious injury
 - Has idea of personal reasonableness
 - it does not preclude duress as a defense to murder
 - In common law, it has to be immediate
 - MPC does not like categorical crimes for this
 - Says it is a jury question
 - Similarity to CL is that dealing with threat from human sources
 - The person who duressed them is guilty of that offense through the innocent instrument

- **Intoxication**

- Introduction
 - The disturbance of mental or physical capacities resulting from the introduction of any substance into the body whether voluntarily or involuntarily.
 - Defense:

- Failure of *Proof*
 - *Negate Mens Rea*
 - Negate AR (volition)
- Traditional Common Law Rules
 - Voluntary intoxication is never an excuse, but it can serve as a failure of proof defense if, as a result of intoxication, the defendant did not have requisite mens rea as required in a specific intent crime. EX. When a college kid goes to a house thinking it was someone else's house
- Evolution
 - Intoxication is NOT an affirmative defense
- State approaches:
 - (1) Freely allows intoxication to negate mens rea
 - (2) No evidence of intoxication permitted;
 - (3) Intoxication as a failure of proof defense to specific intent crimes

LOOK AT NOTES FOR DIFF BETWEEN NECESSITY AND DURESS.

ASSAULT

- CL was really an attempt crime
 - unlawful attempt
 - coupled with present ability – this made it harder to satisfy
 - must be within range
 - to comment violent injury on another
- More recently includes
 - placing someone in reasonable apprehension of an injury, even without intent
 - intent to frighten is usually included

MPC 211.11

- Merges assault and the completed offense of battery
- applies normal attempt rules rather than strict common law requirement that the actor come closer to success