***ACTUS REUS* AND *MENS REA***

**I. GENERAL**

**A. Four elements:** All crimes have several basic common elements: (1) a ***voluntary act*** (“*actus reus*”); (2) a ***culpable intent*** (“*mens rea*”); (3) ***“concurrence”*** between the *mens rea* and the *actus reus*; and (4) ***causation*** of harm.

**II. *ACTUS* *REUS***

**A. Significance of concept:** The defendant must have committed a ***voluntary act***, or ***“actus reus***.***”*** Look for an *actus reus* problem anytime you have one of the following situations: (1) D has not committed physical acts, but has “guilty” ***thoughts***, ***words***, states of ***possession*** or ***status***; (2) D does an ***involuntary act***; and (3) D has an ***omission***, or failure to act.

**B. Thoughts, words, possession and status: *Mere thoughts*** are never punishable as crimes. (*Example:* D writes in his diary, “I intend to kill V.” This statement alone is not enough to constitute any crime, even attempted murder.)

1. **Possession as criminal act:** However, mere ***possession*** of an object may sometimes constitute the necessary criminal act. (*Example:* Possession of narcotics frequently constitutes a crime in itself.)

**a. Knowledge:** When mere possession is made a crime, the act of “possession” is almost always construed so as to include only ***conscious*** possession. (*Example:* If the prosecution fails to prove that D knew he had narcotics on his person, there can be no conviction.)

**C. Act must be voluntary:** An act cannot satisfy the *actus reus* requirement unless it is ***voluntary***.

**1. Reflex or convulsion:** An act consisting of a ***reflex*** or ***convulsion*** does not give rise to criminal liability.

**Example:** D, while walking down the street, is stricken by epileptic convulsions. His arm jerks back, and he strikes X in the face. The striking of X is not a voluntary act, so D cannot be held criminally liable. But if D had known beforehand that he was subject to such seizures, and unreasonably put himself in a position where he was likely to harm others — for instance, by driving a car — this initial act might subject him to criminal liability.

**2. Unconsciousness:** An act performed during a state of ***“unconsciousness”*** does not meet the *actus reus* requirement. But D will be found to have acted “unconsciously” only in rare situations.

**Example:** If D can show that at the time of the crime he was on “automatic pilot,” and was completely unconscious of what he was doing, his act will be involuntary. (But the mere fact that D has *amnesia* concerning the period of the crime will *not* be a defense.)

**3. Hypnosis:** Courts are split about whether acts performed under ***hypnosis*** are sufficiently “involuntary” that they do not give rise to liability. The Model Penal Code (MPC) treats conduct under hypnosis as being involuntary.

**4. Self-induced state:** In all cases involving allegedly involuntary acts, D’s ***earlier voluntary act*** may deprive D of the “involuntary” defense.

**Example:** D, a member of a cult run by Leader, lets himself be hypnotized. Before undergoing hypnosis, D knows that Leader often gives his members orders under hypnosis to commit crimes. D can probably be held criminally liable for any crimes committed while under hypnosis, because he knowingly put himself in a position where this might result.

**D. Omissions:** The *actus reus* requirement means that in most situations, there is no criminal liability for an ***omission*** to act (as distinguished from an affirmative act).

**Example:** D sees V, a stranger, drowning in front of him. D could easily rescue V. D will normally not be criminally liable for failing to attempt to rescue V, because there is no general liability for omissions as distinguished from affirmative acts.

**1. Existence of legal duty:** But there are some “special situations” where courts deem D to have a ***special legal duty to act***. Where this occurs, D’s omission may be punished under a statute that speaks in terms of positive acts.

**a. Special relationship:** Where D and V have a ***special relationship*** — most notably a ***close blood relationship*** — D will be criminally liable for a failure to act. (*Example:* Parent fails to give food or water to Child, and Child dies. Even if there is no general statute dealing with child abuse, Parent can be held liable for murder or manslaughter, because the close relationship is construed to impose on Parent an affirmative duty to furnish necessities and thereby prevent death.)

* **Permitting child abuse:** Some courts have applied this theory to hold one parent liable for child abuse for ***failing to intervene*** to stop affirmative abuse by the other parent.

**b. Contract:** Similarly, a legal duty may arise out of a ***contract***. (*Example:* Lifeguard is hired by City to guard a beach. Lifeguard intentionally fails to save Victim from drowning, even though he could easily do so. Lifeguard will probably be criminally liable despite the fact that his conduct was an omission rather than an act; his contract with City imposed a duty to take affirmative action.)

**c. D caused danger:** If the ***danger was caused*** (even innocently) by ***D himself***, D generally has an affirmative duty to then save V.

* **Example:** D digs a hole in the sidewalk in front of his house, acting legally under a building permit. D sees V about to step into the hole, but says nothing. V falls in and dies. D can be held criminally liable for manslaughter, because he created the condition — even though he did so innocently — and thus had an affirmative duty to protect those he knew to be in danger.

**d. Undertaking:** Finally, D may come under a duty to render assistance if he ***undertakes*** to give assistance. This is especially true where D leaves V ***worse off*** than he was before, or effectively dissuades other rescuers who believe that D is taking care of the problem.

**Example:** V is drowning, while D and three others are on shore. D says, “I’ll swim out to save V.” The others agree, and leave, thinking that D is taking care of the situation. Now, D will be criminally liable if he does not make reasonable efforts to save V.

**III. *MENS REA***

**A. Meaning:** The term ***“mens rea”*** symbolizes the requirement that there be a ***“culpable state of mind***.***”***

**1. Not necessarily state of mind:** Most crimes require a true “*mens rea*,” that is, a state of mind that is truly guilty. But other crimes are defined to require merely “negligence” or “recklessness,” which is not really a state of mind at all. Nonetheless, the term “*mens rea*” is sometimes used for these crimes as well: thus one can say that “for manslaughter, the *mens rea* is recklessness.” There are also a few crimes defined so as to require no *mens rea* at all, the so called “strict liability” crimes.

**B. General vs. specific intent:** Court traditionally classify the *mens rea* requirements of various crimes into three groups: (1) crimes requiring merely ***“general intent”***; (2) crimes requiring ***“specific intent”***; and (3) crimes requiring merely ***recklessness*** or ***negligence***. (Strict liability crimes form a fourth category, as to which there is no culpable mental state required at all.)

**1. “General intent”:** A crime requiring merely ***“general intent”*** is a crime for which it must merely be shown that D ***desired to commit the act which served as the actus reus***.

**2. “Specific intent”:** Where a crime requires ***“specific intent”*** or “special intent,” this means that D, in addition to desiring to bring about the *actus reus*, must have desired to do ***something further***.

**Example of general intent crime:** Battery is usually a “general intent” crime. The *actus reus* is a physical injury to or offensive touching of another. So long as D intends to touch another in an offensive way, he has the “general intent” that is all that is needed for battery. (Thus if D touches V with a knife, intending merely to graze his skin and frighten him, this will be all the (general) intent needed for battery, since D intended the touching, and no other intent (such as the intent to cause injury) is required.

**Example of specific intent crime:** For common-law burglary, on the other hand, it must be shown that D not only intended to break and enter the dwelling of another, but that he also intended to commit a felony once inside the dwelling. This latter intent is a “specific intent” — it is an intent other than the one associated with the *actus reus* (the breaking and entering).

**3. Significance:** The general/specific intent distinction usually matters in two situations: (1) where D is ***intoxicated***; and (2) where D makes a ***mistake*** of law or fact.

**a. Intoxication: *Intoxication*** rarely negates a crime of general intent, but may sometimes negate the specific intent for a particular crime. (*Example:* D breaks and enters, but is too drunk to have any intent to commit larceny or any other felony inside; D probably is not guilty of burglary.)

**b. Mistake:**  Similarly, a ***mistake*** of fact is more likely to be enough to negate the required specific intent.

**Example:** D breaks and enters, in an attempt to carry away something which he mistakenly thinks belongs to him; D will probably be acquitted of burglary, where mistake will generally not negate a general intent (e.g., the intent to commit the breaking and entering by itself).

**4. Abandonment of distinction:** However, many modern codes, and the Model Penal Code, have ***abandoned*** the general/specific distinction, and instead set forth the precise mental state required for each element of each crime. [13]

**C. “Purposely” as mental state:** Many crimes are defined to be committed only where a person acts ***“purposely”*** with respect to a particular element of a crime. Other crimes are defined to require the similar, but not identical, mental state of ***“intentionally***.***”*** [14 - 16]

**1. Definition of “purposely”:** A person acts “purposely” with respect to a particular element if it his ***“conscious object”*** to engage in the particular conduct in question, or to cause the particular result in question.

**2. Not the same as “knowingly”:** In modern statutes, “purposely” is not the same as “knowingly.” If D does not desire a particular result, but is ***aware*** that the conduct or result is ***certain to follow***, this is ***not*** “purposely.”

* **Example:** D consciously desires to kill A, and does so by putting a bomb on board a plane that contains both A and B. Although D knew B’s death was certain, a modern court would probably not hold that D “purposely” killed B, (although D might nonetheless be guilty of murder on the grounds that he acted with a “depraved heart”).

**3. Motive:** D’s ***motive*** will usually be ***irrelevant*** in determining whether he acted “purposely” or “intentionally.”

* **Example:** D, in an act of euthanasia, kills V, his wife, who has terminal cancer. D will be held to have “purposely” or “intentionally” killed V, even though he did it for ostensibly “good” motives.

**a. Relevant to defenses:**  Special motives may, however, be relevant to the existence of a ***defense*** (e.g., the defense of self-defense or necessity).

**D. “Knowingly”:** Modern statutes, and the Model Penal Code, define some crimes to require that D ***“knowingly”*** take an act or produce a result. The biggest distinction between “purposely” and “knowingly” relates to D’s awareness of the ***consequences*** of his act: if the crime is defined with respect to a certain result of D’s conduct, D has acted knowingly (but not “purposely”) if he was “aware that it is ***practically certain*** that his conduct will cause that result.”

**Example:** On the facts of our earlier “bomb on the airplane” example, D will have “knowingly” killed B, but not “purposely” killed B, because he was aware that it was practically certain that his conduct would cause B’s death.

**1. Presumption of knowledge:** A statutory or judge-made ***presumption*** may be used to help prove that D acted “knowingly.” (*Example:* In many statutes governing receipt of stolen property, D’s unexplained possession of property which is in fact stolen gives rise to a presumption that D knew the property was stolen.)

**2. Knowledge of attendant circumstances:** Where a statute specifies that D must act “knowingly,” and the statute then specifies various ***attendant circumstances*** which the definition of the crime makes important, usually the requirement of knowledge is held applicable to ***all these attendant circumstances***.

**Example:** A statute provides that any dealer in used merchandise must file a report with the police if the dealer “knowingly purchases a used item from one who is not in the business of selling such items, at a price less than half of the fair market value of the item.” The statute’s purpose is to cut down on the “fencing” of stolen goods. D, a used merchandise dealer, buys a vase for $500 that is really worth $2,000. Most courts would require the prosecution to show that D knew not only that he was purchasing the vase, but that he knew he was paying less than half of the vase’s fair market value. In other words, D must be shown to have acted knowingly with respect to all of the attendant circumstances, including the circumstance that the purchase price was much less than the value.

**E. “Recklessly”:** A person acts ***“recklessly”*** if he ***“consciously disregards a substantial and unjustifiable risk***....***”*** MPC §2.02(2). The idea is that D has behaved in a way that represents a ***gross deviation*** from the conduct of a law-abiding person.

**1. Must be aware of risk:** Most courts, and the Model Penal Code, hold that D is reckless only if he was ***aware*** of the high risk of harm stemming from his conduct. This is a “subjective” standard for recklessness. But a substantial minority of courts and statutes hold that D can be reckless if he behaves extremely unreasonably even though he was unaware of the risk.

**Example:** D runs a nightclub with inadequate fire exits. A fire breaks out, killing hundreds. Under the majority “subjective” standard for recklessness, D was reckless only if he actually knew of the high risk of harm posed by inadequate fire exits. Under the minority “objective” standard, it would be enough that D was extremely careless and that a reasonable person would have known of the great danger, even though D did not.

**F. “Negligently”:** Some statutes make it a crime to behave ***“negligently”*** if certain results follow. For instance, the crime of “vehicular homicide” is sometimes defined to require a *mens rea* of “criminal negligence.”

**1. Awareness not required:** Most modern statutes, and the Model Penal Code, allow a finding of criminal negligence even if D was ***not aware*** of the risk imposed by his conduct (as in the above night-club fire example).

**2. “Gross” negligence required:** Usually, criminal negligence is ***“gross”*** negligence. That is, the deviation from ordinary care must be greater than that which would be required for civil negligence.

**G. Strict liability:** Some offenses are ***“strict liability***.***”*** That is, no culpable mental state at all must be shown — it is enough that D performed the act in question, regardless of his mental state.

**Examples of strict liability crimes:** The following are often defined as strict liability offenses: Statutory rape (D is generally guilty if he has intercourse with a girl below the prescribed age, regardless of whether he knew or should have known her true age); mislabeling of drugs; polluting of water or air; concealment of a dangerous weapon while boarding an aircraft.

**1. Constitutionality:** Generally there is no constitutional problem with punishing a defendant without regard to his mental state.

**2. Interpretation:** The mere fact that the statute does not specify a mental state does not mean that the crime is a strict liability one — judges must determine whether a particular mental state was intended by the legislature. In general, the older the statute (especially if it is a codification of a common-law crime), the less likely it is to be a strict-liability offense. Most strict liability offenses are modern, and are of relatively low heinousness.

**a. Complex statute that is easy to violate innocently:** If the statute is ***complex***, or ***easy to violate innocently,*** or ***imposes serious penalties,*** the court is likely to read in a *mens rea* requirement, and thus to refuse to treat the statute as imposing strict liability. [*Staples v. U.S.*]

**b. MPC:** Under the MPC, the only offenses that are strict liability are ones called ***“violations.”*** These are minor offenses that do not constitute a “crime” and that may be punished only by fine or forfeiture.

**H. Vicarious liability:** Statutes sometimes impose upon one person liability for the ***act of another***; this is commonly called ***“vicarious liability.”*** In essence, the requirement of an act (*actus reus*) has been dispensed with, not the requirement of the wrongful intent.

**Example:** Statutes frequently make an *automobile owner* liable for certain acts committed by those to whom he lends his car, even without a showing of culpable mental state on the part of the owner.

**1. Constitutionality:** Generally, the imposition of vicarious liability does ***not*** violate D’s due process rights. However, there are exceptions:

**a. D has no control over offender:** If D did not have any ***ability to control*** the person who performed the actual *actus reus*, his conviction is probably unconstitutional.

**Example:** X steals D’s car, and exceeds the speed limit. It is probably unconstitutional for the state to impose criminal sanctions upon D, since he had no ability to control X’s conduct.

**b. Imprisonment:** If D has been sentenced to ***imprisonment*** (or even if he is convicted of a crime for which imprisonment is authorized), some courts hold that his due process rights are violated unless he is shown to have at least ***known*** of the violation.

**Example:** D is a tavern owner whose employee served a minor. If D did not know of this act, or in any way acquiesce in its commission, some courts would hold that D may not constitutionally be imprisoned for it.

**I. Mistake:** Defendants raise the defense of ***mistake*** when they have been mistaken either about the facts or the law. Do not think of “mistake” as being a separate “doctrine.” Instead, look at the effect of the particular mistake on D’s ***mental state***, and examine whether he was thereby prevented from having the mental state required for the crime.

**Example:** Assume that the requisite mental intent for larceny is the intent to take property which one knows or believes to belong to another. D takes V’s umbrella from a restaurant, thinking that it is his own. D’s factual mistake — his belief about who owns the umbrella — is a defense to the theft charge, because it negates the requisite mental state (intent to take the property which one knows or believes belongs to another).

**1. Crimes of “general intent”:** D’s mistake is ***least likely*** to assist him where the crime is a ***“general intent”*** crime (i.e., one for which the most general kind of culpable intent will suffice).

**Example:** Murder is often thought of as a “general intent” crime in the sense that it will be enough that D either intends to kill, intends to commit grievous bodily injury, is recklessly indifferent to the value of human life or intends to commit any of certain non-homicide felonies. Suppose D shoots a gun at V, intending to hit V in the arm and thus create a painful but not serious flesh wound. D mistakenly believes that V is in ordinary health, when in fact he is a hemophiliac. D’s mistake will not help him, because even had the facts been as D supposed them to be, D would have had a requisite mental state, the intent to commit grievous bodily injury.

