**Criminal Law Outline**

**POLICY CONSIDERATIONS**

* Prevention/Deterrence
* Punishment
* Incapacitation of Dangerous Persons/Protect Society
* Protect Non-Criminal Conduct
* Give Notice/Fair Warning
* Consistency (social; economic; racial)
* Evidentiary Considerations
* Administration
* Rehabilitation of Persons
* Punishment Matching Culpability
* Fairness
* Utility
* Financial Costs

**WHY PUNISH**

* Aspirational law – setting laws above common behavior. High bar intended to encourage good conduct.
* Descriptive law – setting laws to reflect current behavior. Bar set where people act.

**Justifications for Punishment**

Substantive justification – looks outside the law to justify law.

Procedural – like number “2”. Some fair process, then rule is justified (?)

* + [Utilitarian] (functional benefit of punishment)

Punishment itself is evil. Only admitted in as far as it promises to exclude some greater evil. Cost/benefit analysis.

* + - Major goals of penal system under Utilitarian punishment.
      * Deterrence
        + Specific (or special) deterrence – deters *the individual* from repeating/performing act.
        + General – deters *the general population*, e.g., criminal tax enforcement of celebrities (increases awareness and deterrence).
      * Incapacitation – e.g. jail.
      * Rehabilitation (supreme court says no longer part, or goal, of formal law)
    - Problem: *violates fairness*. Intuitive sense of fairness.
  + [Retributive](no need for a social good calculation)

The conduct itself deserves condemnation. Punishment must be justified by the seriousness of the offense committed, rather than by the future benefits to be obtained by punishing. Punishment should be proportionate to crime.

* + - Kant: Punishment only because a man has *committed a crime*. Men are ends in themselves. Cannot be used as a means to a greater good.
    - Morris, Equivalence Theory – punishment connects with violation of rules of society. Violation of rules = unfair distribution of benefits and burdens.
    - Problems: Most criminals haven’t benefited from the system—what debt are they paying? Punish when there’s no good for society at large? How do you decide what is proportional?
* Expressive function of the law – law should express outrage at certain events or acts, even if it was an accident.
  + **Vengeance** – principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments, which express it.

**ELEMENTS OF A CRIMINAL ACT – THREE LEGGED STOOL**

1. **#ACTUS REUS – Guilty Act**

**#Voluntary Action**

* + “act” – a bodily movement whether voluntary or involuntary.
  + “element of an offense” – includes **attendant circumstances** (things that are outside control of the actor)

**MPC 2.01** – Requirement of Voluntary Act

* + (1) A person is not guilty of an offense unless his liability is based on conduct which *includes* a **voluntary act** or the **omission** to perform an act of which he is physically capable.
    - *Martin v. State* (man drunk in home, pulled out onto street by cops and found guilty for public drunkenness)
      * Reasoning: Martin satisfied all three by *plain reading*, but statute *presupposes* voluntary conduct. MPC 2.01 interpreted to mean *all required acts have to be voluntary*.
      * Problems: How do you know what the statute presupposes? Do *all* acts need to be voluntary (Martin court) or does offense simply need to *include* a voluntary act?
    - *People v. Decina* (man drove car, had epileptic seizure on public highway, killed 4 people. Guilty)
      * Reasoning: **Includes** voluntary act of driving, even though epileptic seizure was involuntary. Liable for crash. He knew epileptic seizure possible.
  + (2) The following are NOT voluntary acts:
    - (a) a reflex or convulsion
      * Irresistible impulse IS VOLUNTARY. Not a “reflex or convulsion.” *Narrow construct*. Really does have to a reflex.
    - (b) a bodily movement during unconsciousness or sleep
      * Cogdon case: women killed child during sleep. Acquitted.
      * People v. Newton: man shot in the stomach during altercation with police. Shoots police officer, but doesn’t remember doing it. Not guilty.
        + Reasoning: “Where not self-induced, as by voluntary intoxication or the equivalent, unconsciousness is a *complete defense* to a charge of criminal homicide.” Need not be in a coma, inertia, incapable of manual action. Can exist where person physically acts but is not, at the time, conscious of acting.
    - (c) conduct during hypnosis or resulting from hypnotic suggestion
    - (d) a bodily movement that otherwise is not a product of the effort tor determination of the actor, either conscious or habitual

**#Omissions**

**MPC 2.01** (3) Liability for the commission of an offense may not be based on an omission unaccompanied by actions unless:

* + (a) the omission is **expressly made sufficient by the law** defining the offense; or
  + (b) a **duty to perform the omitted act is otherwise imposed** by law.
    - *Jones v. United States* (10-month year old baby died in house of family friend of mother. Mother had lived there for some time. Disputed as to whether friend was paid to take care of baby)
* NOT GUILTY. Must be a ***legal duty*, not a mere moral obligation**. Duty imposed **by law or contract**.

**Four situations** in which failure to act may constitute breach of legal duty

* + (1) **Statue imposes** a duty to care for another
  + (2) One stands in a **certain status relationship** to another (parent to child; husband to wife; master to apprentice; ship’s master to crew and passengers; innkeeper to inebriated customers).
  + (3) One has **assumed a contractual duty** to care for another.
  + (4) One has **voluntarily assumed** the care of another and **so secluded the helpless person as to prevent others** from rendering aid.
    - *Pope v. State* (Pope took mother and child into her house. Mother went into religious frenzy and killed beat child. Pope and mother left for church. Child died some time after)
      * NOT GUILTY. **No legal duty**. Mother was always present. Pope had no right to usurp the role of mother. Cannot be punished for failure to perform a moral obligation.

No generalized duty to rescue in American/English tradition. There is in European traditions.

* + Arguments Against
    - Resources are limited. Should not be allocated for prosecuting bad Samaritans, but on affirmative wrongdoers.
    - Hard to know when to intervene.
    - If duty to rescue, person in need could be overwhelmed.
    - Limits freedom (liaise faire argument). Role of gov. is to limit positive harms.
    - Where do you draw line?

1. **#MENS REA – Guilty mind**

APPLYING THE MPC APPROACH: (1) Determine “material elements” of offense; (2) Determine why type of mens rea is required with respect to each material element.

**MPC 2.02 (2)**: Four mental states with respect to each material element of offense.

* (a) #**Purposely** – (i) if element involves nature of conduct or result, **conscious object** to engage in conduct of that nature or to cause such a result; and (ii) if element involves attendant circumstances, he is **aware of the existence** of such circumstances or he **believes or hopes** that they exist.
* (b) #**Knowlingly** – (i) knowledge concerning nature of conduct and attendant circumstances; and (ii) aware that it is **practically certain** that result with happen.
* (c) #**Recklessly** – CONSCIOUSLY DISREGARDS a **substantial and unjustifiable risk**. Risk is such that failure to perceive it is a **gross deviation** from standard of care that a **reasonable person** would observe.
* (d) #**Negligently** – SHOULD HAVE BEEN AWARE of a **substantial and unjustifiable risk**. Risk is such that failure to perceive it is a **gross deviation** from standard of care that a **reasonable person** would observe.

MPC 2.02 (3) – When mens rea is NOT prescribed by law, use **purpose, knowledge, or reckless**.

MPC 2.02 (4) – When law prescribes one type of mens rea, apply to ALL elements.

MPC 2.02 (5) – If law proscribes lower mens rea needed, higher mens rea will satisfy.

MPC 2.02 (9) – don’t have not know it is illegal.

MPC 2.08(2) – **recklessness** need NOT be shown if the defendant was unaware of the risk because of **voluntary #intoxication**. MPC **imputes awareness** if due to intoxication.

* \* In many jurisdictions, common law meaning of **malicious = specific intent (specific *purpose*).**
* \*INTENT = PURPOSE under MPC.
* \* Common law: Malice means **foresight of the prohibited consequence** (*Cunningham*).

**Common Law Mens Rea**

* [Malice] *Regina v. Cunningham* (Two conjoined houses with porous wall in cellar. Man ripped gas meter off for $. Gas leaked into 2nd house and almost asphyxiated Wade)
  + Lower court found he “unlawfully and maliciously” caused harm. Instructed jury that malicious = wicked. Rejected strict liability notion for malicious (common sense notion).
  + If **malice = wicked, it is almost meaningless** in legal context. Malice postulates foresight of consequence.
* Malice requires:
* (1) an actual intention to do the particular kind of harm that in fact was done; or
* (2) recklessness as to whether such harm should occur or not(i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).
* It is neither limited to nor does it indeed require any ill will towards the person injured.
  + *Regina v. Faulkner* (Guy went to steal rum on a ship, set fire and destroyed vessel. Charged with “maliciously” setting fire)
    - Not malicious. To be malice, **must be intentional and willful**.
* [Civil/Criminal] *State v. Hazelwood*: (Drunk captain. Exon oil spill in Alaska)
  + Lower courts use of civil (ordinary) negligence was OK
* Civil negligence “**adequate to protect Hazelwood’s interests**.”
  + **Criminal (gross)** negligence: **gross deviation** from standard of care.
  + **Civil (ordinary)** negligence: **Ordinary deviation** from SoC. Act with reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such person, in the exercise of *ordinary care*, would not do.”
  + *Santillanes v. New Mexico* (Man cut nephew’s neck with knife. Trial court used civil negligence)
* SCOTUS said child abuse **statute required criminal negligence**.
* Reasoning: “**moral condemnation and social opprobrium**” that comes with conviction of crime should **reflect mental state warranting such contempt**.