**2. “Lesser crime” theory:** D’s mistake will almost never help him if, had the facts been as D mistakenly supposed them to be, his acts would still have been a crime, though a lesser one. This is the ***“lesser crime”*** theory.

**Example:** D steals a necklace from a costume jewelry store. The necklace is made of diamonds, and is worth $10,000, but D mistakenly believes it to be costume jewelry worth less than $500. In the jurisdiction, theft of something worth less than $500 is a misdemeanor, and theft of something worth more than that is a felony. D is guilty of a crime — a felony in most states — because even had the facts been as he supposed them to be, he still would have been guilty of some crime. (But some states, and the Model Penal Code, would scale his crime back to the crime that he would have committed had the facts been as he supposed, in this case, a misdemeanor.)

**a. Moral wrong:** Older decisions extend this principle to deny D of the defense of mistake if, under the facts as D believed them to be, his conduct and intent would have been ***“immoral***.***”*** But modern statutes reject this view.

**3. Mistake must be “reasonable”:** Older cases often impose the rule that a mistake cannot be a defense unless it was ***“reasonable***.***”*** But the modern view, and the view of the MPC, is that ***even an unreasonable mistake*** will block conviction if the mistake prevented D from having the requisite intent or knowledge.

**Example:** D attempts (unsuccessfully) to have sex with a girl he meets on the street. He is charged with assault with intent to rape. D shows that he actually, but unreasonably, believed that V was a prostitute, because prostitutes frequented that area. A traditional court would probably hold that the mistake was no defense, since D’s mistake was “unreasonable.” But a modern court might allow the defense, since had the facts been as D supposed them to be, he would not have intended to commit a crime (unconsented-to sex).

**a. Rejection by finder of fact:** Remember that even in a “modern” jurisdiction, the finder of fact is always free to ***disbelieve*** that the mistake really occurred. Thus on the facts of the above example, the more “unreasonable” D’s story that he thought V was a prostitute, the quicker the jury (or the judge in a bench trial) can be to conclude simply that D was not in fact mistaken.

**4. Mistake of law:** It is especially hard for D to prevail with a defense based on ***“mistake of law***.***”***

**a. Generally no defense:** As a general rule, ***“mistake of law is no defense.”*** More precisely, this means that ***the fact that D mistakenly believes that no statute makes his conduct a crime does not furnish a defense***.

**Example:** D, who is retarded, does not realize that unconsented-to intercourse is a crime. D has unconsented-to intercourse with V. D’s ignorance that unconsented-to intercourse is a crime will not be a defense; so long as D intended the act of intercourse while knowing that V did not consent, he is guilty.

**i. Reasonable mistake:** In this core “D mistakenly believes that no statute makes his conduct a crime” situation, even a ***reasonable mistake*** about the meaning of the statute will usually ***not*** protect D. In other words, so long as the crime is not itself defined in a way that makes D’s guilty knowledge a prerequisite, there is usually no “reasonable mistake” exception to the core “mistake of law is no defense” rule.

**b. Mistake of law as to collateral fact:** It is important to remember that the oft-stated “rule,” “ignorance of the law is no excuse,” really only means ***“ignorance that a statute makes one’s conduct a crime is no excuse.”*** A mistake of law as to some ***collateral fact*** may negative the required mental state, just as a mistake of fact may do so. [29]

**Example 1:** D’s car has been repossessed by Finance Co. D finds the car, breaks in, and takes it back. D’s belief that the car is still legally his *will* absolve him, because it prevents him from having the requisite mental state for theft (intent to take property which one knows or believes to belong to another). (But if D had taken his neighbor’s car, his ignorance that there is a statute making it a crime to take one’s neighbor’s property would not be a defense.)

**Example 2:** D reasonably believes that he has been divorced from W, his first wife, but in fact the “divorce” is an invalid foreign decree, which is not recognized under local law. D then marries V. D’s “mistake of law” about the enforceability of the prior divorce *will* negative the intent needed for bigamy (intent to have two spouses at once).

**c. Mistake of law defense built in:** Of course, it’s always possible for the legislature to write a statute in such a way that a mistake of law *will* constitute a defense (or so that awareness of the criminality of the conduct is an element of the offense). For instance, the legislature might do this by defining the crime to consist of a ***“willful*** violation” — the use of the word “willful” would probably be interpreted to require knowledge by the defendant that his act was prohibited by law.

**Example:** A federal statute prohibits “structuring” bank transactions to evade the requirement that all transactions over $10,000 be reported to the government. Another statute makes it a crime to “willfully” violate the first statute. *Held*, D cannot be convicted of a willful violation of the statute unless the prosecution shows that he was aware of the ban on structuring. [*Ratzlaf v. U.S.*]

**IV. CONCURRENCE**

**A. Two types of concurrence required:** There are two ways in which there must be ***“concurrence”*** involving the *mens rea*: (1) there must be concurrence between D’s ***mental state*** and the ***act***; and (2) there must be concurrence between D’s ***mental state*** and the ***harmful result***, if the crime is one defined in terms of bad results.

**B. Concurrence between mind and act:** There must be concurrence between the ***mental state*** and the ***act***.

**1. Same time:** This requirement is not met if, ***at the time of the act***, the required mental state does not exist.

**Example:** Common-law larceny is defined as the taking of another’s property with intent to deprive him of it. D takes V’s umbrella from a restaurant, thinking that it is his own. Five minutes later, he realizes that it belongs to V, and decides to keep it. D has not committed larceny, because at the time he committed the act (the taking), he did not have the requisite mental intent (the intent to deprive another of his property). The fact that D later acquired the requisite intent is irrelevant.

**2. Mental state must cause act:** In fact, the mental state must ***cause*** the act.

**Example:** D intends to kill V. While driving to the store to buy a gun to carry out his intent, D accidentally runs over V and kills him. D is not guilty of murder, even though the intent to kill V existed at the time the act (driving the car over V) took place. This is because D’s intent to kill did not “cause” the act (driving the car over V).

**a. Any action that is legal cause of harm:** Most crimes are defined in terms of harmful results (e.g., homicide is the wrongful taking of a life). Where D takes ***several acts*** which together lead to the harmful result, the concurrence requirement is met if the mental state concurs with ***any act that suffices as a legal cause*** of the harm.

**i. Destruction or concealment of a “body”:** Because of this rule, D will be guilty if he attempts to kill his victim, believes the victim to be dead, and then destroys or conceals the “body,” killing the victim for real. (*Example:* D strikes V over the head, and thinking V is dead, pushes him over a cliff to destroy the body. The autopsy shows that the blows did not kill V and probably would not have killed him. V really died from the fall off the cliff. Most courts would find D guilty, probably on the theory that the blows to the head were a cause of harm, and the guilty intent (to kill V) caused the blows. [*Thabo Meli v. Regina*, 1 All E.R. 373 (Eng. 1954)])

**C. Concurrence between mind and result:** There must also be concurrence between the mental state and the ***harmful result***, if the crime is one defined in terms of bad results (such as homicide, rape, larceny, etc.) Basically this aspect of concurrence means that if what actually occurred is ***too far removed*** from what was intended, there will be no concurrence and thus no liability.

**1. Different crime:** Thus if the harm which actually occurs is of a completely different ***type*** from what D intended, D will generally not be guilty of the other crime. In other words, the intent for one crime may not usually be linked with a result associated with a different crime.

**Example:** D attempts to shoot V to death while V is leaving his house. The shot misses and ruptures V’s stove, causing V’s house to burn down. Assuming that arson is defined so as to require an intent to burn, D will not be guilty of arson, because the intent for one crime (murder) cannot be matched with the result for another crime (burning) to produce guilt for the latter crime.

**2. Recklessly- or negligently-caused result:** The same rule applies where D has ***negligently*** or ***recklessly*** acted with respect to the risk of a particular result, and a very different result occurs.

**Example:** D recklessly takes target practice with his rifle in a crowded area; what makes his conduct reckless is the high risk that D will injure or kill a person. One of D’s shots hits a gas tank, and causes a large fire. Assuming that the danger of causing a fire was not large, D will not be convicted of arson (even if arson is defined to include reckless burning), since his conduct was reckless only with respect to the risk of bodily harm, not the risk of burning.

**3. Felony-murder and misdemeanor-manslaughter rules:** But this general principle that there is no liability for a resulting harm which is substantially different from that intended or risked by D is subject to two very important ***exceptions***, both relating to ***homicide***:

**a. Felony-murder:** First, if D is engaged in the commission of certain ***dangerous felonies***, he will be liable for certain deaths which occur, even if he did not intend the deaths. This is the ***“felony-murder” rule***.

**b. Misdemeanor-manslaughter:** Second, if D was engaged in a *malum in se* misdemeanor (a misdemeanor that is immoral, not just regulatory), and a death occurs, D may be liable for involuntary manslaughter, even though his conduct imposed very little risk of that death and the death was a freak accident. This is the ***“misdemeanor-manslaughter” rule***.

**4. Same harm but different degree:** If the harm which results is of the ***same general type*** as D intended, but of a ***more or less serious degree***, D gets the benefit of the rules on concurrence.

**a. Actual result more serious than intended:** Thus if the actual harm is ***greater***, and related to, the intended result, D is generally ***not liable*** for the greater harm.

**Example:** Assume simple battery is defined as the intentional causing of minor bodily harm, and aggravated battery is defined as the intentional causing of grievous bodily harm. D gets into a minor scuffle with V, intending merely to hit him lightly on the chin. But V turns out to have a “glass jaw,” which is fractured by the blow. D will not be held guilty of aggravated battery, just simple battery, since his intent was only to produce that lesser degree of injury required for simple battery.

**i. Exceptions in homicide cases:** But again, we have two exceptions to this rule when death results. First, under the misdemeanor-manslaughter rule, if D’s minor attack on V unexpectedly causes V to die, D is guilty of manslaughter (as he would be on the facts of the above example if V unexpectedly bled to death). Second, if D intended to ***seriously injure*** V but not kill him, in most states he will be guilty of murder if V dies from the attack, because most states have a form of murder as to which the mental state is intent-to-grievously-injure.

**Example:** D intends to beat V to a pulp, but not to kill him; V dies unexpectedly. In a state defining murder to include a mental state of intent-to-grievously-injure, D is liable for murder.

**II. The Significance of Harm**

**A. Two aspects of causation:** “Causation” in criminal law relates to the link between the ***act*** and the ***harmful result***. The prosecution must show that the defendant’s *actus reus* “caused” the harmful result, in ***two different senses***: (1) that the act was the ***“cause in fact”*** of the harm; and (2) that the act was the ***“proximate”*** cause (or the “legal” cause) of the harm.

**II. CAUSE IN FACT**

**A. Two ways:** There are two ways in which an act can be the “cause in fact” of harm: (1) by being the ***“but for”*** cause of the harm; and (2) by being a ***“substantial factor”*** in creating the harm. These categories overlap, but not completely.

**B. The “but for” rule:** Most often, the act will be the “cause in fact” of the harm by being the ***“but for”*** cause of that harm. To put the idea negatively, if the result ***would have happened anyway***, even had the act not occurred, the act is ***not a cause in fact*** of that result.

**Example:** D shoots at V, but only grazes him, leaving V with a slightly bleeding flesh wound. X, who has always wanted to kill V, finds V (in the same place V would have been in had D not shot at V), and shoots V through the heart, killing him instantly. D’s act is not a “cause in fact” of V’s death, under the “but for” test — since V would have died, in just the manner and at the same time he did, even if D had not shot him, D’s act was not the “but for” cause of V’s death. Unless D’s act is found to have been a “substantial factor” in V’s death (the other test for causation in fact), which it probably would not, D’s act is not the “cause in fact” of V’s death, and D therefore cannot be punished for that death.

**C. “Substantial factor” test:** D’s act will be found to be the cause in fact of harm, even if the act is not the “but for” cause, if the act was a ***“substantial factor”*** in bringing about the result.

**Example:** At a time of widespread riots, D sets fire to a house at 99 Main Street, and X simultaneously sets fire to one at 103 Main Street. A house at 101 Main Street is consumed by the blaze from the two fires. D is charged with arson. He shows that even had he not torched 99, the flames from 103 would have been enough to burn down 101 at the same time it actually did burn. (Thus D’s act was not the “but for” cause of the burning of 101.) However, since D’s conduct was a (though not the sole) “substantial factor” in burning down 101, he was a “cause in fact” of the fire and will therefore be liable for arson.

**D’s act shortened V’s life:** In a homicide case, if D’s act ***shortened the victim’s life***, this will strongly suggest that D’s conduct was a “substantial factor” in producing the victim’s death.

**Example:** X poisons D, in such a way that despite all medical efforts, V will definitely die within one day. One hour after V drinks the poison, D shoots V, killing him instantly. Since V would have died shortly anyway, it can be argued that D’s shooting was not the “but for” cause of V’s death. But since D shortened V’s life, a court would certainly find that D was a “substantial factor” in causing V’s death, and would find him guilty of murder.

**a. Intervening act shortens V’s life:** Where the ***first*** person to do harm is charged, and defends on the grounds that the second person’s intervening act should relieve him of liability, it’s a closer question, but many courts will find the first person to be guilty here as well.

**Example:** Same facts as above example, except now X, rather than D, is charged with murder. Assuming that V would inevitably have died from the poison had D not come along to shoot him, courts are split about whether D is relieved from liability by the intervening shooting.

**2. Conspiracy:** The above discussion of the “substantial factor” rule assumes that the two concurring acts occurred ***independently*** of each other. If the two occurred as part of a ***joint enterprise***, such as a ***conspiracy***, the act of each person will be attributed to the other, and there will be no need to determine whether each act was a substantial factor in leading to the harm.

**Example:** X and D each shoot V, as part of a successful conspiracy to kill V. Even if D’s shot only caused a small flesh wound and did not really contribute to V’s death, D is guilty of murder, because his co-conspirator’s fatal shot will be attributable to D under the law of conspiracy.

**III. PROXIMATE CAUSE GENERALLY**

**A. Definition of “proximate cause”:** It is not enough that D’s act was a “cause in fact” of the harm. The prosecution must also show that the act and harm are sufficiently closely related that the act is a ***“proximate”*** or “legal” cause of that harm. This is a ***policy*** question: ***Is the connection between the act and the harm so stretched that it is unfair to hold D liable for that harm?***

**1. No precise definition:** There is no precise or mechanical definition of proximate cause — each case gets decided on its own facts.

**2. Model Penal Code formulation:** Under the MPC, in most cases D’s act will be the proximate cause of the harmful result if the result is “not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.” MPC 2.03(2)(b).

**B. Year-and-a-day rule in homicide:** One common-law rule that expresses the proximate-cause idea is the ***“year and a day”*** rule in homicide cases: D cannot be convicted if the victim did not die until a year and a day following D’s act. Many states continue to impose this rule.

**C. Types of problems raised:** Look for two main types of proximate cause problems: (1) situations where the type of harm intended occurred, and occurred in roughly the manner intended, but the ***victim was not the intended one***; and (2) cases where the general type of harm intended did occur and occurred to the intended victim, but occurred in an ***unintended manner***.

**1. Reckless and negligent crimes:** Proximate cause issues are most common in cases where the *mens rea* for the crime is intent. But similar problems also arise where the mental state is recklessness or negligence.

**IV. PROXIMATE CAUSE — UNINTENDED VICTIMS**

**A. Transferred intent:** It will not generally be a defense that the actual victim of D’s act was ***not the intended victim***. Instead, courts apply the doctrine of ***“transferred intent***,***”*** under which D’s intent is “transferred” from the actual to the intended victim.

**Example:** D, intending to kill X, shoots at X. Because of D’s bad aim, D hits and kills V instead. D is guilty of the murder of V, because his intent is said to be “transferred” from X to V.

**1. Danger to actual V unforeseeable:** In most courts, the “unintended victim” rule probably applies even where the danger to the actual victim was ***completely unforeseeable***. (*Example:* While D and X are out on the desert, D shoots at X, thinking the two are completely alone. V, sleeping behind some sagebrush, is hit by the errant bullet. Probably D may be convicted of murdering V.)

**B. Same defense:** In general, D in an “unintended victim” case may raise the ***same defenses*** that he would have been able to raise had the intended victim been the one harmed. (*Example:* D shoots at X in legitimate self-defense. The bullet strikes V, a bystander. D may claim self-defense, just as he could if the bullet had struck the intended victim.)

**C. Mistaken ID:** The fact that D is mistaken about the victim’s ***identity*** will not be a defense.

**Example:** D shoots at V, mistakenly thinking that V is really X, D’s enemy. D will be guilty of the murder of V, just as if he had been shooting at the person who was actually X, and had mistakenly hit V. The crime of murder requires an intent to kill, but does not require a correct belief as to the victim’s identity.

**D. Crimes of recklessness or negligence:** The “unforeseen victim” problem also arises in crimes where the mental state is ***recklessness*** or ***negligence***, rather than intent. But in these situations, a ***tighter link*** between D’s act and V’s injury is probably required than where the crime is intentional.

**V. PROXIMATE CAUSE — UNINTENDED MANNER OF HARM**

**A. Generally:** If D’s intended victim is harmed, but the harm occurs in an ***unexpected manner*** (though it is the same general type of harm intended), the unexpected manner of harm may or may not be enough to absolve D. In general, D will not be liable where the harm occurs through a ***completely bizarre, unforeseeable chain of events***.

**Example:** D gets into a street fight with V, and tries to seriously injure him. As the result of the fight, V is knocked unconscious, recovers a few minutes later, drives away, and is hit by the 8:02 train at a crossing. D’s act is certainly a “but for” cause of the harm to V, since had V not been knocked out, he would have continued on his way and crossed earlier than 8:02. And the general type of harm to V — severe bodily injury — is the same as that intended by D. Yet all courts would agree that the chain of events here was so unforeseeable from D’s perspective that he should not be held liable for V’s death.

**1. “Direct” causation vs. “intervening” events:** Courts often distinguish cases in which D’s act was a ***“direct”*** cause of the harm from those in which there was an ***“intervening”*** cause between D’s act and the harm. But the direct/intervening distinction is only one factor — D has a somewhat better chance, on average, of escaping liability where there was intervening cause than where there was not.

**B. Direct causation:** We say that D’s act was a ***“direct”*** of V’s harm if the harm followed D’s act without the presence of any clearly-defined act or event by an outside person or thing. In direct causation situations, D is rarely able to convince the court that the chain of events was so bizarre that D should be absolved.

**1. Small differences in type of injury:** If the same general ***type of injury*** (e.g., serious bodily harm, death, burning) occurs as was intended by D, the fact that the harm deviates in some small manner from that intended is irrelevant.

**2. Slightly different mechanism:** Similarly, if the general type of harm intended actually occurs, D will not be absolved because the harm occurred in a slightly different ***way*** than intended.

**Example:** D attempts to poison her husband, V, by putting strychnine in a glass of milk she serves him for breakfast. V drinks it, and becomes so dizzy from its effect that he falls while getting up from his chair, hitting his head on the table. He dies from the blow to the head, and the autopsy shows that the poison would not have been enough to kill him directly. Nearly all courts would hold that D is guilty of murder, because her act directly caused V’s death, and there was nothing terribly bizarre about the chain of events leading to that death.

**3. Pre-existing weakness:** If V has a ***pre-existing condition***, unknown to D, that makes him much more ***susceptible to injury or death*** than a normal person would be, D ***“takes his victim as he finds him***.***”*** Thus D may not argue that his own act was not the proximate cause of the unusually severe result.

**Example:** D beats V up, with intent to kill him. V runs away before many blows have fallen, and a person in ordinary health would not have been severely hurt by the blows that did fall. Unknown to D, however, V is a hemophiliac, who bleeds to death from one slight wound. D is guilty of murder, even though from D’s viewpoint V’s death from the slight wounds was unforeseeable.

**Note:** When you are looking at a proximate cause problem, don’t forget to also apply the rules of concurrence and to insist on the *correct mental state*. For instance, suppose D in the above example had only been trying to commit a minor battery on V, instead of trying to kill him. If V died as a result of his hemophilia, D would not be liable for common-law intent-to-kill murder, because he did not have the requisite mental state, the intent to kill. (But he would probably be liable for *manslaughter* under the misdemeanor- manslaughter rule.)

**4. Fright or stress:** Where V’s death results even ***without physical impact***, as the result of a ***fright*** or ***stress*** caused by D, D’s conduct can nonetheless be a proximate cause of the death.

**Example:** During a holdup by D, V, a storekeeper, has a fatal heart attack from the stress. In most courts, V’s death will be held to be the proximate result of D’s act of robbery; coupled with the felony-murder doctrine, this will be enough for D to be guilty of murder, even if there was no way he could have known of V’s heart condition. [*People v. Stamp*]

**C. Intervening acts:** D’s odds of escaping liability are better where an ***“intervening act”*** or intervening ***event*** contributes to the result than where D has “directly” caused the harmful result.

**1. Dependent vs. independent intervening acts:** Courts divide intervening acts into two categories: (1) ***“dependent”*** acts, which are ones which would not have occurred except for D’s act (e.g., medical treatment for a wound caused by D); and (2) ***“independent”*** acts, which would have occurred even if D had not acted, but which combined with D’s act produced the harmful result.

**Example of dependent act:** D wounds V in a fight. X, a doctor, negligently treats V’s wound, and V dies.

**Example of independent act or event:** D poisons V, weakening his immune system. D is then in a car accident which he would have been in even had the poisoning not taken place. V dies from the combined result of the accident and his pre-accident weakened condition.

**a. Significance:** D’s odds of escaping responsibility are somewhat better where the intervening act is ***“independent.”*** An independent intervention will break the chain of events if it was ***“unforeseeable”*** for one in D’s position. A dependent intervening cause will break the chain only if it was both unforeseeable and ***“abnormal***.***”*** An act is less likely to be considered “abnormal” than it is to be considered merely “unforeseeable,” so D typically does better in the independent case.

**2. Intervening acts by third persons:**

**a. Medical treatment:** The most common intervening act is ***medical treatment*** performed by a doctor or nurse upon V, where this treatment is necessitated by injuries inflicted by D. Here, the treatment is obviously in response to D’s act, and therefore is a “dependent” intervening act, so it will only supersede if the treatment is ***“abnormal***.***”***

* **Negligent treatment:** The fact that the treatment is ***negligently performed*** will ***not***, by itself, usually be enough to make it so “abnormal” that it is a superceding event. But if the treatment is performed in a ***reckless*** or ***grossly negligent*** manner, the treatment ***will*** usually be found to be “abnormal” and thus superseding.

**b. Failure to act never supersedes:** A third party’s ***failure to act*** will almost ***never*** be a superseding cause.

**Example:** D shoots V. There is a doctor, X, standing by who could, with 100% certainty, prevent V from dying. X refuses to render assistance because he hates V and wants V to die. D will still be the proximate cause of death — a third party’s failure to act will never supersede.

**3. Act by V:** Sometimes the ***victim herself*** will take an action that is possibly a superseding intervening cause. Acts by victims are generally taken in direct response to D’s act, so they will not be superseding unless they are “abnormal” (not merely “unforeseeable”).

**a. Victim refuses medical aid:** If the victim refuses to receive ***medical assistance*** which might prevent the severe harm imposed by D, the victim’s refusal usually will ***not*** be superseding.

**Example:** D stabs V repeatedly. V refuses a blood transfusion because she is a Jehovah’s Witness. *Held*, V’s refusal to allow the transfusion is not a superseding cause. [*Regina v. Blaue*]

**b. Victim tries to avoid danger:** If the victim attempts to ***avoid the danger*** posed by D, and this attempted escape results in additional injury, the attempt will be a superseding cause only if it is an “abnormal” reaction.

**Example:** D kidnaps V by locking her in a room. V tries to escape by knotting bed sheets together, and falls to her death while climbing down. V’s escape would probably be found not to be “abnormal” even if it is was “unforeseeable,” so it will not be a superseding cause, and D will be the proximate cause of death. The felony-murder rule will then make D guilty of V’s death, even though D did not have any of the mental states for ordinary murder.

**c. V subjects self to danger:** Suppose D urges or encourages V to ***expose himself to danger***. V’s voluntary participation will ***not*** generally supersede, and D will be held to be a proximate cause of the result. [58 - 59]

**Examples:** D persuades V to play Russian Roulette, or to engage in a drag race — many courts will hold D to be the proximate cause of the injury when V shoots himself or crashes.

**ATTEMPT**

**A. Attempt generally:** All states, in general, punish certain unsuccessful ***attempts*** to commit crimes.

**1. General attempt statutes:** Nearly all prosecutions for attempt occur under ***general attempt statutes***. That is, the typical criminal code does not specifically make it a crime to attempt murder, to attempt robbery, etc. Instead, a separate statutory section makes it a crime to attempt to commit any of the substantive crimes enumerated elsewhere in the code.

**B. Two requirements:** For most attempt statutes, there are two principal requirements, corresponding to the *mens rea* and the *actus reus*:

**1. Mental state:** First, D must have had a ***mental state*** which would have been enough to satisfy the *mens rea* requirement of the substantive crime itself. Typically, D will ***intend*** to commit the crime. But if a mental state less than intent (e.g., recklessness) suffices for the substantive crime, there may be instances where this same less-than-intent mental state will suffice for attempted commission of that crime. This is discussed further below.

**2. Act requirement:** Second, D must be shown to have committed some ***overt act*** in furtherance of his plan of criminality. A leading modern view, that of the MPC, is that the act must constitute “a ***substantial step***” in a course of conduct planned to culminate in the commission of the crime, but only if the substantial step is ***“strongly corroborative”*** of D’s criminal purpose. MPC §5.01(1)(c).

**C. Broader liability:** Modern courts impose attempt liability more ***broadly*** than older cases did. Two major illustrations of this broader trend are:

**1. Looser act requirement:** The overt act that D needs to commit can be further away from actual completion of the crime than used to be the case.

**2. Impossibility:** The defense of “legal impossibility” has been dramatically restricted.

**II. MENTAL STATE**

**A. Intent usually required:** Generally, D will be liable for an attempt only if he ***intended*** to do acts which, if they had been carried out, would have resulted in the commission of that crime.

**Example:** D hits V in the jaw, intending only to slightly injure V. Instead, V suffers serious injuries due to hemophilia, but recovers. D will not be liable for attempted murder, even though he came close to killing V; this is because D is liable for attempted murder only if he had the mental state needed for actual murder (in this case, either an intent to kill or an intent to do serious bodily injury).

**1. Specific crime:** Furthermore, D must have had an attempt to commit an act which would constitute the ***same crime*** as he is charged with attempting.

**Example:** On the facts of the above example, it is not enough that D attempted a crime, namely battery against V. What must be shown by the prosecution is that D had the mental state needed for the very crime D is charged with attempting – murder.

**2. Knowledge of likely consequences:** Nor is it enough that D knew that certain consequences were ***highly likely*** to result from his act.

**a. “Substantially certain” results:** But if it is shown that D knew that a certain result was ***“substantially certain”*** to occur, then this may be enough to meet the intent requirement, even though D did not desire that result to occur.

**3. Crimes defined by recklessness, negligence or strict liability:** Ordinarily, there can be no attempt to commit a crime defined in terms of ***recklessness*** or ***negligence*** or ***strict liability***.

**a. Bringing about certain result:** This is clearly true as to crimes defined in terms of recklessly or negligently bringing about a ***certain result*** – there can be no attempt liability for these crimes. [149]

**Example:** D gets into his car knowing that it has bad brakes, but recklessly decides to take a chance. D almost runs into V because he can’t stop in time, but V dives out of the way. D will not be guilty of attempted involuntary manslaughter, because crimes defined in terms of recklessly or negligently bringing about a certain result cannot give rise to attempt liability.

**b. Strict-liability crimes:** Generally, courts will not convict D of attempting a ***strict-liability crime*** unless D had a culpable state of mind.

**4. Intent as to surrounding circumstances:** It is probably ***not*** necessary that D’s intent encompass all of the ***surrounding circumstances*** that are elements of the crime.

**Example:** A federal statute makes it a federal crime to kill an FBI agent. Case law demonstrates that for the completed crime, it is enough that the defendant was reckless or even negligent with respect to the victim’s identity. D tries to shoot V (an FBI agent) to death, but his shot misses; D recklessly disregarded the chance that V might be an FBI agent. Probably D may be found guilty of attempted killing of an FBI agent.

**III. THE ACT — ATTEMPT VS. “MERE PREPARATION”**

**A. The problem:** All courts agree that D cannot be convicted of attempt merely for thinking evil thoughts, or plotting in his mind to commit a crime. Thus all courts agree that D must have committed some ***“overt act”*** in furtherance of his plan of criminality. But courts disagree about what sort of act will suffice. In general, modern courts hold that D must come much ***less close to success*** than older courts required.

**B. Various approaches:** There are two main approaches which courts use to decide whether D’s act was sufficient, the “proximity” approach and the “equivocality” approach.

**1. The “proximity” approach:** Most courts have based their decision on ***how close D came to completing the offense***. This is the ***“proximity”*** approach. In general, older decisions required D to come very close to success – thus older decisions frequently require D to achieve a ***“dangerous proximity to success***.***”*** But modern courts tend to require merely that D take a ***“substantial step”*** towards carrying out his criminal plan.

**2. The “equivocality” approach:** Other courts follow a completely different approach, concentrating not on how close D came to success, but on whether D’s conduct ***unequivocally manifested his criminal intent***. Under this ***“equivocality”*** approach, if D’s conduct could indicate either a non-criminal intent or a criminal one, it is not sufficient – but if it does unequivocally manifest criminal intent, it suffices even though completion of the plan is many steps away.

**a. Confession excluded:** Under the “equivocality” test, any ***confession*** by D, made either to police or to other persons, is usually ***not to be considered*** in determining whether D’s acts were unequivocally criminal in intent.

**3. MPC’s “substantial step” test:** The MPC incorporates aspects of both the “proximity” test and the “equivocality” test. But the incorporated aspects of each test are relatively unstringent in the MPC approach, so that almost any conduct meeting any of the variations of ***either*** of these tests would be sufficient under the Code. Under the MPC, conduct meets the act requirement if, under the circumstances as D believes them to be: (1) there occurs “an act or omission constituting a ***substantial step*** in a course of conduct planned to culminate in [D’s] commission of the crime”; and (2) the act is ***“strongly corroborative”*** of the actor’s criminal purpose.

**a. Illustrations:** Here are some illustrations of conduct that would suffice as overt acts under the MPC’s “substantial step” approach:

**i. *Lying in wait*, *searching*** for or ***following*** the contemplated victim of the crime.

**ii. *Enticing*** or seeking to entice the contemplated victim to ***go to the***place contemplated for its commission.

**iii. *Reconnoitering*** the place contemplated for commission of the crime. (*Example:* D is caught while hiding in the bushes observing V’s residence, while V is away from home. This “casing the joint” will probably suffice.)

**iv.** Unlawful ***entry*** of a structure, vehicle or enclosure where the crime is to be committed.

**v. *Possession of materials*** to be employed in the commission of the crime, if the materials are ***specially designed*** for such unlawful use or can serve no lawful purpose of D under the circumstances. (*Example:* D is stopped on the street at night and is found to be in possession of lock-picking tools. Probably he can be convicted of attempted burglary.)

**b. Followed in many states:** The MPC’s “substantial step” test is a popular one. About half the states, and two-thirds of the federal circuits, now use something like this test.

**IV. IMPOSSIBILITY**

**A. Nature of “impossibility” defense:** The ***“impossibility”*** defense is raised where D has done everything in his power to accomplish the result he desires, but, due to external circumstances, no substantive crime has been committed. Most variants of the defense are ***unsuccessful*** today, but it is still important to be able to recognize situations where the defense might plausibly be raised. Here are some examples:

**Example 1:** D, a would-be pickpocket, reaches into V’s pocket, but discovers that it is empty.

**Example 2:** D, a would-be rapist, achieves penetration of V, but discovers that V is a corpse, not a living woman.

**Example 3:** D buys a substance from V, thinking that it is heroin. In fact, the substance is sugar, because V is an undercover narcotics operative.

**Note:** In these three examples, a modern court would almost certainly hold that D is *liable* for attempt (to commit the substantive crime of larceny, rape and narcotics possession, respectively).

**B. Factual impossibility:** A claim of ***factual*** impossibility arises out of D’s mistake concerning an issue of fact. D in effect says, “I made a mistake of fact. Had the facts been as I believed them to be, there would have been a crime. But under the true facts, my attempt to commit a crime could not possibly have succeeded.”

**1. Not accepted:** The defense of factual impossibility is ***rejected*** by all modern courts. Impossibility is ***no defense*** in those cases where, ***had the facts been as D believed them to be, there would have been a crime***. Thus D is guilty of an attempt (and his “factual impossibility” defense will fail) in all of the following examples:

**Example 1:** D points his gun at A, and pulls the trigger. The gun does not fire because, unbeknownst to D, it is not loaded.