**#Strict Liability**

* [Drugs] *United States v. Balint* (Defendants sold drugs without the correct form. Def. argued that indictment was defective for failing to charge that they knew they were selling prohibited drugs)
  + SCOTUS said proof of knowledge was **not required** by statute. ***Strict liability***.
    - Rule: “In the **prohibition or punishment of particular acts**, the state may in the **maintenance of a public policy** provide ‘that he who shall do them shall do them at **his peril** and will not be heard to plead in defense good faith or ignorance.’”
    - Reasoning: Area like drugs, person should ascertain at his peril.
* [Drugs] *United States v. Dotterweich* (Manufacturing company misprinted two labels, shipped to Dotterweich. Prosecuted for violation of the Federal Food, Drug, and Cosmetic Act)
  + SCOTUS affirmed conviction.
  + Reasoning: **statute required no mens rea at all** with respect to whether those charged knew or should have known the shipment was mislabeled. **Purpose is to encourage maximum care.**
* \*Strict liability in **regulatory legislation**. Innocents will be punished is **outweighed by social benefit**.
  + Justifications
    - Executive discretion: prosecutors can be trusted to only pursue egregious crimes.
    - Jury will only convict when there is an intuitive sense of moral culpability.
    - Strict Liability makes convictions easier 🡪 be a *greater deterrent.*
* [Silent Statute] *Morissette v. United States* (Man took bomb casings, owned by the fed, and flattened them out for profit at a junk yard; SCOTUS reversed conviction)
  + Reasoning: Defendant must be proven to have had knowledge of the facts that made the conversion wrongful, that is, that the property had not been abandoned by its owner.
  + Rule: **lack of intent in statue does NOT mean no intent**. ***Knowingly*** is attached to one element of the crime 🡪 can be attached to all elements. ***There is no precise line, yet, for distinguishing between crimes that require a mental element and crimes that do not*.**
  + Court punts, but **leaves two strong presumptions**
    - Criminal intent should be **assumed** for **common law** cases.
    - Criminal intent should NOT be read into statutes in the **public welfare** category.
  + *Staples v. United States*: Possession of guns is a **legal activity**. Mens rea required, even if congressional statute was silent.

1. **#CAUSATION**

* Specialized term in law. **Two prong concept**.
  + (1) But-for cause (FACTUAL CAUSE),
  + (2) reasonable foreseeability (PROXIMATE CAUSE).
    - Both standards, like everything else in crim law, must be proved **beyond a reasonable doubt.**

\***Negligence** CAN be foreseen. **Gross negligence**, NOT foreseen.

\*Causation not an issue in 99% of cases. Only in odd scenarios.

* **MPC 2.03(2)**: Purpose/knowledge causation
* (a) act is caused if the result differs only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused.
* (b) act is caused if the actual result involved the **same kind of injury** or harm and is **not too remote or accidental** in its occurrence.
* [Forseeability]
  + *People v. Acosta* (Police chase of Acosta. Helicopters crashed while tracking him. Three occupants died)
    - Issue: whether or not the resulting harm was ***foreseeabl****e*. Point of disagreement between majority and dissent.
    - Holding: (1) Proximate cause established. Acosta liable. (2) Not sufficient evidence of malice.
    - Reasoning: (1) Result NOT **highly extraordinary**. It was a **possible consequence** that **reasonably** might have been contemplated. Given the emotional dynamics of any police pursuit, there is an **‘appreciable probability’** that one of the pursuers, in the heat of the chase, may act negligently or recklessly to catch the quarry. (2) Not enough evidence. No reasonable juror could find a conscious disregard for a risk that isbarely objectively cognizable. \*\*\*\* (LOOK AT)
  + *People v. Arzon* (Set fire to his couch, causing fire on 5th floor. Independent fire on 2nd floor, and a fireman died. Defendant’s request for dismissal denied)
    - Reasoning: **Obscure or merely probable** connection between the defendant’s conduct and another person’s death is not enough to support a charge of homicide. However, defendant’s conduct **need not be the sole and exclusive factor** in the victim’s death. Must be **ufficiently direct cause** of death. **Foreseeable** that fireman would respond.
    - TWO QUESTIONS
      * (1) Is def. conduct the **“but-for”** cause?
      * (2) Was it ***reasonably foreseeable***? (PROXIMATE CAUSE) \*\*\*Most courts would say YES (in Arzon).
* [Intervening Cause] *State v. Shabazz* 
  + Negligence by a hospital is understood to be foreseeable (courts have said bad medical care is foreseeable). **Gross negligence** may permit the defendant to escape liability only when it was the ***sole*** cause of the death.
    - Line, for most courts, is GROSS NEGLIGENCE. **Ordinary negligence = foreseeable (even it results in an unforeseeable disease/condition). Gross negligence = NOT foreseeable.**
* [Trigger Mechanism] *People v. Warner-Lambert Co*. (Explosion at gum factory)
  + No proximate cause although factory explosion was foreseeable due to insurance warning.
* Need to **foresee specific triggering mechanism**, not just the harm (seems to go against Acosta)

**#HOMICIDE**

* **MPC 210 – Criminal Homicide**
  + **210.1 – Criminal Homicide**
    - (1) A person is guilty of criminal homicide if he **purposely, knowingly, recklessly or negligently** causes the death of another human being.
    - (2) Criminal homicide is **murder, manslaughter, or negligent homicide**.
  + **210.2 – #Murder**
    - Committed **purposely or knowingly** OR **recklessly** under circumstances **manifesting extreme indifference** to the value of human life. Such recklessness and indifference are **presumed** if the actor is committing robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape (**FM rule**)
    - Felony of the **first degree**
  + **210.3 – #Manslaughter**
    - Committed **recklessly** OR murder under **extreme mental or emotional disturbance** (w/ **reasonable excuse**) 🡪 determined from viewpoint of circumstances as actor believes them to be.
    - Felony of the **second degree**
  + **210.4 – #Negligent Homicide**
    - Committed **negligently**.
    - Felony of the **third degree**.
* Reckless?
  + (1) Magnitude of risk.
  + (2) Lack of justification.
  + (3) Awareness of risk. – awareness of death? Or great-bodily harm?

**Intended Killings**

“First Degree”

* [COMMON LAW] Murder: unlawful killing with ‘**malice aforethought**.’ Manslaughter: unlawful killing **without** ‘malice aforethought’
  + Malice understood to mean a **deliberate, premeditated intent** to ill formed some time beforehand. No killing “on a sudden” could murder.
  + Voluntary manslaughter = common law murder with heat of passion.
* [No Time Needed] *Commonwealth v. Carroll* (fight w/ wife; reached up behind head and shot her; Pennsylvania)
  + Space of time between intent and act is **immaterial** if killing was **intentional, willful, deliberate and premeditated**. INTENT TO KILL = PREMEDITATION.
    - Premeditation doesn’t mean anything if you have intent.
    - Intentional, willful, deliberate, and premeditated all **mesh into one concept**. “no time is too short” for necessary premeditation. **“no time is too short”**
  + Requirement of premeditation and deliberation is met whenever there is conscious purpose to kill. *Commonwealth v. O’Searo*.
  + Premeditation and intention can be formed when pressing trigger. *Young v. State*
* [Time Needed] *State v. Guthrie* (dishwasher kills co-worker; West Virginia)
  + Premeditation **means something**. If not, no difference between first and second degree murder.
    - Not particular period of time, but there must be **some period** between the formation of the intent to kill and actual killing which indicates **opportunity for reflection**. Must kill **purposefully after contemplation**. Must be some evidence that D **considered and weighed decision** (appreciable time).
  + Premeditation serves as a proxy for **blameworthiness**. Inherent assumption that premeditated killings are worse than heat-of-passion killings.
    - 10 yr old girl stabbed 60 times, yet not sufficient evidence for premeditation *People v. Anderson*.
    - Types of evidence:
      * (1) “planning” activity
      * (2) facts about prior relationship that gives reason to kill (“motive”)
      * (3) manner of killing indicative of intential killing (“preconceived designed”)
    - Boy kills father out of mercy; first-degree murder *State v. Forrest*

#Provocation

* Philosophical justification
  + D is less blameworthy
  + Victim is partially blameworthy
  + Defendant is less deterable.
* [Words Alone/Majority] *Girouard v. State* (army couple; wife says horrible things, guy stabs 19 times)
  + Provocation must be **calculated to inflame passion** of **REASONABLE MAN**. Words **alone** are **never sufficient**.
    - Worlds can constitute adequate provocation if they are **accompanied** by conduct indicating a present intention and ability to cause **bodily harm**.
  + Standard is **objective reasonableness**. Should not focus on peculiar frailties of mind of D.
  + Only a **few, specific categories** qualify for provocation (battery, sudden mutual combat)
* [Minority] *Maher v. People* (man saw wife and guy coming from woods)
  + Killing produced by **adequate or reasonable** provocation, before **reasonable time** for blood to cool, result of **temporary excitement** 🡪 manslaughter.
  + Standard: **average man**.
    - Court is not saying that a reasonable person would commit act, but that reasonable person, under certain provocation*s*, would respond in a certain way. Mitigates the culpability of the act.
  + **Jury decides** if circumstances warrant provocation defense. **Question of fact**. Different than the hard categories of *Girouard*. Provoking circumstances need not conform to any **pre-established categories**.
* [Note Cases]
  + Have to see the actual intercourse. Being told about it is not enough. *State v. Simonovich*
  + Not provocation if D was provoker. *Regina v. Johnson*
  + No provocation for infidelity if not married. *State v. Turner*
  + Adequate **cooling time** makes provocation inadequate. *United States v. Bordeaux*
* [MPC] *People v. Casassa* (D obsessed with girl, acted under EED)
  + MPC EED has two components
    - (1) D acted under influence of EED (subjective)
    - (2) must have been “a **reasonable explanation or excuse**” for EED (objective)
      * MPC – purposively vague. Some subjective info, then jury applies those under objective norms of community. Affirmative choice to punt analytical framework of Camplin.
      * Question is whether the actor’s loss of self-control can be understood in temrs that arouse sympathy in the ordinary citizen.
* [Partial Individualization] *D.P.P. v. Camplin* (15 yr old murder older man for sexual abuse and taunting)
  + In considering *the gravity* of situation, Court ruled that the **reasonable man** should be assumed to share “such of the accused’s characteristics as they think would affect the gravity of the provocation to him.” In considering *self-control*, the applied standard of a “person having the power of self-control to be expected of an ordinary person of the **age and sex of the accused**,” without regard to any other special characteristics.
  + Trial court applied “reasonable man” standard.
    - Called “invariant” standard 🡪 applied to all persons in the country. If allow exceptions, where does it end? Phobias? Biases? Past experiences?
    - Court sometimes allows for “special characteristics” – age and gender.