**Example 2:** D intends to rape X, but is unable to do so because he is impotent.

**Example 3:** D is a “con man” who tries to get X to entrust money to him, which D intends to steal. Unbeknownst to D, X is a plainclothes police officer who is not fooled.

**Example 4:** D attempts to poison X with a substance D believes is arsenic, but which is in fact harmless.

**C. “True legal” impossibility:** A different sort of defense arises where D is mistaken about ***how an offense is defined***. That is, D engages in conduct which he believes is forbidden by a statute, but D has misunderstood the meaning of the statute. Here, D will be ***acquitted*** – the defense of “true legal” impossibility is a successful one. You can recognize the situation giving rise to the “true legal” impossibility defense by looking for situations where, ***even had the facts been as D supposed them to be***, no crime would have been committed.

**Example 1:** D obtains a check for $2.50. He alters the numerals in the upper right hand corner, changing them to “12.50.” But D does not change the written-out portion of the check, which remains “two and 50/100 dollars.” Because the crime of forgery is defined as the material alteration of an instrument, and the numerals are considered an immaterial part of a check (the amount written out in words controls), D will be acquitted of attempted forgery. [*Wilson v. State*]

**Example 2:** D is questioned by X, a police officer, during a criminal investigation. D lies, while believing that lying to the police constitutes perjury. D cannot be convicted of attempted perjury, because the act he was performing (and in fact the act he thought he was performing) is simply not a violation of the perjury statute.

**Note:** The defense of “true legal impossibility” is the flip side of the rule that “mistake of law is no excuse.” Just as D cannot defend on the grounds that he did not know that his acts were prohibited, so D will be acquitted where he commits an act that he thinks is forbidden but that is not forbidden.

**D. Mistake of fact governing legal relationship:** There is a third category, involving a ***mistake of fact*** that ***bears upon legal relationships***. In this situation, D understands what the statute prohibits, but mistakenly believes that the facts bring his situation within the statute. Here, D will be ***convicted*** of attempt. This is because ***had the facts been as D supposed them to be, his conduct would have been a crime.***

**Example:** D buys goods which he believes are stolen. In fact, the goods are police “bait,” and D has been tricked by the seller, an undercover police officer, into thinking that they are stolen. D is guilty of attempted possession of stolen property.

**Example:** D has intercourse with X, who he believes is in an unconscious drunken stupor. In fact, X is already dead at the time of intercourse. D is guilty of attempted rape, since had the facts been as he supposed them to be, his conduct would have been a crime. [*U.S. v. Thomas*, 13 U.S.C.M.A. 278 (1962)]

**Note:** All three categories – “factual” impossibility, “true legal impossibility” and “factual mistake bearing on legal relationship” – can be explained with one principle. Ask, “Would D’s conduct have been criminal had the facts been as D supposed them to be?” For the “true legal impossibility” situation, the answer is “no.” For the other two situations, the answer is “yes,” so D is guilty of attempt in just the latter two situations.

**E. “Inherent” impossibility (ineptness and superstition):** If D’s act is, to a reasonable observer, so ***farfetched*** that it had ***no probability of success***, D may be able to successfully assert the defense of ***“inherent impossibility***.***”***

**1. Courts split:** Courts are ***split*** about whether to recognize a defense of “inherent impossibility.” The MPC authorizes a ***conviction*** in such cases, but also allows conviction of a lesser grade or degree, or in extreme circumstances even a dismissal, if the conduct charged “is so inherently unlikely to result or culminate in a commission of a crime that neither such conduct nor the actor presents a public danger....”

**Example:** D, a Haitian witch doctor, immigrates to the U.S. and continues practicing voodoo. A police officer sees D sticking pins in a doll representing V, in an attempt to kill V. D is charged with attempted murder of V. A court might conclude that D’s conduct was so inherently unlikely to kill V (and that D himself was so unlikely to commit the substantive crime of murder or to make a more “serious” attempt to kill V) that D should be acquitted, or convicted of a lesser crime such as attempted battery.

**V. RENUNCIATION**

**A. Defense generally accepted:** Where D is charged with an attempted crime, most courts accept the defense of ***renunciation***. To establish this defense, D must show that he ***voluntarily abandoned*** his attempt before completion of the substantive crime.

**Example:** D decides to shoot V when V comes out of V’s house. D carries a loaded gun, and waits in the bushes outside V’s house. Five minutes before he expects V to come out, D decides that he doesn’t really want to kill V at all. D returns home, and is arrested and charged with attempted murder. All courts would acquit D in this circumstance, because he voluntarily abandoned his plan before completing it (even though the abandonment came after D took sufficient overt acts that he could have been arrested for an attempt right before the renunciation).

**B. Voluntariness:** All courts accepting the defense of abandonment require that the abandonment be ***“voluntary***.***”***

**1. Threat of imminent apprehension:** Thus if D, at the last moment, learns facts causing him to believe that he will be ***caught*** if he goes through with his plan, the abandonment will generally not be deemed voluntary.

**Example:** On the facts of the above example, just before V is scheduled to come out of his house, D spots a police officer on the sidewalk near D. D’s abandonment has been motivated by the fear of imminent apprehension, so his abandonment will not be deemed voluntary, and D can be convicted of attempted murder.

**2. Generalized fear:** On the other hand, if D abandons because of a ***generalized*** fear of apprehension, not linked to any ***particular*** threat or event, his abandonment will probably be deemed voluntary.

**Example:** On the facts of the above two examples, suppose that D’s decision to abandon is motivated not by the appearance of a police officer, but by D’s sudden thought, “If I get caught, I’ll go to prison for life.” D’s abandonment will probably be treated as voluntary, and will be a bar to his prosecution for attempt.

**3. Other special circumstances:**

**a. Postponement:** If D merely ***postpones*** his plan, because the scheduled time proves less advantageous than he thought it would be, this does ***not*** constitute a voluntary abandonment.

**b. Dissuasion by victim:** Similarly, if D’s renunciation is the result of ***dissuasion by the victim***, it will probably be deemed involuntary.

**Example:** D decides to rob V, a pedestrian, on a secluded street at night. D says, “Your money or your life,” and brandishes a knife at V. V pulls out his own switchblade and says, “If you come any closer, I’ll carve you up.” D turns around and walks away. D’s abandonment will almost certainly be found to be involuntary, because it was motivated by the victim’s conduct. Therefore, D can be convicted of attempted robbery.

**VI. ATTEMPT-LIKE CRIMES**

**A. Problem generally:** Some ***substantive*** crimes punish incomplete or “inchoate” behavior. If D intends to commit acts which, if completed, would constitute one of these inchoate crimes, D may raise the defense that he cannot be convicted of “an attempt to commit a crime which is itself an attempt.”

**1. Occasionally successful:** Very occasionally, defendants have succeeded with this defense.

**Example:** D, who is very weak, throws a rock at V, a police officer, but his arm is not strong enough to get the rock even close to V. One type of “assault” defined by statute in the jurisdiction is “an attempt to commit battery by one having present ability to do so.” D is charged with “attempted assault.” A court might hold that D should not be convicted, because the crime of assault (of the attempted-battery type) is intended to cover near-battery, and the crime here is effectively near-near-battery. But most courts would probably reject this defense and would convict D on these facts.

**VII. MECHANICS OF TRIAL; PUNISHMENT**

**A. Relation between charge and conviction:** Complications arise where D is: (1) charged with a completed substantive crime, but shown at trial to be guilty of at most an attempt; or (2) charged with attempt, but shown at trial to have committed the underlying substantive crime.

**1. Substantive crime charged, attempt proved:** If D is charged with a completed crime but shown to have committed only an attempt, the courts agree that D ***may be convicted of attempt***. The attempt is said to be a “lesser included offense.”

**2. Attempt charged, completed crime proved:** Conversely, if D is charged with an attempt and is shown at trial to have committed the underlying complete crime, D may normally be ***convicted of attempt***. (But the attempt statute may be drafted so as to make failure an element of attempt; if so, D will escape liability.)

**III. Group Criminality**

**ACCOMPLICE LIABILITY AND SOLICITATION**

**I. PARTIES TO CRIME**

**A. Modern nomenclature:** Modern courts and statutes dispense with common-law designations like “principal in the first degree,” “accessory before the fact,” “accessory after the fact,” etc. Instead, modern courts and statutes usually refer only to two different types of criminal actors: “accomplices” and “principals.”

**1. Accomplice:** An ***“accomplice”*** is one who ***assists*** or ***encourages*** the carrying out of a crime, but does not commit the *actus reus*.

**2. Principal:** A ***“principal,”*** by contrast, is one who ***commits*** the *actus reus* (with or without the assistance of an accomplice).

**Example:** As part of a bank robbery plan, A steals a car, and drives B to the First National Bank. A remains in the car acting as lookout. B goes inside and demands money, which he receives and leaves the bank with. A drives the getaway car. Since B carried out the physical act of robbery, he is a “principal” to bank robbery. Since A merely assisted B, but did not carry out the physical act of bank robbery, he is an “accomplice” to bank robbery.

**3. Significance of distinction:** Relatively little turns today on the distinction between “accomplice” and “principal.” The main significance of the distinction is that generally, the accomplice may not be convicted unless the prosecution also proves that the principal is guilty of the substantive crime in question. The most important rule to remember in dealing with accomplices is that generally, the accomplice is ***guilty of the substantive crimes*** he assisted or encouraged.

**II. ACCOMPLICES — THE ACT REQUIREMENT**

**A. Liability for aiding and abetting:** The key principle of accomplice liability is that one who ***aids***, ***abets***, ***encourages*** or ***assists*** another to perform a crime, will himself be ***liable for that crime***.

**Example 1:** Same facts as the above bank-robbery example. A is guilty of bank robbery, even though he did not himself use any violence, or even set foot inside the bank or touch the money.

**Example 2:** A and B have a common enemy, V. A and B, in conversation, realize that they would both like V dead. A encourages B to kill V, and supplies B with a rifle with which to do the deed. B kills V with the rifle. A is guilty of murder — he assisted and encouraged another to commit murder, so he is himself guilty of murder.

**1. Words alone may be enough: *Words***, by themselves, may be enough to constitute the requisite link between accomplice and principal — if the words constituted ***encouragement*** and ***approval*** of the crime, and thereby assisted commission of the crime, then the speaker is liable even if he did not take any physical acts.

**2. Presence at crime scene not required:** One can be an accomplice even without ever being ***present*** at the ***crime scene***. That is, the requisite encouragement, assistance, etc., may all take place before the actual occasion on which the crime takes place.

**Example:** On the facts of Example 2 above, A is not shielded from guilt of murder merely because he was a 1,000 miles away when B fired the rifle at V.

**3. Presence not sufficient:** Conversely, ***mere presence*** at the scene of the crime is ***not***, by itself, sufficient to render one an accomplice. The prosecution must also show that D was at the crime scene for the ***purpose of approving and encouraging*** commission of the offense.

**a. Presence as evidence:** But D’s presence at the crime scene can, of course, be convincing circumstantial ***evidence*** that D encouraged or assisted the crime.

**Example:** If the prosecution shows that A’s presence at the crime was so that he could serve as a “look out” while B carried out the physical acts, A is obviously an accomplice and is thus guilty of the substantive crime.

**4. Failure to intervene:** Normally, the mere fact that D ***failed to intervene*** to prevent the crime will ***not*** make him an accomplice, even if the intervention could have been accomplished easily.

**Example:** A and B, who are good friends, walk down a city street together. B decides to shoplift a ring from a sidewalk vendor. A remains silent, when he could easily have dissuaded B. A is not an accomplice to theft of the ring.

**a. Duty to intervene:** There are a few situations, however, where D has an ***affirmative legal duty*** to intervene. If he fails to exercise this duty, he may be an accomplice.

**Example:** Under general legal principles, both parents have an affirmative duty to safeguard the welfare of their child. Mother severely beats Child while Father remains silently by. Father is probably an accomplice to battery or child abuse, because he had an affirmative duty to protect Child and failed to carry out that duty.

**B. Aid not crucial:** Suppose that D gives assistance in furtherance of a crime, but the assistance turns out ***not to have been necessary***. In this situation, D is generally ***guilty*** — as long as D intended to aid the crime, and took acts or spoke words in furtherance of this goal, the fact that the crime would probably have been carried out anyway will be irrelevant.

**1. Attempts to aid where no crime occurs:** If D attempts to give aid, but the substantive crime never takes place because the principal is ***unsuccessful***, D may be liable for an ***attempt***.

**Example:** A gives B a gun with which to kill V, and encourages B to do so. B shoots at V, but misses. A is guilty of attempted murder, just as B is.

**a. Crime not attempted by the principal:** If, on the other hand, the principal does not even ***attempt*** the crime, most courts will ***not*** hold D guilty of even the crime of attempt on an accomplice theory. However, D is probably guilty of the crime of “solicitation,” and a minority of courts might hold him guilty of attempt.

**Example:** A tries to persuade B to murder V, and gives B a rifle with which to do so. B turns A into the police, rather than trying to kill V. In most states, A is not liable for attempted murder on an accomplice theory, but may be liable for criminal solicitation. A few states, and the MPC, would hold D liable for attempted murder on these facts.

**C. Conspiracy as meeting the act requirement:** Some cases, especially older ones, hold that if D is found to have been in a ***conspiracy*** with another, he is automatically liable for any crimes committed by the other in furtherance of the conspiracy. (See *supra*)

**1. Insufficient under modern view:** However, the modern view, and the view of the MPC, is that the act of joining a conspiracy is ***not, by itself, enough*** to make one an accomplice to all crimes carried out by any conspirator in furtherance of the conspiracy. But even in courts following this modern view, membership in the conspiracy will be strong *evidence* that D gave the other conspirators the required assistance or encouragement in the commission of the crimes that were the object of the conspiracy.

**III. ACCOMPLICES — MENTAL STATE**

**A. General rule:** For D to have accomplice liability for a crime, the prosecution must generally show the following about D’s mental state: (1) that D ***intentionally aided or encouraged*** the other to commit the criminal act; and (2) that D had the mental state ***necessary for the crime*** actually committed by the other.

**1. Must have purpose to further crime:** The first requirement listed above means that it is not enough that D intends acts which have the ***effect*** of inducing another person to commit a crime — D must have the ***purpose*** of helping bring that crime about.

**Example:** D writes to X, “Your wife is sleeping with V.” X, enraged, shoots V to death. D does not have the requisite mental state for accomplice liability for murder or manslaughter merely by virtue of intending to write the letter — the prosecution must also show that D intended to encourage X to kill V.

**2. Must have *mens rea* for crime actually committed:** D must be shown to have the *mens rea* for the ***underlying crime***. Thus if the person assisted commits a ***different crime*** from that intended by D, D may escape liability.

**Example:** D believes that X will commit a burglary, and wants to help X do so. D procures a weapon for X, and drives X to the crime scene. Unbeknownst to D, X really intends all along to use the weapon to frighten V so that X can rape V; X carries out this scheme. D is not an accomplice to rape, because he did not have the *mens rea* — that is, he did not intend to cause unconsented-to sexual intercourse. The fact that D may have had the *mens rea* for burglary or robbery is irrelevant to the rape charge, though D might be held liable for attempted burglary or attempted robbery on these facts.

**3. Police undercover agents:** Where a ***police undercover agent*** helps bring about a crime by a suspect, the agent will usually have a valid defense based on his lack of the appropriate mental state.

**B. Knowledge, but not intent, as to criminal result:** The most important thing to watch out for regarding the mental state for accomplice is the situation where D ***knows*** that his conduct will encourage or assist another person in committing a crime, but D does not ***intend*** or ***desire*** to bring about that criminal result.

**1. Not usually sufficient:** Most courts hold that D is ***not*** an accomplice in this “knowledge but not intent” situation.

**Example:** X asks his friend D for a ride to a particular address. X is dressed all in black, and D knows that X has previously committed burglary. D does not desire that X commit a burglary, but figures, “If I don’t give X a ride, someone else will, so I might as well stay on his good side.” D drives X to the site, and X burgles the site. D is not guilty of burglary on an accomplice theory, because mere knowledge of X’s purpose is not enough — D must be shown to have intended or desired to help X commit the crime.)

**C. Assistance with crime of recklessness or negligence:** If the underlying crime is not one that requires intent, but merely ***recklessness or negligence***, ***some*** courts hold D liable as an accomplice upon a mere showing that D was reckless or negligent concerning the risk that the principal would commit the crime.

**1. Lending car to drunk driver:** Thus if D ***lends his car to one that he knows to be drunk***, and the driver kills or wounds a pedestrian or other driver, some courts find D liable as an accomplice to manslaughter or battery. On these facts, D has had the mental state of recklessness (sufficient for involuntary manslaughter or battery), so a court may — but will not necessarily — hold that D’s lack of intent to bring about the death or injury to another is irrelevant.

**a. Negligence-manslaughter:** Observe that in the above “lend car to drunk driver” scenario, D may be liable for manslaughter even if accomplice theory is not used — the crime of manslaughter is generally committed when one recklessly brings about the death of another, so D may, by entrusting his car to a known drunk, be guilty of manslaughter as a principal.

**IV. ACCOMPLICES — ADDITIONAL CRIMES BY PRINCIPAL**

**A. “Natural and probable” results that are not intended:** A frequently-tested scenario involves a principal who commits not only the offense that the accomplice has assisted or encouraged, but ***other offenses*** as well. The accomplice will be liable for these additional crimes if: (1) the additional offenses are the ***“natural and probable” consequences*** of the conduct that D did intend to assist (even though D did not intend these additional offenses); ***and*** (2) the principal committed the additional crimes ***in furtherance of the original criminal objective*** that D was trying to assist.

**Example:** D1 and D2 agree to commit an armed robbery of a convenience store owned by V. D1 personally abhors violence. However, he knows that D2 is armed, and that D2 has been known to shoot in the course of prior robberies. D1 urges D2 not to shoot no matter what, but D2 refuses to make this promise. During the robbery, V attempts to trip an alarm, and D2 shoots her to death. A court would probably hold that D1 is liable for murder on an accomplice theory, since the shooting was a “natural and probable” consequence of armed robbery, and the shooting was carried out to further the original criminal objective of getting away with robbery.

On the other hand, if D2 forcibly raped V instead of shooting her, and D1 had no reason to expect D2 to do this, D1 would not be liable for rape on an accomplice theory. This is because the rape was not the “natural and probable” consequence of the conduct encouraged by D1, nor was it committed in furtherance of the original objective of robbery.

**1. Unforeseeable:** Thus if D can show that the additional offenses were ***unlikely*** or ***unforeseeable***, D will not be liable for them. (*Example:* This is why D1 would not be liable for rape on the above hypothetical.)

**2. MPC rejects extended liability:** The Model Penal Code rejects even the basic principle allowing an accomplice to be held liable for “natural and probable” crimes beyond those which he intended to aid or encourage. Under the MPC, only those crimes that D ***intended*** to aid or encourage will be laid at his door.

**3. Felony-murder and misdemeanor-manslaughter rules:** Wherever the additional offense is a ***death***, the accomplice may end up being guilty not because of the “natural and probable consequences” rule, but because of the specialized ***felony-murder*** or ***misdemeanor-manslaughter*** rules. For instance, under the felony-murder rule (discussed *infra*), if in the course of certain dangerous felonies the felon kills another, even ***accidentally***, he is liable for murder. This can be combined with the general principles of accomplice liability to make the accessory liable for an unintended death.

**Example:** D1 and D2 agree to commit an armed robbery together, with D2 carrying the only gun. D1 does not desire that anybody be shot. D2 points his gun at V and asks for money; the gun accidentally goes off, killing V. D1 is probably guilty of murder on these facts. However, this is not because V’s death was a “natural and probable consequence” of armed robbery.

Instead, it is because under the felony-murder doctrine, even an accidental death that directly stems from the commission of a dangerous felony such as armed robbery will constitute murder. By felony-murder alone, D2 is thus guilty of murder even though he did not intend to shoot, let alone kill, V. Then, since D1 was D2’s accomplice in the armed robbery, D1 is liable for armed robbery. Since the killing occurred in the furtherance of the robbery *by D1* (even though he was not the shooter), and since D1 had the mental state required for felony-murder (intent to commit a dangerous felony), D1 is liable for murder without any use of the “natural and probable consequences” rule.

**V. GUILT OF THE PRINCIPAL**

**A. Principal must be guilty:** Generally, the accomplice cannot be convicted unless the prosecution shows that the person being aided or encouraged — the principal — is ***in fact guilty*** of the underlying crime.

**1. Principal’s conviction not necessary:** But it is not necessary that the principal be ***convicted***. (*Example:* A is charged with assisting B to commit a robbery. B is never arrested or brought to trial. Instead, B gets immunity and turns state’s evidence against A. A can be convicted of being an accomplice to the robbery upon proof that B committed the robbery, and that A helped B carry it out — the fact that B is never charged or convicted is irrelevant.)

**2. Inconsistent verdicts:** But if the principal is actually ***acquitted***, the accomplice must normally be acquitted as well. This is clearly true if the principal is acquitted in the ***same trial***, and probably true even if the principal is acquitted in an ***earlier*** trial. [*People v. Taylor*, 527 P.2d 622 (Cal. 1974)]

**VI. WITHDRAWAL BY THE ACCOMPLICE**

**A. Withdrawal as defense:** One who has given aid or encouragement prior to a crime may ***withdraw*** and thus avoid accomplice liability. In other words, withdrawal is generally a ***defense*** to accomplice liability (in contrast to the conspiracy situation, where it is usually not a defense to the conspiracy charge itself, merely to substantive crimes later committed in furtherance of the conspiracy). The withdrawal will only be effective if D has ***undone*** the effects of his assistance or encouragement.

**Example:** X tells D that X wants to rob a gas station at gun point, and that he needs a gun to do so. D supplies X with a gun for this purpose. D then has second thoughts, and takes the gun back from X, while also telling X, “I don’t think this robbery is a good idea.” X gets a different gun from someone else, and carries out the same robbery of the same store. D is not guilty of being an accomplice to the robbery, because he withdrew, in a way that undid the effect of his earlier assistance and encouragement.

**1. Effect of aid must be undone:** It is not enough that D has a subjective change of heart, and gives no further assistance prior to the crime. He must, at the very least, make it ***clear to the other party*** that he is repudiating his past aid or encouragement.

**2. Verbal withdrawal not always enough:** If D’s aid has been only ***verbal***, he may be able to withdraw merely by stating to the “principal” that he now withdraws and disapproves of the project. But if D’s assistance has been more ***tangible***, he probably has to take ***affirmative action*** to undo his affects.

**Example:** On the facts of the prior example, where D supplies a gun to X, it probably would not be enough for D to say, “I think the robbery is a bad idea,” while letting X keep the gun — D probably has to get the gun back.

**a. Warning to authorities:** Alternatively, D can almost always make an effective withdrawal by ***warning the authorities*** prior to commission of the crime.

**3. Not required that crime be thwarted:** Regardless of the means used to withdraw, it is ***not necessary*** that D actually ***thwart*** the crime.

**Example:** D encourages X to commit a particular burglary at a specified time and place. X thinks better of it, and leaves a message at the local police station alerting the police to the place and time for the crime. He does not make any effort to talk X out of the crime, however. Due to police inefficiency, the message gets lost, and X carries out the crime. D’s notice to the authorities will probably be held to be enough to constitute an effective withdrawal, even though D was not successful in actually thwarting the crime.

**VII. VICTIMS AND OTHER EXCEPTIONS TO ACCOMPLICE LIABILITY**

**A. Exceptions for certain classes:** There are certain ***classes*** of persons as to whom no accomplice liability will be imposed:

**1. Victims:** Most obviously, where the legislature regards a certain type of person as being the ***victim*** of the crime, that victim will not be subject to accomplice liability.

**a. Statutory rape:** Thus a ***female below the age of consent*** will not be liable as an accessory to ***statutory rape*** of herself, even if she gives assistance and encouragement to the male.

**b. Kidnapping and extortion:** Similarly, a person who meets the demands of an ***extortionist***, or a person who pays a ransom to ***kidnappers*** to secure the release of a loved one, will not be an accomplice to the extortion or kidnapping.

**2. Crime logically requiring second person:** Where a crime is defined so as to logically require participation by a second person, as to whom ***no direct punishment*** has been authorized by the legislature, that second person will not be liable as an accomplice.

**Examples:** Since an abortion cannot be performed without a pregnant woman, the pregnant woman will not be liable as an accomplice to her own abortion, assuming that the legislature has not specifically authorized punishment for the woman in this situation. The same would be true of a customer who patronizes a prostitute, or one who purchases illegal drugs — if the legislature has not specifically punished customers of prostitutes or purchasers of drugs, these will not be liable as accomplices to prostitution/drug sales.

**VIII. POST-CRIME ASSISTANCE**

**A. Accessory after the fact:** One who knowingly gives assistance to felon, for the purpose of helping him ***avoid apprehension*** following his crime, is an ***accessory after the fact***. Under modern law, the accessory after the fact is ***not liable*** for the ***felony itself***, as an accomplice would be. Instead, he has committed a distinct crime based upon obstruction of justice, and his punishment does not depend on the punishment for the underlying felony.

**B. Elements:** Here are the elements for accessory after the fact:

**1. Commission of a felony:** A ***completed felony*** must have been committed. (It is not enough that D ***mistakenly believed*** that the person he was assisting committed a felony — but the person aided need not have been formally charged, or even caught.)

**2. Knowledge of felony:** D must be shown to have ***known***, not merely ***suspected***, that the felony was committed.

**3. Assistance to felon personally:** The assistance must have been given to the ***felon personally***. (Thus it is not enough that D knows that a crime has been committed by some unknown person, and D destroys evidence or otherwise obstructs prosecution.)

**4. Affirmative acts:** D must be shown to have taken ***affirmative acts*** to hinder the felon’s arrest. It is not enough that D ***fails to report the felon***, or fails to turn in ***evidence*** that he possesses.

**C. Misprision of felony:** At common law, one who simply fails to report a crime or known felon — without committing any affirmative acts to hinder the felon’s arrest — is guilty of the separate crime of ***“misprision of felony.”*** However, almost no states recognize this crime today.

**IX. SOLICITATION**

**A. Solicitation defined:** The common-law crime of ***solicitation*** occurs when one ***requests or encourages another*** to perform a criminal act, regardless of whether the latter agrees.

**1. Utility:** The main utility of the crime is that it allows punishment of the solicitor if the person who is requested to commit the crime ***refuses***.

**Example:** Wendy is unhappily married to Herbert, and has been having an affair with Bart. Wendy says to Bart, “Won’t you please kill Herbert? If you do, we can live happily ever after.” Bart does not respond either way, but tells the police what has happened. The police arrest Wendy before Bart takes any action regarding Herbert. On these facts, Wendy is guilty of solicitation — she has requested or encouraged another to perform a criminal act, and it does not matter that the other has refused.

**B. No overt act required:** The crime of solicitation is never construed so as to require an ***overt act*** — as soon as D makes his request or proposal, the crime is complete (as in the above example).

**C. Communication not received:** Courts disagree about whether D can be convicted of solicitation where he attempts to communicate his criminal proposal, but the proposal is never ***received***.

**1. Model Penal Code:** The Model Penal Code imposes liability in this “failed communication” situation.

**Example:** On the facts of the above example, Wendy sends a letter to Bart asking Bart to kill Herbert. The letter is intercepted by police before Bart can get it. Courts are split as to whether Wendy can be convicted of solicitation; the MPC would impose liability here. (Even courts not following the MPC approach would probably allow a conviction for “attempted solicitation” on these facts.)

**D. Renunciation:** Some courts allow the defense that the solicitor ***voluntarily renounced*** his crime. Thus the MPC allows the defense of renunciation if D ***prevents*** the commission of the crime, and does so voluntarily.

**E. Solicitation as an attempted crime:** If all D has done is to request or encourage another to commit a crime (“bare” solicitation), this is ***not*** enough to make D guilty of an ***attempt*** to commit the object crime. However, if D has gone further, by making extensive preparations with or on behalf of the solicitee, or otherwise making overt acts, this may be enough to cause him to be guilty of not only solicitation but an attempt at the crime (even if the solicitee himself refuses to participate).

**Conspiracy**

**A. Definition of “conspiracy”:** The common-law crime of ***conspiracy*** is defined as ***an agreement between two or more persons to do either an unlawful act or a lawful act by unlawful means***. At common law, the prosecution must show the following:

**1. Agreement:** An ***agreement*** between two or more persons;

**2. Objective:** To carry out an act which is either ***unlawful*** or which is lawful but to be accomplished by ***unlawful means***; and

**3. *Mens rea:*** A ***culpable intent*** on the part of the defendant.

**B. Procedural advantages:** The prosecution gets a number of ***procedural*** advantages in a conspiracy case. The two most important are:

**1. Joint trial:** Joinder laws generally let the prosecution try in a ***single proceeding*** all persons indicted on a single conspiracy charge.

**2. Admission of hearsay:** Statements made by any member of the conspiracy can generally be admitted against all, without constraint from the ***hearsay*** rule. ***Any previous incriminating statement by any member of the conspiracy, if made in furtherance of the conspiracy, may be introduced into evidence against all of the conspirators***. See FRE 801(d)(2)(E).

**Example:** D1, D2 and D3 are charged with conspiracy to rob a bank. D1, the mastermind, tries to recruit X, an arms supplier, into the conspiracy, by telling X that D3 is also part of the conspiracy. X refuses to join the conspiracy. At the Ds’ trial for conspiracy, X testifies as to D1’s statements about D3’s participation. This testimony will be admitted against D3 for the substantive purpose of showing that D3 was part of the conspiracy. This will be true even though the statement by D1 is hearsay as to D3.

**a. Hearsay considered in determining admissibility:** In the federal system, and in many states, the judge may determine the admissibility of hearsay ***without respect to the rules of evidence***. This means that the incriminating statement by a member of the alleged conspiracy ***may itself be considered*** in determining whether the conspiracy has been sufficiently documented that the hearsay should be admissible against the defendant.

**II. THE AGREEMENT**

**A. “Meeting of the minds” not required:** The essence of a conspiracy is an ***agreement*** for the joint pursuit of unlawful ends. However, no true “meeting of the minds” is necessary — all that is needed is that the parties communicate to each other in some way their intention to pursue a joint objective.

**1. Implied agreement:** Thus words are not necessary — each party may, by his ***actions alone***, make it clear to the other that they will pursue a common objective.

**Example:** A is in the process of mugging V on the street, when B comes along. B pins V to the ground, while A takes his wallet. A conspiracy to commit robbery could be found on these facts, even though there was no spoken communication between A and B.

**2. Proof by circumstantial evidence:** The prosecution may prove agreement by mere ***circumstantial evidence***. That is, the prosecution can show that the parties committed acts in circumstances strongly suggesting that there ***must*** have been a ***common plan***.

**Example:** V, a politician, is riding in a motorcade down a crowded city street. A and B both simultaneously shoot at V. The fact that both people shot simultaneously would be strong, and admissible, evidence that A and B had agreed to jointly attempt to kill V, and would thus support prosecution of the two for conspiracy to commit murder.

**B. Aiding and abetting:** Suppose that A and B conspire to commit a crime (let’s call the crime “X”). C then “aids and abets” A and B in the commission of crime X, but never reaches explicit agreement with A and B that he is helping them. It is clear that C will be liable for X if A and B actually commit X. But if A and B never commit X, courts are ***split*** about whether C, as a mere aider and abettor, is also liable for conspiracy to commit X. The MPC holds that a person does ***not*** become a co-conspirator merely by aiding and abetting the conspirators, if he himself does not reach agreement with them.

**Example:** D knows that A and B plan to kill X. D, without making any agreement with A and B, prevents a telegram of warning from reaching X. If X is thus unable to flee, and A and B kill X, it is clear that D is liable for the substantive crime of murder, since he aided and abetted A and B in carrying out the murder. But if X escapes, so there is no substantive crime of murder to be charged, can D be convicted of conspiracy to commit murder? Courts are split. The MPC would acquit D on these facts, since under the MPC an aider and abettor is not liable for the conspiracy if he did not reach any agreement with the conspirators.

**C. Parties don’t agree to commit object crime:** Although there must be an agreement, it is not necessary that each conspirator agree to commit the ***substantive object crime(s)***. A particular D can be a conspirator even though he agreed to help only in the ***planning stages***. (*Example:* D1, D2 and D3 work together to commit a bank robbery. D3’s only participation is to agree to obtain the getaway car, not to participate in the bank robbery itself. D3 is still guilty of conspiracy to commit bank robbery.)

**D. Feigned agreement:** Courts disagree about the proper result where one of the parties to a “conspiracy” is merely ***feigning*** his agreement. The problem typically arises where one of the parties is secretly an ***undercover agent***.

**Example:** A and B agree that they will rob a bank. B is secretly an undercover agent, and never has any intention of committing the robbery. In fact, B makes sure that the FBI is present at the bank, and A is arrested when he and B show up. Courts disagree about whether the requisite “agreement” between A and B took place, and thus about whether A can be prosecuted for conspiracy to commit bank robbery.