**Untended Killings**

Murder

* [Reckless] *Commonwealth v. Malone* (13 yr old killed playing Russian roulette w/friend; pulled trigger 3 times; guilty of murder)
  + **Gross recklessness** (reasonably anticipate that death is likely) **= malice**. Killing resulting from **intentional act w/ reckless and wanton disregard** of consequences. No motive for homicide is **irrelevant**.
* Law has articulated loose algorithm to get at Malone-type situations (NOT a question of culpability, but of **grading**):
  + (1) Magnitude of risk.
  + (2) Lack of justification.
  + (3) Awareness of risk. – awareness of death? Or great-bodily harm?
    - Murder v. Manslaughter
      * *People v. Prindle*: man ran from cops on high-speed chase. Court set aside a conviction for depraved indifference murder, finding evidence sufficient only to establish reckless manslaughter.
        + What if wife was pregnant, rushing to hospital? Increased justification. Running from abuser?
  + MPC – code treats an unintended killing as murder when it is **committed recklessly** and “under circumstances manifesting extreme indifference to the value of human life.”
    - **Gross deviation** from standard of conduct. **Ordinary recklessness = manslaughter**.
* [Degree] *United States v. Fleming* (drunken man speeding on bridge, hit oncoming car and kill woman; guilty of 2nd degree murder)
  + Malice necessary for murder. No malice = manslaughter. Proof of the existence of malice may be established if conduct is “**reckless and wanton and a gross deviation** from reasonable standard of care. Can **infer awareness** of risk of death or seriously bodily injury. Difference between malice and gross neg. is **degree, not of kind**.
  + MPC 2.08(2) – recklessness need not be shown if the defendant was unaware of the risk because of **involuntary intoxication**. MPC **imputes awareness** if due to intoxication.
* [Common Law] Prevailing view: gross negligence = involuntary manslaughter. Recklessness = murder (malice).

Manslaughter And Negligent Homicide

Civil vs. Criminal Liability

* [Traditional Common Law Approach] *State v. Barnett*; *Rex v. Bateman*: involuntary manslaughter **requires gross negligence**. **Beyond ordinary negligence (civil).**
  + - Courts will read “gross deviation” into the statute. Underlying premise that it is unfair to impose criminal liability for ordinary negligence. Logic: criminal sanctions and the associated condemnation is disproportionate to the fault.
* [Minority Jurisdictions] ordinary negligence is sufficient for criminal liability.
* [Civil] Torts about apportioning losses, not deterring regular behavior. Legitimate behavior. Don’t want to chill with criminal sanctions.
* [Criminal] Anti-social behavior (nature of activity). Punishment and deterrence.
* *Commonwealth v. Welansky* (night club. Obscure exits. Place burned and killed people)
  + Had duty as owner. Essence of reckless conduct is **intentional** conduct (commission or omission), involves a **high degree of likelihood** that **substantial harm** will result. Involuntary manslaughter.
    - Says recklessness, but imputes awareness?
* [Contributory Negligence]
  + NOT a defense to manslaughter. *Dickerson v. State*.
* [MPC] Requires **gross deviation** for recklessness and negligence, but adds “substantial and unjustifiable risk.”
  + Encompasses 1) Magnitude of risk. 2) Lack of justification. 3) Awareness of risk.
  + Creates two crimes, distinguished by whether the D was **aware of the unwarranted risk** he was creating.
    - Manslaughter: **reckless** – “consciously disregarded a substantial and unjustifiable risk that conduct would cause death” Gross deviation from standard of care that law-abiding person would observe.
    - Negligent homicide: person **should have been aware** of such a risk. Not aware = less culpable.
  + [Applied] *People v. Hall* (skier skiing dangerously. Killed someone.)
    - Could be involuntary manslaughter b/c consciously disregarded a substantial and unjustifiable risk.
  + [Individualization]
    - MPC def. of negligence reflects a **fully individualized standard**. Care that a **reasonable person *in* the actor’s situation**.
      * Up to courts to to determine what includes situation—blindness? Yes. Low IQ? Maybe.

**#Felony-Murder Rule**

* Purpose of F-M Rule: try to encourage felons to engage in less risky behavior**.** Principle purpose is **deterrence**.
  + Under felony-murder, sometimes things like provocation get swallowed up. Like applying F-M rule in Maher.
  + FM rule punishes disproportionate to the crime?
    - Great majority of jurisdictions retain FM rule even in face of heavy academic and judicial criticism.
  + Problems:
    - Imputs mens rea where none exists.
    - Appreciable delta of moral fault between act of D and punishment.
* [Common Law Approach] In committing felony, if death results, liable for murder (U.S. approach). **Strict liability** for killings that result from felonies, **regardless of foreseeability**. Dispenses with the mens rea requirement. Still need actus reus and causation.
  + Many statutes today **specify** which felonies apply & which do not.
  + *Regina v. Serne* (guy and wife set fire to house for insurance benefit, two children died) Guilty for willful murder.
    - Involved in **inherently dangerous activity**, deaths ensue, liable. **Intent irrelevant**. Rule: any act known to be **dangerous to life** and **likely in itself to cause death**, done for the purpose of **committing a felony** which causes death, should be murder.
  + *People v. Stamp* (robbery, guy dies of heart attack; first degree murder)
    - Felon held **strictly liable** for all killings, regardless of foreseeability. Homicide direct result of the robbery. Works as long as the underlying physical condition is NOT the **only substantial factor**.
  + [CAUSATION] *King v. Commonwealth* (transporting 500 pounds of marijuana; plane crashed into mountain)
    - Committing felony, but not the **proximate cause** of death. Crash not a **foreseeable result of felony**.
* [MPC] ***Eliminates FM rule***, rebuttable **presumption of mens rea (recklessness)** for listed felonies.
  + Not going to allow you to impute mens rea w/out ability to rebut relating to moral culpability. I’m not morally culpable for murder.
  + Gets rid of FM b/c of all absurd results.
  + Do use parody in respect to attendant circumstances. (every time court has read parody statute 🡪 read into it a recklessness requirement)
* [Modern Approach] Enumerate **specific felonies** that trigger felony-murder rule. Major limits come from **three judicial improvisations**.
  + The “Inherently Dangerous Felony” Limitation
    - [Abstract Approach] *People v. Phillips* (doctor encourage parents to not replace eye of sick child, child died; charged with grand theft)
      * Felony-murder rule could be triggered only by felonies **inherently dangerous to life**. Judging dangerousness of certain felonies **in the abstract**.
      * False imprisonment not found to be dangerous in the abstract. *People v. Henderson*
    - [Dangerously Committed] *Hines v. State* (rejects the California abstract view, in line with most current approach)
      * Hines’s violation of the prohibition of a firearm (by convicted felons) created a **foreseeable risk of death**.
      * Most jurisdictions will permit a felony (even a nonviolent felony like theft) to qualify if it is **committed in a dangerous way**.
  + The “Merger Doctrine”
    - *People v. Burton* (killed person during armed robbery
      * In *Ireland*, the court said “second-degree felony-murder instruction may not be properly given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged.” Like F-M rule in *Maher*, would defeat work of the legislature. Net effect of this would be to hold that all intentional killings accomplished by means of a deadly weapon could **never be mitigated to manslaughter**. “Included in facts” test.
      * In *Wilson*, no significant difference between indoors (felonly-burglarly) and outdoors (no felony). Both *Ireland* and *Wilson* are proponents of the “included in fact” theory.
      * *Burton* court went against the two above. Test **two**: “independence” test. Discards “included in fact” test b/c it results in absurd results. Relies on test two.
    - Two tests commonly used to determine merger doctrine
      * (1) whether the felony is **“included in fact”** in the homicide, and
      * (2) whether the felony is **“independent”** of the homicide.
    - *People v. Farley* – merger shmerger. Certain enumerated felonies, such as burglary, can never merge. Overturned *Wilson*.
  + Killings not “in furtherance” of the felony
    - Situations where lethal act occurs **after commission** of felony, **unrelated** to the felony, or committed by someone **resisting** the felony.
    - FM rule not extended to lethal acts of **third persons** not in furtherance of the felonious scheme. *State v. Canola*