**1. Traditional view that there is no conspiracy:** The traditional, common-law view is that there is ***no agreement***, and therefore ***no conspiracy***. Thus on the facts of the above example, A could not be charged with conspiracy to commit bank robbery. This traditional view is sometimes called the ***“bilateral”*** view, in the sense that the agreement must be a bilateral one if either party is to be bound.

**2. Modern view allows conspiracy finding:** But the modern view is that regardless of one party’s lack of subjective intent to carry out the object crime, ***the other party may nonetheless be convicted of conspiracy***.

**a. Model Penal Code agrees:** The Model Penal Code agrees with the modern view. The Code follows a ***“unilateral”*** approach to conspiracy — a given individual is liable for conspiracy if he “agrees with another person or persons,” whether or not the other person is really part of the plan. Thus under the MPC, A in the above example has clearly agreed to rob the bank (even though B has not truly agreed), and A can therefore be prosecuted for conspiracy.

**III. *MENS REA***

**A. Intent to commit object crime:** Normally, the conspirators must be shown to have agreed to commit a crime. It is then universally held that each of the conspirators must be shown to have had ***at least the mental state required for the object crime***.

**Example:** A and B are caught trying to break into a dwelling at night. The prosecution shows only that A and B agreed to attempt to break and enter the dwelling, and does not show anything about what A and B intended to do once they were inside. A and B cannot be convicted of conspiracy to commit burglary, because there has been no showing that they had the intent necessary for the substantive crime of burglary, i.e., it has not been shown that they had the intent to commit any felony once they got inside.

**1. Must have intent to achieve objective:** Also, where the substantive crime is defined in terms of causing a ***harmful result***, for conspiracy to commit that crime the conspirators must be shown to have ***intended to bring about that result***. This is true even though the intent is not necessary for conviction of the substantive crime.

**Example:** A and B plan to blow up a building by exploding a bomb. They know there are people in the building who are highly likely to be killed. If the bomb goes off and kills X, A and B are guilty of murder even though they did not intend to kill X (because one form of murder is the “depraved heart” or “reckless indifference to the value of human life” kind). But A and B are *not* guilty of conspiracy to murder X, because they did not have an affirmative intent to bring about X’s death.

**2. Crime of recklessness or negligence:** It’s probably also the case that there can be no conspiracy to commit a crime that is defined in terms of recklessly or negligently causing a particular result.

**3. Attendant circumstances:** But where the substantive crime contains some elements relating to the ***attendant circumstances*** surrounding the crime, and strict liability applies to those attendant circumstances, then two people ***can*** be convicted of conspiracy even though they had no knowledge or intent regarding the surrounding circumstances.

**a. Federal jurisdiction:** Elements relating to ***federal jurisdiction*** illustrate this problem. Even if the Ds are shown not to have been aware that the elements of federal jurisdiction were present, they can still be held liable for conspiracy to commit the underlying federal crime.

**Example:** It is a federal crime to assault a federal officer engaged in the performance of his duties. Cases on this crime hold that the defendant need not be shown to have been aware that his victim was a federal officer. D1 and D2 orally agree to attack V, thinking he is a rival drug dealer. In fact, V is a federal officer. D1 and D2 can be convicted of conspiracy to assault a federal officer, because V’s status as such was merely an attendant circumstance, as to which intent need not be shown. [*U.S. v. Feola*, 420 U.S. 671 (1975)]

**B. Supplying of goods and services:** The Ds must be shown to have ***intended*** to further a criminal objective. It is not generally enough that a particular D merely ***knew*** that his acts might tend to enable others to pursue criminal ends. The issue arises most often where D is charged with conspiracy because he ***supplied goods or services*** to others who committed or planned to commit a substantive crime.

**1. Mere knowledge not sufficient:** It is ***not*** enough for the prosecution to show that D supplied goods or services with ***knowledge*** that his supplies might enable others to pursue a criminal objective. Instead, the supplier must be shown to have ***desired*** to further the criminal objective. On the other hand, this desire or intent can be shown by ***circumstantial*** evidence.

**a. “Stake in venture”:** For instance, the requisite desire to further the criminal objective can be shown circumstantially by the fact that the supplier in some sense acquired a ***“stake in the venture.”***

**Example:** D and S agree that if S supplies D with equipment to make an illegal still, D will pay S 10% of the profits S makes from his illegal liquor operations. S will be held to have had such a stake in the venture that the jury may infer that he desired to bring about the illegal act of operating his still.

**b. Controlled commodities:** The supplier is more likely to be found to be a participant in a conspiracy if the substance he sold was a ***governmentally controlled*** one that could only have been used for illegal purposes. (*Example:* S supplies the Ds with horse-racing information of benefit only to bookmakers, in a state where bookmaking is illegal.)

**c. Inflated charges:** The fact that the supplier is charging his criminal purchasers an ***inflated price*** compared with the cost of the items if sold for legal purposes, is evidence of intent.

**d. Large proportion of sales:** If sales to criminal purchasers represent a ***large portion*** of the supplier’s overall sales of the item, the supplier is more likely to be held to have had the requisite intent.

**e. Serious crime:** The more ***serious*** the crime, the more likely it is that the supplier’s participation will be found to be part of the conspiracy.

**IV. THE CONSPIRATORIAL OBJECTIVE**

**A. Non-criminal objective:** Traditionally, and in England, the Ds could be convicted of conspiracy upon proof that they intended to commit acts that were ***“immoral”*** or “contrary to the public interest.” In other words, the fact that the act or ultimate object was not explicitly criminal was not an automatic defense.

**1. Modern American view rejects:** But the modern American tendency is to allow a conspiracy conviction ***only*** if the Ds intended to perform an act that is ***explicitly criminal***. Thus the MPC allows a conspiracy only where the defendants intend to commit a crime.

**Example:** D1 collaborates with various prostitutes, with the intention of publishing a directory of prostitutes. Under the traditional/English view, D1 and the prostitutes can be convicted of conspiracy to “corrupt public morals,” even though actual publication of the directory would not itself have been a crime. But under the modern American view, there could be no conspiracy here, since no act was intended which would have been criminal. [*Shaw v. Dir. Pub. Prosec.*, 2 W.L.R. 897 (Eng. 1961)]

**B. The “overt act” requirement:** At common law, the crime of conspiracy is ***complete as soon as the agreement has been made***. But about half the states have statutes requiring, in addition, that some ***overt act*** in furtherance of the conspiracy must also be committed.

**1. MPC limits requirement:** The MPC limits the overt act requirement to ***non-serious crimes***. Under the MPC, a conspiracy to commit a felony of the first or second degree may be proved even without an overt act.

**2. Kind of act required:** The overt act, where required, may be ***any act*** which is taken in furtherance of the conspiracy. It does ***not*** have to be an act that is ***criminal in itself***. Thus acts of ***mere preparation*** will be sufficient. (*Example:* If the conspiracy is to make moonshine liquor, purchase of sugar from a grocery store would meet the overt act requirement.)

**3. Act of one attributable to all:** Even in states requiring an overt act, it is not necessary that each D charged with the conspiracy be shown to have committed an overt act. Instead, if the overt act requirement applies, the overt act of a ***single person*** will be ***attributable to all***.

**C. Impossibility:** The same rules concerning ***“impossibility”*** apply in conspiracy as in attempt. [184 - 184] For instance, the defense of ***“factual impossibility”*** is always rejected. (*Example:* D1 and D2 agree to pick the pocket of a certain victim. The pocket turns out to be empty. The Ds are liable for conspiracy to commit larceny.)

**D. Substantive liability for crimes of other conspirators:** The most frequently-tested aspect of conspiracy law relates to a member’s liability for the ***substantive crimes*** committed by other members of the conspiracy. This subject is complicated, and requires close analysis.

**1. Aiding and abetting:** Normally, each conspirator ***“aids and abets”*** the others in furtherance of the aims of the conspiracy. Where this is the case, a D who has aided and abetted one of the others in accomplishing a particular substantive crime will be liable for that substantive crime — this is not a result having anything to do with conspiracy law, but is instead merely a product of the general rules about accomplice liability (discussed *infra*).

**Example:** A and B agree to a scheme whereby A will steal a car, pick B up in it, and wait outside the First National Bank while B goes in and robs the teller. A steals the car, picks up B, and delivers B to the bank. Before B can even rob the teller, A is arrested out on the street. B robs the teller anyway. A is clearly liable for the substantive crime of bank robbery, because he has “aided and abetted” B in carrying out this crime. It is also true that A and B are guilty of conspiracy to commit bank robbery, but this fact is not necessary to a finding that A is liable for B’s substantive crime — aiding and abetting is all that is required for A to be liable for bank robbery.

**2. Substantive liability without “aiding and abetting”:** The more difficult question arises where A and B conspire to commit crime X, and B commits ***additional crimes*** “in furtherance” of the conspiracy, but without the direct assistance of A. Does A, by his ***mere membership*** in the conspiracy, become liable for these additional crimes by B in furtherance of the conspiracy?

**a. Traditional view:** The traditional “common law” view is that each member of a conspiracy, by virtue of his ***membership alone***, is likely for reasonably foreseeable crimes committed by the others in ***“furtherance”*** of the conspiracy.

**Example:** Same basic fact pattern as prior example. Now, however, assume that A knows that B is carrying a gun into the bank, and A also knows that B would rather shoot anyone attempting to stop him than go to prison. However, A has done nothing to help B get the gun, and has not encouraged B to use the gun. B goes into the bank, and shoots V, a guard, while V is trying to capture B. V is seriously wounded. Under the traditional view, if B is liable for assault with a deadly weapon, A will be liable also, merely because he was a member of a conspiracy, and the crime was committed by another member in furtherance of the aims of the conspiracy (robbery with successful escape).

**b. Modern/MPC view:** But modern courts, and the MPC, are ***less likely to hold that mere membership in the conspiracy***, without anything more, automatically makes each member liable for substantive crimes committed by any other member in furtherance of the conspiracy.

**Example:** Same facts as above example. Assuming that A in no way encouraged or helped B to use his gun, a modern court might not hold A substantively liable for the assault on V, despite the fact that it was done in furtherance of the conspiracy.

**V. SCOPE: MULTIPLE PARTIES**

**A. Not all parties know each other:** When not all parties ***know*** each other, you may have to decide whether there was one large conspiracy or a series of smaller ones.

**B. “Wheel” conspiracies:** In a ***“wheel”*** or ***“circle”*** conspiracy, a “ring leader” participates with each of the conspirators, but these conspirators deal only with the ring leader, not with each other.

**1. “Community of interest” test:** In the “wheel” situation, there can either be a single large conspiracy covering the entire wheel, or a series of smaller conspiracies, each involving the “hub” (the ring leader) and a single spoke (an individual who works with the ring leader). There will be a single conspiracy only if two requirements are met: (1) each spoke ***knows that the other spokes exist*** (though not necessarily the identity of each other spoke); and (2) the various spokes have, and realize that they have, a ***“community of interest.”***

**C. “Chain” conspiracies:** In a ***“chain”*** conspiracy, there is a distribution chain of a commodity (usually ***drugs***). As with “wheel” conspiracies, the main determinant of whether there is a single or multiple conspiracies is whether all the participants have a “community of interest.”

**Example:** A group of smugglers import illegal drugs; they sell the drugs to middlemen, who distribute them to retailers, who sell them to addicts. If all members of the conspiracy knew of each other’s existence, and regarded themselves as being engaged in a single distribution venture, then a court might hold that there was a single conspiracy. Otherwise, there might be merely individual conspiracies, one involving smugglers and middlemen, another involving middlemen and retailers, etc.

**D. Party who comes late or leaves early:** Special problems arise as to a conspirator who ***enters*** the conspiracy ***after*** it has begun, or ***leaves it before*** it is finished. [188]

**1. Party comes late:** One who enters a conspiracy that has ***already committed substantive acts*** will be a conspirator as to those acts only if he is not only told about them, but ***accepts them*** as part of the general scheme in which he is participating.

**Example:** D is a fence who buys from A and B, two jewelry thieves. D is clearly conspiring to receive stolen property. But he will normally *not* be a conspirator to the original crime of theft, unless he somehow involved himself in that venture, as by making the request for particular items in advance.

**2. Party who leaves early:** One who ***leaves*** a conspiracy before it is finished is liable for acts that occur later only if those acts are ***fairly within the confines of the conspiracy as it existed*** at the time D was still present.

**Example:** D agrees to help A and B rob a bank; D is to procure the transportation, and to deliver it to A. D steals a car and delivers it to A, then leaves the conspiracy. D is guilty of conspiring to rob the bank even though he does nothing further, since the bank robbery is part of the original agreement. But if A and B, totally unbeknownst to D, decided after D left the conspiracy that they wished to use the car to rob a grocery store, D would not be guilty of conspiracy to rob the grocery store.

**VI. DURATION OF THE CONSPIRACY**

**A. Why it matters:** You may have to determine the ***ending point*** of a conspiracy. Here are some issues on which the ending point may make a difference:

**1. Who has joined:** A person can be held to have ***joined*** the conspiracy only if it still existed at the time he got involved in it;

**2. Statute of limitations:** The ***statute of limitations*** on conspiracy does not start to run until the conspiracy has ended; and

**3. Statements by co-defendants:** Declarations of co-conspirators may be admissible against each other, despite the hearsay rule, but only if those declarations were made in furtherance of the conspiracy while it was still in progress.

**B. Abandonment:** A conspiracy will come to an end if it is ***abandoned*** by the participants.

**1. Abandoned by all:** If ***all*** the parties abandon the plan, this will be enough to end the conspiracy (and thus, for instance, to start the statute of limitations running).

**a. No defense to conspiracy charge:** But abandonment does ***not*** serve as a defense to the ***conspiracy charge itself***. Under the common-law approach, the conspiracy is ***complete as soon as the agreement is made***. Therefore, abandonment is irrelevant.

**Example:** A and B, while in their prison cell, decide to rob the first national bank the Tuesday after they are released. Before they are even released, they decide not to go through with the plan. However, X, to whom they previously confided their plans, turns them into the authorities. A and B are liable for conspiracy to commit bank robbery, even though they abandoned the plan — their crime of conspiracy was complete as soon as they made their agreement, and their subsequent abandonment did not, at common law, change the result.

**2. Withdrawal by individual conspirator:** A similar rule applies to the ***withdrawal*** by an ***individual conspirator***.

**a. Procedural issues:** Thus for ***procedural*** purposes, D’s withdrawal ends the conspiracy as to him. So long as D has made an ***affirmative act*** bringing home the fact of his withdrawal to his confederates, the conspiracy is over as to him, for purposes of: (1) running of the statute of limitations; (2) inadmissibility of declarations by other conspirators after he left; or (3) non-liability for the substantive crimes committed by the others after his departure. (Instead of notifying each of the other conspirators, the person withdrawing can instead notify the police.)

**b. As defense to conspiracy charge:** But if D tries to show withdrawal as a ***substantive defense*** against the conspiracy charge itself, he will fail: the common-law rule is that ***no act of withdrawal***, even thwarting the conspiracy by turning others into the police, will be a defense. This comes from the principle that the crime is ***complete*** once the agreement has been made.

* **More liberal Model Penal Code view:** But the MPC relaxes the common-law rule a bit. The MPC allows a limited defense of ***“renunciation of criminal purpose***.***”*** D can avoid liability for the conspiracy itself if: (1) his renunciation was ***voluntary***; and (2) he ***thwarted*** the conspiracy, typically by ***informing the police***. (Good faith efforts by D to thwart the conspiracy, which fail for reasons beyond D’s control, such as police inefficiency, are ***not*** enough, even under the liberal MPC view.)

**VII. PLURALITY**

**A. Significance of the plurality requirement:** A conspiracy necessarily involves ***two or more*** persons. This is called the ***“plurality”*** requirement.

**B. Wharton’s Rule:** Under the common-law ***Wharton’s Rule***, where a substantive offense is defined so as to necessarily require more than one person, a prosecution for the substantive offense must be brought, rather than a conspiracy prosecution. The classic examples are ***adultery***, ***incest***, ***bigamy*** and ***dueling*** crimes.

**Example:** Howard and Wanda are husband and wife. Marsha is a single woman. Howard and Marsha agree to meet later one night at a specified motel, to have sex. They are arrested before the rendezvous can take place. Since the crime of adultery is defined so as to require at least two people, Howard and Marsha cannot be convicted of conspiracy to commit adultery, under the common law Wharton’s Rule.

**1. More persons than necessary:** A key ***exception*** to Wharton’s Rule is that there is no bar to a conspiracy conviction where there were ***more participants*** than were logically necessary to complete the crime.

**Example:** Same facts as above example. Now, however, assume that Steve, Howard’s friend, has urged him to have sex with Marsha, and has reserved the hotel room for them. Despite Wharton’s Rule, Howard, Marsha and Steve can all be prosecuted for conspiracy, because there were more persons involved than merely the two necessary direct parties to the substantive crime of adultery.

**2. Sometimes only a presumption:** Modern courts, including the federal system, frequently hold that Wharton’s Rule is not an inflexible rule but merely a ***presumption*** about what the legislature intended. Under courts following this approach, if the legislative history behind the substantive crime is silent about whether the legislature intended to bar conspiracy convictions, a conspiracy charge is allowed.

**Example:** A federal act makes it a federal crime for five or more persons to conduct a gambling business prohibited by state law. The five Ds are charged with conspiracy to violate this federal act. *Held*, the legislative history behind the federal act shows no congressional intent to merge conspiracy charges into the substantive crime, so a conspiracy charge is valid here. [*Iannelli v. U.S.*, 420 U.S. 770 (1975)]

**3. Model Penal Code rejects Rule:** The Model Penal Code almost completely ***rejects*** Wharton’s Rule.

**a. No conviction for conspiracy and substantive offense:** However, the Code does provide that one may not be convicted of ***both*** a substantive crime and a conspiracy to commit that crime. (By contrast, most states ***allow*** this sort of ***“cumulative”*** punishment scheme, as long as the situation is not the classic Wharton’s Rule scenario where only the parties logically necessary for the completed crime have been charged.)

**C. Statutory purpose not to punish one party:** The court will not convict a party of conspiracy where it finds that the legislature intended not to punish such a party for the ***substantive*** crime. Typically, this situation arises where the legislature that defined the substantive crime recognized that two parties were necessarily involved, but chose to punish only one of those parties as being the “more guilty” one.

**Example:** Stewart and Barbara, who are not married to each other, agree that Stewart will transport Barbara across state lines, so that they can have sex. The federal Mann Act prohibits the transportation of a woman across state lines for purposes of sexual intercourse. Cases interpreting the Mann Act itself hold that the woman is an innocent “victim” and thus does not violate the act merely by allowing herself to be transported interstate. Stewart and Barbara are arrested before they cross the state line, and are prosecuted for conspiracy to violate the Mann Act.

*Held*, Barbara may not be convicted of conspiracy, because the legislature did not intend to punish her for the substantive crime that she is accused of conspiring to commit. (A modern court would probably allow *Stewart* to be convicted, however.) [*Gebardi v. U.S.*, 287 U.S. 112 (1932)]

**D. Spouses and corporations:**

**1. Spouses:** At common law, a ***husband and wife*** cannot by themselves make up a ***conspiracy***. But virtually all modern courts have ***rejected*** this common law rule, so a conspiracy composed solely of husband and wife is punishable.

**2. Corporations:** There must at least be two ***human*** members of any conspiracy. Thus although a corporation can be punished as a conspirator, there can be no conspiracy when only one corporation and one human being (e.g., an officer or stockholder of the corporation) are implicated.

**E. Inconsistent disposition:** Look out for situations where one or more members of the alleged conspiracy are not convicted — does this prevent the conviction of the others? For now, let’s assume that there are only two purported members, A and B.

**1. Acquittal:** Where A and B are tried in the ***same proceeding***, and A is acquitted, all courts agree that B must also be acquitted. But if the two are tried in ***separate*** proceedings, courts are split. Most courts today hold that A’s acquittal does ***not*** require B’s release.

**a. Model Penal Code rejects consistency requirement:** The MPC, as the result of its “unilateral” approach, follows the majority rule of not requiring consistency where separate trials occur.

**Example:** A and B are the only two alleged conspirators. A is acquitted in his trial. B is then tried. B may be convicted, because under the “unilateral” approach, we look only at whether B conspired with anyone else, not whether “A and B conspired together.”

**2. One conspirator not tried:** If A is ***not brought to justice*** at all, this will ***not*** prevent conviction of B (assuming that the prosecution shows, in B’s trial, that both A and B participated in the agreement).

**VIII. PUNISHMENT**

**A. Cumulative sentencing:** May a member of the conspiracy be convicted of ***both*** conspiracy to commit the crime and the substantive crime itself?

**1. Cumulative sentencing usually allowed:** Most states allow a ***cumulative sentence***, i.e., conviction for both conspiracy and the underlying crime.

**2. MPC limits:** But the Model Penal Code does not follow this majority approach — D may not be convicted simultaneously of crime X, and conspiracy to commit crime X.

**a. Some objectives not realized:** If, however, the conspiracy has a number of objectives, and less than all are carried out, even under the MPC there can be a conviction of both conspiracy and the carried-out crimes.

**IV. Exculpation**

**A. Justification and excuse generally:** The twin doctrines of ***“justification”*** and ***“excuse”*** allow D to escape conviction even if the prosecution proves all elements of the case. There is no important distinction between those defenses referred to as “justification” and those referred to as “excuses.” Here is a list of the main justifications/excuses:

**1. *Duress***;

**2. *Necessity***;

**3. *Self-defense***;

**4. *Defense of others***;

**5. *Defense of property***;

**6. *Law enforcement*** (arrest, prevention of crime and of escape);

**7. *Consent***;

**8. *Maintenance of domestic authority***;

**9. *Entrapment***.

**B. Effect of mistake:** The effect of a ***mistake of fact*** by D on these defenses has changed over time:

**1. Traditional view:** The traditional rule has generally been that D’s ***reasonable*** mistake will not negate the privilege, but that an ***unreasonable*** mistake by D will negate the defense.

**2. Modern view:** But the modern trend, as exemplified by the MPC, is to hold that so long as D genuinely believes (even if ***unreasonably***) that the facts are such that the defense is merited, the defense will stand. (There is an exception if D is charged with an act that may be committed “recklessly” or “negligently” — here, he loses the defense if the mistake was “reckless” or “negligent.”)

**II. DURESS**

**A. General nature:** D is said to have committed a crime under ***“duress”*** if he performed the crime because of a ***threat of***, or ***use of***, ***force*** by a third person sufficiently strong that D’s will was ***overborne***. The term applies to force placed upon D’s ***mind***, not his body.

**Example:** X forces D to rob Y, by threatening D with immediate death if he does not. D will be able to raise the defense of duress.

**B. Elements:** D must establish the following elements for duress:

**1. Threat:** A ***threat*** by a third person,

**2. Fear:** Which produces a ***reasonable fear*** in D,

**3. Imminent danger:** That he will suffer ***immediate*** or ***imminent***,

**4. Bodily harm: *Death*** or ***serious bodily injury***.

**C. Model Penal Code test:** Under the MPC, the defense is available where the threat to D was sufficiently great that “a person of ***reasonable firmness*** in [D’s] situation would have been ***unable to resist***.” MPC §2.09(1).

**D. Not available for homicide:** Traditionally, the defense of duress is not available if D is charged with ***homicide***, i.e., the intentional killing of another.

**Example:** D is a member of a gang run by X. X and the other gang members tell D that if D does not kill V, an innocent witness to one of the group’s crimes, they will kill D immediately. D reasonably and honestly believes this threat. D kills V. Few if any courts will allow D to assert the defense of duress on these facts, because he is charged with the intentional killing of another. (The result probably would not change even if D had originally been coerced into joining the gang.)

**1. Reduction of crime:** A few states allow duress to ***reduce the severity*** of an intentional homicide (e.g., from first-degree premeditated murder to second-degree spur-of-the-moment murder).

**2. Felony-murder:** Also, duress is accepted as a defense to a charge of ***felony-murder***. (*Example:* D is coerced into driving X to a robbery site. During the robbery, X intentionally kills V, a witness, to stop V from calling the police. Although in most states D would ordinarily be liable for felony-murder, most states would allow him to raise the defense of duress here.)

**E. Imminence of threatened harm:** D must be threatened with ***imminent*** or ***immediate*** harm, in most courts. Thus the threat of ***future harm*** is not sufficient. But modern courts are more willing to relax this requirement.

**Example:** D witnesses X kill V. X phones D to say that if D testifies against X at X’s murder trial, X will kill D after the trial. D lies on the stand to avoid implicating X. D is then charged with perjury. Traditionally, most courts would not allow D to raise the defense of duress, since the threatened harm was not imminent. But a modern court, and the Model Penal Code, might not impose this requirement of immediacy.

**F. Threat directed at person other than defendant:** Traditionally, most courts have required that the threatened harm be directed ***at the defendant***.

**1. Modern view:** But modern courts, and the MPC, are more liberal. Many courts now recognize the defense where the threat is made against a member of D’s ***family***. The MPC imposes no requirement at all about who must be threatened (but remember that under the MPC the test is whether a person of “reasonable firmness” would be coerced, and this may be hard to prove if D is coerced by the threat of harm to a complete stranger).

**G. Defendant subjects self to danger:** Nearly all courts deny the defense to a D who has ***voluntarily placed himself in a situation*** where there is a substantial probability that he will be subjected to duress.

**Example:** D voluntarily joins an organized crime group known to have the policy of *omerta*, or death to anyone who informs on the gang. D is called to the witness stand, and lies to protect other gang members. D will not be able to raise the defense of duress, since he voluntarily or at least recklessly placed himself in a position where he was likely to be subjected to duress.

**H. Guilt of coercer:** Even though the person subjected to duress may have a valid defense on that ground, this will not absolve the person who did the coercing.

**Example:** A forces B to rob V, by threatening to kill B if he does not. Even though B probably has a duress defense to a robbery charge, A will be guilty of robbery, on an accomplice theory.

**III. NECESSITY**

**A. Generally:** The defense of ***“necessity”*** may be raised when D has been compelled to commit a criminal act, not by coercion from another human being, but by ***non-human events***. The essence of the defense is that D has chosen the ***lesser of two evils***.

**Example:** D needs to get his seriously ill wife to the hospital. He therefore violates the speed limit. Assuming that there is no available alternative, such as an ambulance, D may claim the defense of necessity, since the traffic violations were a lesser evil than letting his wife get sicker or die.

**B. Requirements for defense:** The principal requirements which D must meet for the necessity defense are:

**1. Greater harm:** The harm sought to be avoided is ***greater*** than the harm committed;

**2. No alternative:** There is no third ***alternative*** that would also avoid the harm, yet would be non-criminal or a less serious crime;

**3. Imminence:** The harm is ***imminent***, not merely future; and

**4. Situation not caused by D:** The situation was not brought about by D’s carelessly or recklessly ***putting himself in a position*** where the emergency would arise.

**Note:** In contrast to the case of duress, the harm D is seeking to avoid need not be serious bodily harm, but may be non-serious bodily harm or even *property damage*.

**C. Homicide:** Courts have traditionally been very reluctant to permit the necessity defense where D is charged with an ***intentional killing***.

**1. Model Penal Code view:** The MPC does not rule out the necessity defense even in intentional homicide cases. But under the MPC, one may not sacrifice one life to save another, since the Code requires the choice of the lesser of two evils, not merely the equal of two evils, and all lives are presumed to be of equal value. But if a life can be sacrificed to save two or more lives, the Code would allow the defense. (*Example:* D, a mountain climber, is roped to V, who has fallen over a cliff. If the only alternative is that both climbers will die, D may cut the rope even if this will inevitably cause V’s death.)

**D. Economic necessity not sufficient:** The harm that confronts D may be of a non-bodily nature, such as damage to his property. But courts do not accept the defense of ***“economic necessity***.***”*** (*Example:* D, an unemployed worker, may not steal food and then claim the defense of necessity. But if he is actually about to starve to death, then the defense may be allowed.)

**E. Civil disobedience:** The necessity defense is almost always rejected in cases of ***“civil disobedience.”***

**Example:** To protest U.S. military assistance to El Salvador, the Ds trespass in their local IRS office, splash blood on the walls, and do other criminal acts to draw attention to why U.S. policy is bad. *Held*, the Ds’ necessity defense is invalid, because there were lawful ways of attempting to bring about changed government policies. [*U.S. v. Schoon*]

**IV. SELF-DEFENSE**

**A. Self-defense generally:** There is a general right to ***defend oneself*** against the use of ***unlawful force***. When successfully asserted, the defense is a complete one, leading to acquittal.

**B. Requirements:** The following requirements must generally be met:

**1. Resist unlawful force:** D must have been resisting the ***present or imminent use*** of ***unlawful force***;

**2. Force must not be excessive:** The degree of force used by D must not have been ***more than was reasonably necessary*** to defend against the threatened harm;

**3. Deadly force:** The force used by D may not have been ***deadly*** (i.e., intended or likely to cause death or serious bodily injury) unless the danger being resisted was also deadly force;

**4. Aggressor:** D must not have been the ***aggressor***, unless: (1) he was a ***non-deadly aggressor*** confronted with the unexpected use of deadly force; or (2) he ***withdrew*** after his initial aggression, and the other party continued to attack; and

**5. Retreat:** (In some states) D must not have been in a position from which he could ***retreat*** with complete safety, unless: (1) the attack took place in D’s dwelling; or (2) D used only non-deadly force.

**C. Requirement of “unlawful force”:** Self-defense applies only where D is resisting force that is ***unlawful***.

**1. Other party commits tort or crime:** Generally, this means that the other party must be committing a ***crime or tort***.

**a. Other party has privilege:** Thus if the other party, even though he is using force, is ***entitled*** to do so, the force is not unlawful, and D may not use force to defend against it. For instance, a property owner who is using non-deadly force to defend his property against attempted theft is not using “unlawful” force.

**Example:** D tries to pick V’s pocket. V, not a trained or dangerous fistfighter, hits D lightly with his fist. V has a privilege to use reasonable non-deadly force to defend his property, so V is not using “unlawful” force, and D therefore has no right to use any force in self-defense.

**b. Other party uses excessive force:** However, if the other party is entitled to use some degree of force, but uses ***more than is lawfully allowed***, the excess will probably be treated as unlawful, and D may resist it by using force himself.

**Example:** On the facts of the above example, suppose that V pulls out a gun and aims it at D and starts to pull the trigger, even though V realizes that D is unarmed and not dangerous. D may probably tackle V and knock away the gun, because V has gone beyond the scope of the privilege to use reasonable force to defend property.

**c. Reasonable mistake by D:** If D makes a ***reasonable mistake*** about the unlawful status of the force being used against her, she will nonetheless be protected. (In general, the defense of self-defense is not voided by a reasonable mistake.) But in most states, D will lose the defense if her mistaken belief that the opposing force was unlawful was unreasonable. See the further discussion of mistake in self-defense below.

**D. Degree of force:** D may not use more force than is ***reasonably necessary*** to protect himself.

**1. Use of non-deadly force:** D may use ***non-deadly force*** to resist virtually any kind of unlawful force (assuming that the level of non-deadly force D uses is not more than is necessary to meet the threat).

**a. No need to retreat:** D may use non-deadly force without ***retreating*** even if retreat could be safely done.

**b. Prevention of theft:** D may use non-deadly force to resist the other person’s attempted theft of ***property***.

**2. Deadly force:** D may defend himself with ***deadly force*** only if the attack threatens D with ***serious bodily harm***.

**a. Definition of “deadly force”:** Remember that “deadly force” is usually defined as force that is ***intended or likely*** to cause ***death or serious bodily harm***.

**i. Firing firearm:** Generally, if D purposely ***fires a gun*** in the direction of another person, this will be considered use of deadly force. See MPC §3.11(2).

**ii. Result irrelevant:** The ***actual result*** of the deadly force is ***irrelevant***, either way.

**Example 1:** D shoots at V with a gun, and misses him entirely. D has used deadly force, and will be liable for assault and/or battery if deadly force was not permissible.

**Example 2:** D, not a particularly capable fistfighter, swings his fist at V’s stomach, intending to immobilize V. V unexpectedly suffers a ruptured spleen, and dies. D will not be deemed to have used deadly force, since the force was neither intended nor likely to cause death or serious bodily harm.

**iii. Threats:** D’s verbal ***threat*** to use deadly force does ***not*** itself constitute use of deadly force, provided that D ***does not intend to carry out the threat***. (MPC §3.11(2))

**b. Nature of attack:** D may use deadly force to defend against the threat of ***serious bodily harm***. Most courts also allow it to protect against ***kidnapping*** and forcible ***rape***.

**c. Effect of mistake:** As with other sorts of mistakes, if D is reasonably mistaken in the belief that he is threatened with serious bodily harm, he will not lose the right to reply with deadly force.