**#RAPE**

* **MPC 213.1** – Rape and Related Offenses
  + [Rape] (1) A male who has sexual intercourse w/ a female NOT his wife is guilty of rape if:
    - (a) he compels her to submit by ***force/threat of imminent death, serious bodily injury, extreme pain or kidnapping***, to be inflicted on anyone; OR
    - (b) he has **substantially impaired** her power to appraise or control her conduct by administering or employing **without her knowledge** drugs, intoxicants or other means for the purpose of preventing resistance; OR
    - (c) female is unconscious; OR
    - (d) less than 10 years old
      * 2nd degree unless actor inflicts serious bodily injury upon anyone or victim was not voluntary social companion at the time or had not previously permitted sex, then 1st degree.
  + [Gross Sexual Imposition] (2) A male who has sexual intercourse with a female (not wife) commits 3rd degree felony if:
    - (a) he **compels her** to submit by ***any threat that would prevent resistance by a woman of ordinary resolution***; OR
    - (b) he knows that she ***suffers from a mental disease/defect*** which renders her incapable of appraising nature of her conduct; OR
    - (c) he knows ***she is unaware that a sexual act is being committed*** upon her or that she submits because she mistakenly supposes that he is her husband.
* [Old Definition] Rape: carnal knowledge of a woman forcibly and against her will.
* [Force Required] *State v. Rusk* (meet at bar; go back to his place, turns off ignition and takes key, puts hand on throat)
  + Elements of Maryland law: intercourse, force or threat, non-consent.
    - Requires BOTH **force/threat** and **non-consent**. Have to prove both. Approach of **majority of jurisdictions**.
    - Non-consent **alone is insufficient for liability to attach**.
    - Non-consent established through proof of resistance or fear of death/serious bodily injury or “fear so extreme as to preclude resistance, or fear which renders mind incapable, or overpowers mind” Fear must be **reasonably grounded**.
      * Maryland type courts require **reasonable fear**. Morbid fear of safe snakes 🡪 acquitted. Not reasonable fear. MPC 213.1(2)(a) “ordinary resolution.” **Objective standard**.
  + Close case, 2-1. Issue: did Rusk use “force”? Light choking around neck used by majority to want to send it to a jury. If “light choking” wasn’t there, court probably would have found no evidence of “force or threat.”
  + *State v. DiPetrillo* – Overturned conviction and sent back to consider **physical force** (not psychological force b/c of employer-employee relationship). Dissent: P’s testimony is insufficient as a matter of law to establish physical force.
    - *DiPetrillo* and *Rusk* require **physical force exterior to regular sexual acts**. Implies that **some force is ok**.
  + **Vast majority of states still require** BOTH D’s force and P’s nonconsent. Minority of states now criminalize all instances of nonconsensual intercourse.
    - Non-consent was unequivocal, but not enough evidence to establish force. *State v. Alston* (old boyfriend, took her home and raped despite verbal protests)
    - Force does NOT include **intimidation, fear, or apprehension**. *State v. Thompson* (high school principal threatened student with not graduating)
    - Rape requires **actual or threat of physical compulsion or violence**. *Commonwealth v. Mlinarich* (threatened to send her back to detention home)
  + [Solution] **MPC** **§ 213.1(2)**: conviction for “gross sexual imposition” in cases where submission is compelled by threat of force or “by any **threat** that would prevent resistance by a woman of **ordinary resolution**.”
    - Other states use same approach under **duress**.
    - Threatening to fire and kick out of apartment constitute **threatening to retaliate**. *State v. Lovely*
* [Eliminating Force Requirment]
  + *State in the Interest of M.T.S.* (juvenile court; kid penetrated girl while sleeping)
    - “Physical force” can be the act of sexual penetration. Penetration satisfies “physical force” of statute by itself.
      * Reads “non consent” into the statute to avoid problem of any sex = force. “any act of sexual penetration engaged in by the defendant *without the affirmative and freely given permission*…” Physical force qualifies the nature and character of sexual penetration. Sexual penetration through force = unauthorized sexual penetration.
    - *M.T.S.* easy to criticize. If all sex is forcible, why did the statue require force in addition to penetration?
  + Even in jurisdictions that have abolished force requirement, **prosecutors in practice rarely go forward in the absence of evidence of physical force/resistance**.
  + [CONSENT] *M.C. v. Bulgaria*
    - Rape = offense against women’s autonomy. **Lack of consent**, not force, is the **essential** element. Moving towards affirmative consent.
* “No means no” regime.
  + Counter-argument: in society, no often does not mean no.
  + If move to “no means no” non-consent regime, is force or threat required? Probably not.
  + What does “non-consent” mean? If person is pressured to consent, and does, did they really consent? Is there a meaningful choice?
* [Defective Consent]
  + **Maturity**: Statutes always draw bright-line, set specific **age of consent**. Anything below = statutory rape.
  + **Mental Retardation**: MPC imposes liability when person consenting “suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct.”
  + **Incapacity—drugs and alcohol**
* [Deception] *People v. Evans* (seduced P through series of lies)
  + Deception, but **no forcible compulsion nor threat beyond a reasonable doubt**.
  + Fraud needs to be in the factum, not the inducement *Boro v. Superior Court* (fake doctor, sex with serum-injected donor)
* [Mens Rea]….do I need this section? \*\*\*\*\*\* LOOK AT (*sherry* and *fischer*)
* Until recently, prison-rapes and homosexual rapes not included in the def of sexual assault.
* Susan Estrich, “Is it Rape?”
  + Real rape v. simple rape 🡪 woman forced to have sex w/o consent by only one man, **whom she knows**, who does not beat her or attack her with a gun. Vastly underreported and dramatically ignored. Not prosecuted, though rape technically.
  + Real or aggravated rape: extrinsic violence, multiple assailants, or no prior relationship between victim and offender (strangers).
* Rape law modifies evidentiary standards of other types of crime.
  + First report of rape admissible (most jurisdiction – first report of rape rule). Traditionally considered hearsay (not subject to cross examination, etc.) Assumption that most juries won’t believe claim of rape unless it is reported soon after the event. Does carving out special evidentiary rules do a disservice to women?
* Berkowitz case: stopped off at friend of boyfriends. Girl said she said no. He said only heard moaning. Traditional law requires **more than unwillingness**. Requires **force as well**. Penn SC (no force).
  + What are the standards to evaluate after she says no?
  + Societal norms: (1) no sometimes actually means no for some women; (2) norm that male sexual aggression is expected.

**JUSTIFICATION AND EXCUSES**

* Negate culpability even when **all the elements are present**.
* **Justification** – Gives ***reasons*** why action was taken. Act was a **good or right or sensible or permissible** thing to do given the circumstances, special or general. Admit responsibility, but say it wasn’t bad. Ex. self-defense.
* **Excuse** – Admit that act was **bad**, but don’t accept full, or any, ***responsibility***. Ex. insanity.

**#Self–Defense**

“Reasonableness”

* [Definition] *United States v. Peterson*
  + Law of self-defense is **law of necessity**, arises ***only*** when necessity begins, and equally ends with the necessity.
    - “Necessity must bear all semblance of reality, and ppear to admit of **no other alternative**, before taking lifewill be justifiable as excusable.”
  + **RULE**: “There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been **unlawful and immediate**. The defender must have believed that he was in **imminent peril of death or serious bodily harm**, and that he response was ***necessary*** to save himself therefrom. These beliefs must not only have been honestly entertained, but also **objectively reasonable** in light of the surrounding circumstances.”
    - Does not have to be **truly necessary**, only **reasonably believed**.
* [Objective] *People v. Goetz* (shot youths on subway for asking $5; had been mugged before; acquitted)
  + Mens Rea – NY statute uses an **objective standard** (***reasonably*** believes). Did not follow the **MPC** which only requires that D ***believed.***However, objective standard takes into account **“circumstances”** facing D in his **“situation”**. Involves physical characteristics and any relevant knowledge and **prior experiences** (Goetz had been mugged before). Thus, both **subjective and objective**.
    - “…whether the defendant’s conduct was that of a **reasonable man** in the **defendant’s situation**.”
  + *New Yorker Case* (black guy shoot white youths who came to guy’s house; found guilty)
    - How to square two cases? Race and socio economic status?
    - Both cases applied an objective standard.
* [Current Law]
  + Prevailing American rule is that a self-defense claim can succeed only when the D’s fear and use of defensive force were **both reasonable**.
* [MPC] – has not been influential in state statutory reform.
  + **Subjective test**: actor believes that the necessary circumstances are present.
  + **BUT**, knowledge/beliefs **recklessly or negligently** acquired will not protect against crimes in which recklessness or negligence is sufficient for culpability.

#Battered Women

* [Imminence] *State v. Kelly* (wife killed husband with scissors; repeated history of abuse; can expert testimony concerned BWS be allowed?)
  + - Expert testimony **relevant and admissable**, but standard is still **objective standard**. Expert testimony directly relevant to critical element—if D **believed** she was in **imminent danger** of her life.
      * Testimony of BMW **only relevant** to **honesty and reasonableness** of D’s belief.
    - Prevailing view in law is *Humphrey*. Maintains **objectivist standpoint**. BMS relevant to reasonableness, but only in a limited way.
      * *Kelly* is NOT what a battered woman would believe (consistent with Humphrey). Belief of reasonable person if one accepts that this type of behavior speaks to imminence. Is this a real distinction?
      * What syndromes are we comfortable with? What rule can we justify that will account for some syndromes and not for others? (PTSD, holocaust syndrome, etc.) Law is not in business of happiness, but law? Bully syndrome? Necessity? 🡪 Dudley and Stephens.
    - Policy justification: allowing BWS testimony counters belief that woman **could have left** if it was so bad. Counter: prejudicial 🡪 devalues life of victim. Allowed b/c testimony explains D belief of **imminence.**
    - **CF:** Some courts maintain objective standard and reject reasonable BWS standard. Other courts have become fully subjective.
      * “assume the physical **and psychological properties** peculiar to the accused.” *State v. Leidholm*
      * Question is NOT reasonable battered person, but a reasonable person. *People v. Romero*
  + [Inevitable] *State v. Norman* (woman systematically abused; killed husband while asleep)
    - Subjective believe of **inevitable harm** is NOT imminent enough for self-defense.
    - No self-defense because **no imminence** of death or serious bodily injury. BWS does not mean attack is not required at time of killing. If allowed, “imminent” would be substantially more indefinite and all-encompassing.
* Most courts now admit testimony on BWS.
  + Some admit **battered child syndrome.**
  + Generally don’t admit PTSD by military vets.

Other Issues

* Some circumstances, not liability for unintentionally killing or injuring third person if acting in self-defense. *People v. Adams* (bullet went through person and hurt another)
  + MPC 🡪 can be convicted of **reckless endangerment**.

#Duty To Retreat

* [Retreat Rule] *State v. Abbott* (crazy driveway fight)
  + **Retreat Rule**: if actor **knows** that he can avoid necessity of using force with **complete safety** by retreating, that defeats his right to self-defense
  + If **moderate force** is used 🡪 can **always** stand your ground. Retreat is only an issue if D used **deadly force**.
* [Castle Doctrine]
  + Don’t have to retreat generally if **you’re in your home**. What about at office? Extension of home? Any other property other than castle? Duty to retreat (for most jurisdictions).
  + Some courts require a retreat, in the home, if assailant is **co-occupant** (wife, children).
* **First aggressor rule**: can’t claim… first aggressor can **shift** if someone **over responds**.
* [Stand Your Ground] (expansion of the castle doctrine)
  + Castle doctrine is expanding to include anywhere person has **right to be**. Reasonableness is presumed under statues to have fear of life, state has burden to prove otherwise. If say right words, immunity from arrest and further civil action. **Emboldens private law enforcement**.

**#Necessity**

* **MPC 3.02** – Justification Generally: Choice of Evils
  + (1) Conduct which the actor ***believes*** (subjective) to be **necessary to avoid a harm/evil** to himself OR to another is justifiable, provided that
    - (a) the harm/evil avoided ***is*** **greater than** that sought to be prevented by the law defining the offense charged; and
    - (b) neither code/law provides exceptions/defenses dealing with the specific situation; and
    - (c) legislative purpose to exclude the justification does not otherwise plainly appear
  + (2) When actor is **reckless/negligent** in bringing about the situation requiring necessity 🡪 defense not available for any offense for which recklessness/negligence suffices to establish culpability.
* Self defense responding directly to attacker. **Against an unlawful attacker**. Necessity is **avoiding situation**, no act against aggressor. Duress the **will is overborne**.
  + *People v. Unger* (prisoner escaped from honor farm to avoid harm/sexual assault; didn’t say anything, afraid of retaliation; ok to raise necessity defense)
* *Lovercamp* factors are **relevant, but not necessary** to raise necessity.
* *Lovercamp* factors
* Faced with specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future.
* Not time for a complaint to authorities or exists a history of futile complaints.
* No time to resort to courts
* No evidence of force or violence towards prison personnel or other innocents during escape.
* Immediately reports to authorities when attained a position of safety.
* NY & MPC (3.02): **objective standard that harm is greater that is avoided**. Illinois is **subjective standard**, what “accused **reasonably believed** such conduct was necessary.”
  + Option closed if law explicitly says no.
* Actor under MPC first has to **subjectively believe it was necessary**.
* Actor’s fault under NYC and ILL would **defeat the claim**. Would NOT (totally) defeat the claim under **MPC.** Can still be charged for crimes with negligent/reckless elements.
* Other Types
  + Courts divided over whether to allow necessity for marijuana medical uses.
  + Many court unsympathetic to **economic necessity**.
* [Policy Protest] *United States v. Schoon* (30 ppl protesting IRS involvement in El Salvador)
  + **Indirect civil disobedience** can ***never*** meet all the requirements of necessity.
  + Elements
    - Faced with choice of evils and chose lesser
    - Acted to prevent **imminent harm**
    - Reasonably anticipated a direct causal relationship between their conduct and harm to be averted.
    - No legal alternatives to violating law.

**Duress**

* **MPC § 2.09**
  + (1) Affirmative defense if actor coerced to do so by **use/threat of unlawful force** against himself or another, which person of **reasonable firmness in his situation** would have been **unable to resist**.
    - Standard objective, but not wholly external. Can take into account actor’s **situation**. Tangible factors, not temperament. “Situation” is ambiguous.
  + (2) Duress unavailable if actor **recklessly** placed himself in situation where **probably subject** to duress. Also unavailable if actor was **negligent** in situation whenever negligence suffices to establish culpability for the **offense charged**.
  + (3) Not duress that woman acted on command of her husband.
    - MPC allows duress in murder cases. Most exclude (and some exclude even in FM cases)
* *State v. Toscano* (chiropractor committed insurance fraud)
  + Adopted MPC. Departed from common law that required **immediate threat, aimed at accused,** and **non-capital offense**.
  + Some courts still require **imminence** (reject *Toscano* and MPC).
    - *United States v. Fleming* (solder threatened with death march)
      * Mere assertions of threat not enough. D not at “last ditch”; deanger o fdeath or great bodily harm was not ***immediate****.*
    - Must show no **reasonable opportunity** of escape. *United States v. Contento-Pachon*
    - No immediacy required if **threat left no realistic choice**. *Regina v. Ruzic*
* Variations
  + Immaturity doesn’t affect duress. *State v. Heinemann*
  + Low IQ doesn’t affect reasonable person standard for duress. *United States v. Johnson*
  + Mental retardation should be considered. *Commonwealth v. DeMarco*
  + Courts do not agree on BWS as excuse to do drug deal or robbery for abuser.

**Insanity**

* **Two Common Law Approaches to Insanity**
  + **Cognitive impairment** (M’Naghten): incapacity to appreciate wrongfulness of act
  + **Volitional impairment** : irresitable impulse
    - All jurisdictions create a presumption of legal sanity at trial.
    - Most courts place burden of proof of insanity on the defense.
    - Most jurisdictions the decision to raise insanity **must be left entirely within the D’s control**.
* [Cognitive] *M’Naghten’s Case*
  + Party accused was laboring under such a defect of reason, from **disease of the mind,** as **not to know the nature and quality of the act** he was doing; or, if he did now it, that he **did not know he was doing** what was wrong.
    - COGNITIVE rendering of insanity. You don’t **appreciate that your act is wrong**.
    - BURDEN OF PROOF is on **defendant**.
  + Insanity is legal concept.
* *The King v. Porter*
  + May be element of retribution, but **prime purpose** of law is deterrence (protect public). No **specific deterrence** with punishing insane. Maybe general deterrence?
  + Abolition of insanity defense motivated by retributivists?
* [Volitional] *Blake v. United States* (schizophrenic robs bank)
  + **Irresistible impulse test**. Severe mental disease **impaired his control** over conduct.
  + Once **burden of production** for hypothesis of insanity is met, **burden of proof** is on **prosecution** to prove beyond a reasonable doubt (very high standard) that D was sane at the time of the commission of the crime.
* [Anti-Blake] *United States v. Lyons*
  + Rejects volitional. ALL criminal impulses—including those not resisted—**treated as resistible**. Volitional prong does not comport with current medical and scientific knowledge. Insanity defense available only if at the time of conduct, as a result of a mental disease or defect, he is **unable to appreciate the wrongfulness** of that conduct.
  + Psychiatrists do not possess sufficient scientific knowledge to assess lack of self-control.
    - Line between irresistible impulse and impulse not resists is no sharper then line between dark and dusk.
  + Experts and jury speculate 🡪 **high risk** of **fabrication and “moral mistakes”**
* **MPC** does **both** volitional and cognitive prongs.
  + Requires a diagnosable **mental disease or defect**.
  + M’Naghten does not, only requires a state of mind be one of disease, disorder or disturbance. Mere excitability of normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness, are quite different things than disease or disorder or mental disturbance. Such a character as to prevent him form knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong.
  + **MPC 4.01(1)**: A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he **lacks substantial capacity** either to
    - 1) appreciate the criminality [wrongfulness] of his conduct or
    - 2) conform his conduct to the requirements of law”
  + **4.01(2)**: Insanity defense ***cannot*** be based upon **“an abnormality manifested only by repeated criminal or otherwise antisocial conduct”** (psychopaths don’t get off).
  + **Lots of jurisdictions dropped the MPC and returned to *M’Naghten* in wake of Hinckley case.**
* [Civil Commitment] The family or state can move for person to be involuntary committed AFTER acquittal by **clear and convincing evidence**. Very high bar.
* Those committed under mental health issues often **spend longer and are more restricted** than if they would have gone into criminal system.
  + Insanity defense rarely prevail in court in the U.S. Defense attorney’s rarely advice clients to enter to the plea. Juries don’t like insanity.
  + Evidence that diff formulations of insanity test don’t really make a difference.

Diminished Capacity

* [Mental Health Evidence]
  + *United States v. Brawner*
    - Insanity cannot be used to reduce crime. All or nothing. BUT, evidence of mental evidence CAN be used to **negate specific intent** and allow for reduction in severity of sentence.
    - Judge decides what evidence is **logically relevant**.
      * Has to aid the jury, have **sufficient scientific support** (tries to weed out bogus experts). Seems to be somewhat fuzzy, low standard. Would it be hepful to the jury?
  + *Clark v. Arizona*
    - Mental incapacity is **never**admissible to rebut mens rea.
  + *McCarthy v. State*  - evidence is admissible to rebut specific intent IF a lesser included general intent crime is included. Tries to circumscribe all or nothing approach.
    - Element A, B, C, D. Lesser included offense: A, B, C.
  + *People v. Wetmore* – presence or absence of lesser-included defense **cannot affect result** that if a crime requires specific intent, a D, b/c of mental illness, lacks that intent, cannot commit that crime.
  + **Most states do not impose special restrictions on the use of mental health evidence to rebut a required mens rea.** 
    - MPC takes this view as well.
      * **4.02(1)**: Evidence that the D suffered from a mental disease or defect is **admissible whenever it is relevant** to prove that the D did or did not have a **state of mind** which is an element of the offense.

Rotten Social Background

* Behavioral controls so impaired b/c of socio/economic deprivation that acquittal is required (not insane).
* MPC def of insanity always requires **substantial impairment**. Why different than rotten social background?
  + Difficulty of verification. And it’s such a **widespread problem**.
  + Strong version: negates mens rea requirement
  + Soft version: excuses, in part, the conduct. Mitigating factor.
  + Usually used in the generally sense that individual does not have normative backup to make good decisions. They don’t “know better.”

**EXPANDING LIABILITY**

**#Attempt**

* + **MPC § 5.01** – Need ***specific intent*** AND ***substantial step***
    - acting with the culpability otherwise required for commission of the crime, actor
      * a) (missing attendant circumstances) purposely engaged in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
      * b) (missing result) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
      * c) (missing conduct) 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
  + [Attempt When Another Acts] § 5.01(3)
    - if conduct would establish complicity under § 2.06 if the crime were committed by the other person, actor is guilty of attempt to commit the crime, even if the crime was not committed or attempted by the other person

Actus Reus

* + [Substantial Step] **MPC § 5.01(2)**
    - act constituting a ***“substantial step”*** in the course of conduct intended to result in the crime
    - act is strongly corroborative of the actor’s criminal purpose, although it need not establish purpose by itself
      * lying in wait, searching for, or following
      * enticing victim to go to place for commission
      * unlawful entry of a structure, vehicle, or enclosure
      * possession of materials to be employed in the commission of the crime that are specifically designed for unlawful use (or have no lawful purpose)
      * possession, collection, or fabrication of materials near commission place with no lawful use
      * soliciting an innocent agent to engage in conduct constituting an element of a crime
    - ⇒ kind of collapses actus reus with mens rea since substantial step can go towards showing of purpose

Mens Rea

* + [Purposefully] **MPC § 5.01(1)(B)** – Need ***purposefully***. The required mens rea is satisfied if the defendant acts “with the **purpose of causing** or with the **belief that his conduct will cause**” the prohibited result.
    - Seems like to be saying parody but not parody. Parody with respect ONLY to ***attendant circumstances***. Negligence or even strict liability can be sufficient. In regard to **material elements**, ***specific intent*** is required. **Hybrid model**. Requires purpose with respect to results.
      * In *Thacker*, no purpose for material elements of crime. Not guilty.
  + [Majority View] *Smallwood v. State* (guy having sex who was HIV positive)
    - ATTEMPT requires a ***specific intent***, even when recklessness or some lesser mens rea would suffice for conviction of the complete offense.
    - No specific intent demonstrated here. Guy was at least reckless, why require a greater mens rea requirement than actual crime?
      * (1) Linguistic (cannot attempt something you don’t intend); (2) moral (intend to commit crime is worse that reckless/negligence); (3) Utilitarian (specific intent means hurtful consequences are likely to follow)
      * Also, actu reas, in one sense, is missing. So become extra stringent with other legs (mens rea).
      * No liability either for attempted assault, b/c crime also requires specific attempt.
    - *Thacker v. Commonweath* (man shot at light in tent, fortunately missed) – not guilty b/c not **specific intent**. Under common law, guilty of **nothing**.
      * Reckless endangerment was created to fill this gap.
  + [Minority View – Parody Requirement] *People v. Thomas* (Colorado requirement)
    - CRIMINAL INTENT: acting with the **kind of culpability** otherwise required for commission of an offense, engages in conduct constituting a **substantial step** toward committing a crime.
    - Ex. reckless driving would be attempt for manslaughter.
    - Ex. bank robber, shots gun in air and grazes bystander.
      * Crimes: robbery, illegal possession of arms, attempted murder in parody jurisdiction (mens rea for bank robbery – felony) 🡪 seems a little silly.
      * Runs in with a toy gun? If teller died of heat attack, would be guilty of felony murder attempt b/c you take person as you find them *Stamp*. Or, read into statute that it required recklessness 🡪 inconsistent with strict liability.
  + [Preparation Versus Attempt] How close to crime do acts need to be?
    - Values that favor pushing the line towards the crime.
      * Opportunity to repent
      * Hard to be sure.
    - [Last Step] *R. v. Eagleton*
      * Prevailing view: Line should be at **last step**. Takes aim or firing? “he must have done all that he intended to do and was able to do for the purpose of effectuating his criminal purpose.”
        + Preserves opportunity to repent?
        + Is this standard workable? If lighting fuse, then if its long, would still have chance to stomp it out? Does fuse count as last step?
    - [Dangerous Proximity] *People v. Rizzo* (looking for guy; stopped by police before found him)
      * Test in NY for sufficiency: ***“dangerous proximity”*** to success. 
        + Physical/spatial notion.
      * *Commonwealth v. Bell* (not attempt; undercover cop and man who agreed to have sex with 4 year old). Look to **actions left to be taken** or distance of gap between the D actions and the goal of crime. Test of **proximity**.
      * *Bell* and *Rizzo* introduce third value/concern: opportunity of police to **intervene early**.
      * Physical proximity test has taken over. Prevailing common law approach.
        + Worst of both worlds? Police **intervention hampered** (line is super close to crime), police prevented from intervening early. Also, NOT close enough to act to allow for **full opportunity** to repent.
  + *McQuirter v. State* (black guy followed white woman in neighborhood; cop said he confessed to saying he wanted to get the first woman he say)
    - How would come out under dangerous proximity test? Williams test (yes; action doesn’t require much; everything is **intent**)?
    - Problem: can we trust a confession standing alone?
    - H: court found sufficient evidence to convict.
      * Example of mob justice? Judicial lynching?
  + [Equivocality Test] Wisconsin test or *The King v. Barker*
    - Alternative to proximity test and Williams test.
    - Actions demonstrate **unequivocally**, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.
      * Stronger than beyond a reasonable doubt.
      * If can offer **any** alternative conduct, then don’t have actus reus.

#Abandonment

* + [Abandonment]
    - **MPC 5.01(4)**
      * Abandonment is ***affirmative defense***. Must manifest a **complete** and **voluntary** renunciation of criminal purpose.
        + Does not affect liability of accomplice who does not abandon crime.
        + NOT voluntary if its motivated by circumstances which increase chance of being caught or make crime more difficult.
        + NOT complete if it is motivated by a decision to postpone crime to more advantageous time or transfer crime to another object/victim.
    - Abandonment defense would undue a crime after its already done. Different than other affirmative defenses that say you never committed a crime. Uncomfortable with ppl to **undue** crimes they’ve committed. Probably why abandonment defense has not caught on in jurisprudence.
    - Modern approach to abandonment (those who accept it despite its conceptual problems)
      * Abandonment MUST be **voluntary.**
      * Abandonment MUST be **complete.**
      * P. 621 Williams test– **reject the proximity** requirement all together. PBYR that **intent was there** and **some act** 🡪 Jury.
  + Why do we care about jury instructions?
    - Law is aspirational
    - Establishes norms.
* **#Complicity**
* **MPC § 2.06**
* (1) guilty of an offense if it is committed by the conduct of another person for which he is **legally accountable**
* (2) Legally accountable when
* (a) acting with the **kind of culpability that is sufficient** for the commission of the offense, he ***causes*** an innocent or irresponsible person to engage in such conduct
* (b) made legally accountable by Code or law; or
* (c) is an ***accomplice*** of the other person
  + (3) Accomplice if:
    - (a) [Mens Rea] with the ***purpose of promoting or facilitating*** the commission of the offense, he
      * (i) [Actus Reus] **solicits** such other person to commit it; or
      * (ii) **aids or agrees or attempts to aid** such other person in planning/committing it; or
      * (iii) [Omission] having a **legal duty** to prevent the commission of the offense, fails to make **proper effort** so to do;

\*\*Code is silent on whether purpose is required for attendant circumstance elements of the offense.

***Actus Reus*** § 2.06(3)

* **solicits** such other person to commit the offense; or
* **aids or agrees or attempts to aid** (successful contact with principal is not even required) such other person in planning or committing the offense; or
* having a **legal duty** to prevent the commission of the offense, fails to make proper efforts to do so

***Mens Rea*** § 2.06(3)(a)

* with the **purpose of promoting or facilitating** the commission of the offense
* if result is an element of the offense, accomplice if **he acts with the kind of culpability**, if any, that would be **sufficient** for the commission of the offense

***Defenses***

* victim of the offense
* conduct was only incidental to commission (i.e., prostitution)
* terminates complicity prior to commission and
  + wholly deprives his complicity of effectiveness in the offense; or
  + gives timely warning to law enforcement or otherwise makes proper effort to prevent the crime
* accomplice ***can be convicted*** even if person who committed the offense has NOT been prosecuted or committed (or is convicted of a different offense or is immune or is acquitted)

Common Law

* + Accessory (in common law). Punishment is same for secondary as principle.
  + [MENS REA] *Hicks v. United States* (positioned horse so it was blocking Colvard’s escape; didn’t prove he had intent to encourage/aid)
    - Need **specific intent** to encourage principle. *Mens rea*
    - Evidence shows no facts from which the jury could have properly found that the encounter was the result of **any previous conspiracy or arrangement**. *Actus reus*
      * No evidence of **contribution** by second party. If there were 🡪 would do work for BOTH actus reas and mens rea.
      * Mere knowledge is not sufficient. Need to ***intend***. Ex. know marijuana in car, but need to intend marijuana to be there.
    - Hypotheticals (p.663-64)
      * i. No (no actus reus or mens rea)
      * ii. No. Don’t know if he had mens rea from facts. May have been just been cheering. High requirement of mens rea.
      * iii. No. Mens rea, but no actus reus.
      * iv . Yes. Mens rea and actus reus missing from iii.
    - Causation does NOT come into play b/c causation is in the principle’s action.
  + [Nexus With The Defendant] *State v. Gladstone* (said didn’t have enough marijuana to sell, but gave address of neighbor who did)
    - Issue with mens rea. Vital element is missing (nexus) 🡪 didn’t associate (communicate/counsel/encourage/hire/induced/procured) himself with principle.
      * Helped buyer, not seller. Red herring argument? Court says “associate yourself with the venture,” but that’s different than nexus. Seems to say that if robbery, then would have gone different way. Didn’t Gladstone associate himself with venture?
  + MPC **draft** (p.666)
    - Knowledge is enough if he ***substantially facilitated*** its commission. Different than common law (requires purpose). (lowers mens rea, raises actus reus).
      * What is criteria of substantially certain?
    - Draft rejected. Code requires actor have **purpose** of promoting or facilitating the commission of the crime.
      * All three hypos (moonshine farm, Gladstone, gun-gladstone) would be not liable under MPC.
  + NY (p.668)
    - Believing it **probable…provides means or opportunity**.
  + *McVay* and *Roebuck*
    - Wrestling with mens rea issue of ***intending actions, not results***.
      * For accomplice liability, the accomplice must have the ***specific intent*** to further the underlying **actions/conduct**, but for the **result**, he need only have the mens rea required for the result element of the substantive offense. [MPC Agrees]
      * Break from traditional intentionality principle that mens rea has to go to outcome.
      * Aided in act, thus **joined** them in culpability for result. Seems consistent with rudimentary fault principle (secondary as morally culpable as principle).
      * Problematic for SL cases (*Balient*).
    - MPC (p.676) seems to be an ad hoc exception to the intentionality principle.
      * Taxi example – probably yes. Complicit in underlying action that caused the result.
        + P.601 *Commonwealth v. Root* – under MPC 2.06(3)(a)(ii), guy seems to aid in environment.
      * Note 4 (p. 678) – MPC punts to the courts to make a decision. Clerk who gives pharmacist drugs seems unaware.
  + [Beyond MPC – Reasonably Foreseeable] *People Luparello* (henchmen, in looking for D girlfriend, kills)
    - Liable for result, even if not intended, if it is ***reasonably foreseeable***. Way beyond MPC, anything that is RF.
      * Guy didn’t intend for henchman to kill, only to find out where ex-girlfriend was.
      * Like FM rule.
        + Liability disproportionate to fault.
        + Both grounded in deterrence theory.
      * Not like FM.
        + FM you can be convicted for things non-foreseeable (though there still needs to be causation. (worse)
        + FM is narrower in one sense (confined to felonies) (better)
    - Merger doctrine limit FM? Independent felonious purpose. Maybe just want to charge them with murder.
      * In *Luparello*, any something attaches… far greater scope than FM in this sense (can allow for greater disproportionality).
  + [Encouragement] *Wilcox v. Jeffery* (guy clapped at illegal UK jazz concert
    - Clapping counted as encouragement. Do NOT need **“but-for” causation** between encouragement/aid and result.
      * Abolish causation in part because it would be impossible to prove?
      * We don’t worry about causation between secondary and principle.
* **#Conspiracy**
* **MPC 5.03** – Criminal Conspiracy
  + (1) Person is guilty of conspiracy with another if with the ***purpose of promoting/facilitating*** its commission he:
    - (a) agrees with such other person(s) 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
    - (b) agrees to **aid** such person(s) in the **planning/commission** of such crime or of an attempt/solicitation to commit such crime.
  + (2) [Scope] If guilty of conspiracy and knows that person who he conspired with has conspired others to commit **same crime** 🡪 he is ***guilty*** of conspiring w/ those ppl, **whether or not he knows their identity**.
  + (3) [Multiple Criminal Objectives] If conspires to commit a number of crimes, he is guilty of ***only one conspiracy*** as long as such multiple crimes are the **object of the same agreement or continuous conspiratorial relationship**.
  + (5) [Overt Act] No person may be convicted of conspiracy, other than a **1st/2nd felony**, UNLESS an ***overt act*** in pursuance of such conspiracy is alleged and proved by him or by person with whom he conspired.
  + (6) [Renunciation] It is an **affirmative defense** that the actor, after conspiring to commit a crime, ***thwarted the success*** of the conspiracy, under circumstances manifesting a **complete and voluntary** renunciation of his criminal purpose.
  + (7) [Duration]
    - (a) conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object **are committed or the agreement is *abandoned*** by the D and by those with whom he conspired; and
    - (b) such abandonment is **presumed** if neither D nor conspirators do ***overt act*** in pursuance of conspiracy during period of limitation; and
    - (c) if individual abandons agreement, the conspiracy is terminated as to **him only** if and when he **advises those** with whom he conspired of his abandonment or he informs police of his conspiracy.
* CONSPIRACY: The crime of ***agreeing with another to commit*** a criminal offense.
  + Unlike attempt, does NOT **merge** into complete offense.
    - Punished separately and in addition to completed offense. Designed to not only punish “preparatory behavior” but also address the special danger posed by group criminal activity.
  + Majority of states **reject** general approach 🡪 grading conspiracy w/o regard to the sentence for the object of conspiracy. Most fix punishment at some term tied, but less than, sentence provided for object crime.
  + **MPC**: punishment for conspiracy ***same as object crime***.
  + Rarely is conspiracy explicit. Usually ***inferred***. Proof is often circumstantial. Knowledge of D of ALL details is NOT required. Enough that he knows the ***essential nature*** of it. *United States v. James*
  + [Inferred Conspiracy] *Interstate Circuit, Inc. v. United States* (movie theatre fixed prices by single agreement that listed a bunch of different parties)
    - Conspiracy inferred b/c all parties were listed on letter. **Explicit agreement** NOT necessary. “It was enough that, knowing that **concerted action** was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.” Seems like **tacit agreement** works.
      * Agreement would have been against own self-interest unless all parties joined in.
  + [Actus Reus]
    - **MPC 5.03(5)** – requires an **overt act**. Worried about pure mental agreement.
      * Shows that the conspiracy is “at work.” Generally can be satisfied by acts that would be considered **equivocal or merely preparatory** in the law of attempts. Traditional view is that ***any overt act*** (or sometimes the act of agreement alone) suffices to render conduct punishable as conspiracy.
  + [Mens Rea] *People v. Lauria* (telephone answering service that facilitated prostitution)
    - Both **knowledge** and **intent** must be present in order to make supplier participant in criminal activity.
      * (1) Intent may be inferred from knowledge, when purveyor of legal goods for illegal use has **acquired a stake** in the venture.
      * (2) Intent may be inferred form knowledge, when **no legitimate use** for goods or services exists.
      * (3) Intent may be inferred form knowledge, when the **volume of business** with the buyer is **grossly disproportionate** to any legitimate demand or when sales for illegal use amount to a **high proportion** of seller’s total business.
      * Only **tacit, mutual understanding** is required. **Special interest vs. mere knowledge** (really thin line).
    - **MPC 2.06(3)(a) & 5.03(1)**: requires **purpose** for BOTH conspiracy and accomplice liability.
      * Purpose is required for misdemeanors as well as felony.
    - P.719 meth trailer 🡪 high price was for **risk** of trailer damage. For for profit of making meth.
  + [Corrupt Motive] *Commonwealth v. Gormley* (entering false votes in good faith, no opposition candidate)
    - Applying *Powell* doctrine: **Good faith and ignorance** of criminality. Conspiracy must be motivated by **corrupt motive** or engage in conduct **known to be wrongful**.
      * Conspiracy is **agreeing to illegal act**. If don’t know its illegal, NOT agreeing to ***illegal act***, only agreeing to act.
    - **MPC 2.02(9)** – lack of knowledge of law (also recklessness/negligence) is NOT a defense.
      * Similar to Colorado parody doctrine. Called symmetry doctrine (whatever mens rea required for the underlying offense satisfies the mens rea requirement for conspiracy).
        + Alan and Bill (p. 722). Under symmetry approach, yes.
      * Doesn’t apply to *Gormley* b/c knowledge is an element of offense?
    - *United States v. Freed*
      * When do we impute knowledge?
      * Ex. red light case. Strict liability. Under symmetry approach, passenger convicted of conspiracy.
  + [Furtherance Of A Conspiracy] *Pinkerton v. United States* (Walter and Daniel, brothers, indicted for IRS violations; Daniel was in jail and didn’t participate directly in offenses, but they were in furtherance of an original agreement)
    - Anything co-conspirator does in ***furtherance*** of conspiracy (objectives) that is ***reasonably foreseeable or a natural consequence*** of the unlawful (objectives) 🡪 liable.
      * **MPC** REJECTS *Pinkerton*, imposing accomplice liability on conspirators for the substantive crimes of their co-conspirators ***only*** when the strict conditions of **accomplice liability** are met.
    - Hypo from email:
      * Under *Pinkerton* (conspiracy, have to **agree**, mens rea of **purpose**): A is liable. B is liable (both robberies in furtherance of common conspiracy and foreseeable). D is liable for second robbery (part of conspiracy, liable for all of it). D is liable for first robbery. B & C liable for D’s theft (probably, there is a reasonably foreseeability and natural consequence component)
      * Under Complicity theory: A is liable (purposely encourage their commission). B is not liable (did purposely encourage C’s robbery. Did not encourage). D is not liable for second robbery (no aid or encouragement of that crime). D is liable for first liable (car used). B & C not liable for D’s theft (did not aid the theft, presumably didn’t “encourage” theft knowingly).
      * Under *Luporello* (all reasonably foreseeable consequences): probably yes to all. Really permissive standard.
  + Luperello and Pinkerton
    - Accomplice theory should produce same results as Pinkerton (in chart) b/c of foreseeability.
    - *Pinkerton* is broader than traditional accomplice theory (which doesn’t include foreseeability), but narrower than *Luperllo* b/c limited by furtherance of conspiratorial objective. *Luperello* broader than everything (foreseeability and not limited by conspiratorial objective).
  + *People v. Brigham*
    - No conspiratorial liability (didn’t further objective), but found under complicity theory.
  + *United States v. Alvarez* (drug exchange at motel)
    - Ample evidence to support jury conclusion that murder was a ***reasonably foreseeable*** consequence of the drug conspiracy. Convicted of murder. Justified given their relative culpability?
    - Couldn’t be convicted under FM b/c underlying crime isn’t inherently dangerous felony (?)
  + *State v. Bridges* (16 year old birthday party; kids got in fight, left to get help, returned w/ guns; ppl shot)
    - Co-conspirator may be liable for the commission of **substantive criminal acts** that are NOT within the scope of the conspiracy if they are ***reasonably foreseeable*** as the **necessary and natural consequences** of the conspiracy.
      * At minimum negligence, but mostly likely reckless for Bridges mens rea.
    - Life in prison. *Pinkerton* blurs culpability distinctions.
    - Couldn’t be convicted murder under FM rule b/c of the **merger doctrine**.
  + Most jurisdictions **reject** *Pinkerton* b/c doesn’t have limitations like those applied to FM rule.
    - Merger Doctrine: “independent felonious purpose.” FM would eradicate certain felonies from law. Want to respect intent of legislature for making independent crimes.
  + [Impossibility] Can still be convicted of conspiracy even if **object is impossible**. *United States v. Jimenez Recio* (guys caught in sting; lower court held couldn’t conspire if didn’t join before sting was set up)
  + [Abandonment And Withdrawal]
    - MPC 5.03(7)(3)
    - A D’s affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal/abandonment. *U.S. v. U.S. Gypsum Co.*
    - Withdrawal requires MORE than ***implied dissociation***. Needs to be sufficiently clear and delivered to those in authority of conspiracy such that jury sees disassociation is known to organization. Simply not spending time w/ conspirators is NOT enough. *U.S. v. Randall*
    - MPC allows for ***complete defense*** for renunciation under some circumstances. Need to manifest renunciation AND succeed in preventing commission of the criminal objectives.
  + [Scope]
    - MPC 1.07(1)(b) – D may NOT be convicted of more than one offense if “one offense consists only of a conspiracy or other form of preparation to commit the other.” But when agreement is to achieve ***various criminal objectives*** and is NOT limited to a specific crime 🡪 cumulative sentences.
* **Scope**
  + [Single Or Multiple Conspiracies]
    - [Spoke Analogy] *Kotteakos v. United States*
      * **Multiple conspiracies, not one**. Metaphor about spokes and wheel. No rim. Individual parties were only linked to middle, not to other spokes. Mere knowledge of other parties is NOT enough.
      * Rim was found. Knowledge of others, plus some sort of **interdependence** (wanting the group to succeed). *Anderson v. Superior Court*
    - [Links In Chain] *United States v. Bruno*
      * Single conspiracy. Does NOT matter if links of chains don’t communicate with each other. **Know** they’re **connected and necessary** part of the crime. Mutually dependent on each other. (but what if individual retailers compete against each other?)
      * **MPC** – how many conspiracies are there? 5.103(1) (no single answer).
        + Avoids artificiality of spokes and chains.
        + Abolishes all of collateral consequences of conspiracy. Restricts liability to normal accomplice principles.
    - How much should be infer interdependence from knowledge?
    - Joining and liability (p. 731)
      * Join conspiracy, liable for all prior conspiracy, but not substantive acts.
* **Constitutional Constraints on the Definition of Crimes**
* The Ban On Status Crimes
  + *Robinson v. California* (arrested for addiction)
    - Cannnot be arrested for status/involuntary action/disease. Like being arrested for common cold. Illness may be contracted innocently or involuntarily (addicted from birth b/c user parent).
      * Notions of Status
      * Notions of Involuntariness
      * Notion of disease
        + Probably a mix of status/involuntariness.
        + Ex. being a prostitute? Not a disease?
      * Ok to **civilly commit** an addict. Treatment vs. punishment (stigma of moral condemnation). There is a **distinctive stigma** of criminal punishment.
    - 90 days itself is not cruel and unusual, but **question cannot be considered in the abstract**.
    - Harlan: cannot punish someone for a **bare desire**.
  + *Powell v. Texas* (alcoholic)
    - Reinterprets *Powell* to mean “punish a mere status” 🡪 only can be punished if accused has committed some act, engaged behavior. Very narrow read of *Powell*.
    - H: can punish for alcoholism. Not for irresistible impulse (medicine is unclear on alcoholism, is it an irresistible impulse?), but when they act on impulse. Cannot keep *Robinson* within reasonable limits. Slippery slope.
  + *Robinson*/*Powell* stands for constitutionalizing classic understanding of voluntary act.
    - Ex. homeless guy with extreme history of public intoxication. Seems like cannot help himself. Doesn’t matter under *Robinson/Powell*. BUT, maybe only 4 would uphold (White seems like he would say no). Not insanity b/c not due to mental defect (alcoholism not define)
  + *Keeler v. Superior Court*
    - Jurisdictional issue – courts not allowed to make new laws. Power to define crimes and fix penalties is vested exclusively in the legislative branch.
      * Even if there are good policy reasons, not the place of the court to **extend** the common law.
    - Constitutional – D didn’t have notice. Retroactive enlargement of law.
      * Abortion issue lurking in this case?
* **EXAM**
  + Two questions. ~1500 words each. Word limit.
    - One: issue spotter. In MPC jurisdiction. If MPC ambiguous 🡪 bring in common law.
      * Find issues. Recognize significant tensions. Give best arguments on both sides. Resolve tensions and why they resolved on certain side. Describe what values underwrite law that push to either side (underlying policy concerns).
    - Second: thought piece. Responding to quote or working through statute and describing how it would play out. Or straight policy piece.
      * If requires close read, put statutory language itself in.
* **REVIEW**
  + MPC on individual/objective standard for fatal self-defense?
    - Common law: like *Goetz*, normally objective.
    - MPC sort of punted. Put both standards in. **Jury is ultimately making decision on whether norms used are allowed**. (another tension: judge v. jury). MPC relaxes admissibility requirement, in the end, pushes towards the jury.
      * Subjective at the outset, but then requires some objective check.
  + MPC mens rea provision in respect to rape.
    - Think *Rusk*: force becomes proxy for non-consent.
    - MPC does NOT call for affirmative consent. Not lynchpin for non-consent.
  + MPC in causation
    - Animated by common law. Med neg. is always foreseeable. Gross neg. is NOT foreseeable. Simple negligence is foreseeable.
      * *Stamp* is not MPC, but majority rule and is followed fairly closely by MPC?
    - Most cases, causation only requires a sentence or to. If an issue, will jump out at you. Strange occurrence.
  + If **attempted felony**, can NOT have FM rule.
  + Merger Doctrine: prevents charging twice.
    - Lesser-included offenses merge into the crime itself. Cannot charge w/ both simple and aggravated assault. Same assault 🡪 have to choose one of them.
    - Independent felonious intent is a common way for the courts to look at.
    - Can use inherently dangerous or innumerate felony. Attempt to limit reach of FM.
    - “Included in fact” used for the case it was in, but clunky and hard to apply to other cases.
    - Q: what is the **nature** of underlying felony. Is it included in the murder? Or is it an independent crime?
  + Use common law for doctrine of **omission** Duty to prevent harm if you created it.