**E. Imminence of harm:** The harm being defended against must be reasonably ***imminent***.

**1. MPC liberal view:** The MPC construes this requirement somewhat liberally — D may use force to protect himself against unlawful force that will be used ***“on the present occasion***.***”***

**Example 1:** V tells D on the telephone, “I will kill you tomorrow.” D goes to V’s house and shoots V. D may not claim self-defense, because V’s threat was not for imminent force.

**Example 2:** D is stranded in his broken-down car in the middle of a neighborhood he does not know well. V sees D defenseless, and says, “I’m gonna go get my friends and we’re gonna come back and strip the tires off your car.” Under the MPC, D may use non-violent force to prevent V from getting his friends, because the threat is that unlawful force will be used “on the present occasion,” even though the force is not completely imminent.

**2. Withdrawal by aggressor:** One consequence of the requirement that the danger be imminent is that if the ***aggressor withdraws*** from the conflict, the victim ***loses his right to use force,*** at least where the withdrawal should reasonably be interpreted as indicating that the danger is over. (But if the assailant seems to be getting ***reinforcements***, that’s not a “withdrawal,” and the victim can keep using force.)

**Example:** V and D are friends. They get into a verbal dispute, and V takes a swing at D. D starts to swing back. V stops swinging and says, “Wait a minute, we’ve always been friends, let’s stop fighting.” D (who has no reason to believe that V’s offer to stop the fight is phony) continues to beat V up. D will not be able to use the defense of self-defense if he is charged with battery occurring after V’s offer to stop — once V withdrew from the conflict, the occasion requiring self-defense was over.

**F. Aggressor may not claim self-defense:** If D is the ***initial aggressor*** — that is, one who strikes the first blow or otherwise precipitates the conflict — he may ordinarily ***not claim self-defense***.

**Example:** D starts a fight in a bar with V, by brandishing a knife at V. V, using his own knife, tries to cut D’s knife-wielding hand. D hits V in the face with his other hand, injuring him. D cannot claim self-defense, because he precipitated the conflict by brandishing the knife.

**1. Aggression without actual force:** D can be treated as an aggressor, and thus lose the right of self-defense, even if D did not actually strike the first blow. It is enough if D did an ***unlawful*** (i.e., tortious or criminal) act which ***“provoked”*** the physical conflict.

**Example:** The above example illustrates this principle — D has merely brandished the knife, not used it, yet he is deemed the aggressor.

**2. Exceptions:** There are two ***exceptions*** to the rule that the one who is the aggressor may not claim self-defense:

**a. Non-deadly force met with deadly force:** First, if D provokes the exchange but uses no actual force or only ***non-deadly force***, and the other party ***responds with deadly force***, D may then defend himself (even with deadly force, if necessary).

**Example:** D attacks V with his fists. V defends by knocking D down, then starting to smash D’s head against the wall, so that D is in danger of being killed or badly hurt. D manages to pull a knife, and kills X. Probably D is entitled to a claim of self-defense. V, by meeting non-deadly force with deadly force, was acting unlawfully, and D will be permitted to save his life. (All of this assumes that D did not have the duty and opportunity to retreat, a duty which he might have in some states under some circumstances.)

**b. Withdrawal:** Second, if D ***withdraws from the conflict***, and the other party (V) initiates a ***second conflict***, D may use non-deadly force (and even deadly force if he is threatened with death or serious bodily harm). This is true even if D started the initial conflict with the use of deadly force. All of this is so because once D (the initial aggressor) withdraws, the conflict is over, so V’s use of force becomes unlawful force that D can defend against.

**Example:** In a bar, D attacks V with his fists, hits him several times, and knocks him down. D leaves the bar and gets into his car, intending to drive away. V, after getting up, follows D outside, and attacks D with his fists, just as D is getting to the car. D swings back, hitting and injuring V. D will be entitled to claim self-defense, because he withdrew from the conflict, and V was in effect starting a new conflict in which V was really the aggressor.

**G. Retreat:** Some states (but not yet a majority) require that if D could ***safely retreat***, he must do so ***rather than use deadly force***.

**1. No retreat before non-deadly force:** No states require retreat before the use of ***non-deadly force***.

**Example:** V attacks D with non-deadly force. D could withdraw from the encounter with complete safety, by getting into his car and driving away. D instead stands his ground and fights back with his fists, with which he is not especially proficient. In all states, even those with a general “duty to retreat,” D is privileged, because no retreat is ever required before the use of non-deadly force.

**2. Retreat only required where it can be safely done:** The retreat rule, in states requiring it, only applies where D could retreat with ***complete safety*** to himself and others. Also, if D reasonably but mistakenly believes that retreat cannot be safely done, he will be protected.

**3. Retreat in D’s dwelling:** Those states requiring retreat do not generally require it where the attack takes place in ***D’s dwelling***.

**Example:** D invites V to D’s house, and the two parties get into a dispute. V attacks D with a knife. D could easily go into a bedroom which can be locked from the inside; while there, he could readily call the police. Instead, D grabs a knife — the only reasonably available means of combating V, given D’s inferior martial arts skills — and seriously wounds V. Even in states imposing a general duty of retreat, D is exempt from the duty here, since the attack is taking place in his own dwelling.

**a. Not applicable if D was aggressor:** But this exception for a dwelling does not apply if D was the ***aggressor***.

**b. Assailant also resident:** Also, some courts hold that the dwelling exception to the retreat requirement does not apply where the ***assailant is also a resident*** of the dwelling. But other courts, probably representing the more modern view, do not remove the exception in this situation.

**Example:** H and W are married. H attacks W at home. W could easily retreat to a lockable bedroom, but instead uses deadly force (though no more than reasonably necessary) to rebut the attack. Of the states requiring a duty to retreat, most would give W an exemption because she is in her dwelling, but a few would impose the duty of retreat even here because H is also a resident of the dwelling.

**H. Effect of mistake:** The effect of a ***mistake*** by D concerning the need for self-defense will depend largely on whether the mistake is ***“reasonable.”*** Observe that there are various kinds of mistakes that D might make concerning the need for self-defense: (1) a mistaken belief that he is about to be attacked; (2) a mistake in belief that the force used against him is unlawful; (3) a mistaken belief that only deadly force will suffice to repel the threat; or (4) a mistaken belief that retreat could not be accomplished safely.

**1. Reasonable:** As long as D’s mistaken belief as to any of these points is ***reasonable***, all courts will allow him to claim self-defense.

**Example:** While D is walking down the street one evening, V says, “Your money or your life,” and points what appears to be a gun at D. In fact, the “gun” is merely V’s finger poking through V’s jacket. A reasonable person in D’s position would be likely to believe that there was a real gun. D also reasonably believes that V may shoot D even if D gives up the property, because this has happened in the neighborhood on several recent occasions. D pulls his own gun and shoots V to death. Later evidence shows that V, a career mugger, would never have dreamt of actually doing physical harm to a victim. Because D’s mistakes (about the existence of a gun, and about whether it would be used against him) were “reasonable,” D is entitled to claim self-defense despite the mistakes.

**2. Unreasonable mistake:** But if D’s mistake is ***unreasonable***, most states hold that he ***loses*** the right to claim self-defense.

**Example:** D travels on a New York City subway while carrying an unlicensed loaded pistol. Four youths approach him, and one states, “Give me $5.” D pulls out the gun and shoots at each of the four, one of whom is sitting on a bench and apparently posing no imminent threat to D at the time. D later admits that he did not think the youths had a gun, but that he had a fear, based on prior times when he was mugged, that he might be maimed as a result of this encounter.

*Held*, D’s claim of self-defense is valid only if he “reasonably believed” that one of the victims was about to use deadly physical force or about to commit one of certain violent crimes upon him. This imposes an objective standard, by which D’s conduct must be that of a reasonable person in D’s situation. [*People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986)]

**a. MPC/minority view:** A minority of courts, and the Model Penal Code, hold that even an ***unreasonable*** (but genuine) mistake as to the need for self-defense will protect D. This is, in a sense, the more “modern” view. (But if the crime is one that can be committed by a “reckless” or “negligent” state of mind, even under the MPC D’s reckless or negligent mistake as to the need for self-defense will not absolve him.)

**b. Not totally subjective:** Even in courts following the majority “objective” standard for reasonableness of mistake, the standard is not completely objective.

**i. D’s physical disadvantages:** Courts generally take D’s ***physical disadvantages*** into account in determining the reasonableness of his mistake.

**Example:** If D is a small woman, and V is a large man, obviously it is reasonable for D to fear harm more readily than if the roles were reversed.

**ii. D’s past experiences and knowledge:** Similarly, courts generally hold that D’s ***past experiences*** and knowledge are to be taken into account in determining whether D’s mistake was a “reasonable” one.

**Example:** In *People v. Goetz*, *supra*, D was allowed to put on evidence that he was previously mugged, thus contributing to his belief that danger to him was likely in the present encounter.

**c. Intoxication:** If the cause of D’s unreasonable mistake as to the need for self-defense is his ***intoxication***, all courts agree that the intoxication does not excuse the mistake, and D will not be entitled to a claim of self-defense.

**Example:** D gets drunk in a bar. He mistakenly believes that V is about to shoot him. He instead draws first, and shoots V to death. Had D been sober, he would have realized that V was not about to attack him. All courts agree that because D’s mistake was caused by his intoxication, he loses the claim of self-defense.

**I. Battered women and self-defense:** Where a woman ***kills her spouse*** because she believes this is the only way she can protect herself against ongoing ***battering*** by him, courts normally do not change the generally-applicable rules of self-defense.

**1. Standard for “reasonableness”:** In a battered-woman case, the courts try not to allow too much subjectivity into the determination of whether the woman has acted reasonably. Most courts make the test, What would a reasonable woman do in the defendant’s situation, taking into account the prior history of abuse, but not taking into account the particular psychology of the woman herself (e.g., that she is unusually depressed, or aggressive, or otherwise different)?

**2. Imminence of danger:** Nearly all courts continue to require in battered-woman cases, as in other cases, that self-defense be used only where the danger is ***imminent***. For instance, courts have not modified the traditional requirement of imminent danger to cover situations where the woman’s counter-strike ***does not come during a physical confrontation***. Thus D would probably be convicted of murder for killing her abusing husband, V, in any of the following situations:

* V, after abusing D, has ***gone to sleep***, and D shoots him in the head while he sleeps;
* D ***waits*** for V to return home, and kills him immediately, before any kind of argument has arisen; and
* D ***arranges with someone else*** (at the most extreme, a hired killer) to kill V.

(But if the absence of confrontation is merely a ***momentary lull*** in the attack — e.g., V’s back is temporarily turned, but D reasonably believes that the attack will resume any moment — then the requirement of imminence is typically found to be satisfied.)

**3. Battered child:** Essentially the same rules apply where a ***battered child*** kills the abusive parent or step-parent, typically the father. Thus many courts allow psychologists to testify about a “battered child’s syndrome.” But courts apply the imminence requirement in the case of killings by children, just as in the case of killings by the wife.

**J. Resisting arrest:** A person’s right to use force to ***resist an unlawful arrest*** is much more limited than his right to use force to resist other kinds of unlawful attack.

**1. Deadly force:** Virtually no state allows a suspect to use ***deadly force*** to resist an unlawful arrest.

**2. Non-deadly force:** A substantial minority of states now bar even the use of ***non-deadly force*** against an unlawful arrest. The MPC, for instance, refuses to allow the use of force to resist an unlawful arrest, if D knows that the person doing the arresting is a police officer. MPC §3.04(2)(a)(i).

**Example:** Officer comes to D’s house to arrest D for a felony committed a long time ago, as to which the police have long suspected D. Officer does not have a warrant. D knows that Officer is a police officer, but D also knows that constitutionally, a warrant is required for entering a suspect’s house to arrest him unless there are exigent circumstances. Although D thus knows that the arrest is unlawful, D may not use even non-deadly force — such as punching or kicking the officer — to resist arrest, under minority/MPC view.

1. **Traditional view:** But the traditional view, probably still followed by a bare majority of states, is that a suspect *may* use ***non-deadly*** force to resist an unlawful arrest.

**3. Excessive force:** Nearly all states allow the use of non-deadly force to resist an arrest made with ***excessive force***, or in any situation where D reasonably believes that he will be ***injured***. (But even here, deadly force may not be used.)

**Example:** In a Rodney King-like scenario, D is arrested properly, then kicked and beaten with truncheons for several minutes, while he does not resist. Nearly all states would allow D to punch or kick the arresting officer and to run away, in order to escape the blows. But D could not pull out a knife and stab the arresting officer, even in this extreme situation.

**K. Injury to third persons:** If while D is using force to protect himself, he ***injures a bystander***, his criminal liability with respect to this injury will be measured by the same standards as if it was the assailant who was injured.

**1. D not reckless or negligent:** Thus if D’s conduct was not reckless or negligent with respect to the bystander, he will not be liable, assuming that self-defense as to the assailant was proper.

**2. Recklessness or negligence:** Conversely, if D *is* reckless or negligent with respect to the risk of injuring a bystander, D may not claim self-defense if the charge is one that requires only recklessness or negligence (as the case may be).

**Example:** X, wielding a knife, attacks D in a crowded bar. D pulls out what he knows to be a very powerful gun, and shoots at X. The bullet misses X and kills Y, a bystander. Even if, as seems likely, D had a general right to use deadly force in his own defense in this situation, a jury could find that D was reckless as to the risk of killing a bystander. If the jury so concluded, D would then be guilty of voluntary manslaughter, because his mental state with respect to Y — recklessness — suffices for manslaughter.

**L. “Imperfect” self-defense:** D may be entitled to a claim of ***“imperfect”*** self-defense, sufficient to reduce his crime from murder to ***voluntary manslaughter***, if D killed in self-defense but failed to satisfy one of the requirements for acquittal by reason of self-defense.

**1. Unreasonable mistake:** Thus if D makes an ***unreasonable mistake*** as to the need for force, or as to the unlawfulness of the other party’s force, most states give him the claim of imperfect self-defense.

**2. Initial aggressor:** Similarly, if D was the ***initial aggressor***, and thus lost the right to claim true self-defense, he can still use imperfect self-defense to get his crime reduced to manslaughter.

**Example:** X insults D. D pulls a knife and advances towards X. X pulls a gun and is about to shoot D. With his spare hand, D pulls a gun and shoots X to death. Because D was the aggressor — and he was the first to use physical violence rather than mere words — he does not have a “full” claim of self-defense. However, he met all the requirements for use of deadly force except that he not have been the aggressor, so he’ll probably be entitled to have the charge reduced from murder to voluntary manslaughter.

**3. Model Penal Code view:** The MPC similarly says that an unreasonable belief in the need for deadly force will give rise to manslaughter if D was reckless in his mistake. (If D’s unreasonable belief was merely negligent, under the MPC he cannot be charged with anything higher than criminally negligent homicide.)

**M. Burden of proof:** Nearly all states make a claim of self-defense an ***affirmative defense***, i.e., one which must be raised, in the first instance, by D. Many states also place the ***burden of persuasion*** on D, requiring him to prove by a ***preponderance of the evidence*** that all the requirements for the defense are met. It is constitutional for a state to put this burden of persuasion upon the defendant. [*Martin v. Ohio*, 480 U.S. 228 (1987)]

**V. DEFENSE OF OTHERS**

**A. Right to defend others in general:** A person may use force to ***defend another*** in roughly the same circumstances in which he would be justified in using force in his own defense.

**B. Relation between defendant and aided person:** At common law, a person was permitted to defend only his ***relatives***.

**1. Modern rule:** Today, however, most courts and statutes permit one to use force to defend anyone, even a ***total stranger***, from threat of harm from another.

**C. Requirements:** D must generally meet the following requirements in order to have a claim of defense of others:

**1. Danger to other:** He reasonably believes that the other person is in ***imminent danger*** of ***unlawful bodily harm***;

**2. Degree of force:** The ***degree of force*** used by D is no greater than that which seems reasonably ***necessary*** to prevent the harm; and

**3. Belief in the other person’s right to use force:** D reasonably believes that the party being assisted would have the right to use in his ***own defense*** the force that D proposes to use in assistance.

**D. Retreat:** Most courts hold that D may not use deadly force if he has reason to believe that the person being aided could ***retreat with safety***. Thus the MPC requires that D at least “try to cause” the person being aided to retreat if retreat with safety is possible (although D may then use deadly force if his attempt at causing retreat fails).

**1. Home of either party:** Probably retreat is not necessary if the place where the encounter takes place is the ***dwelling*** or ***place of business*** of either the defendant or the party assisted.

**E. Mistake as to who is aggressor:** Courts are split about the effect of D’s mistake concerning ***who was really the aggressor***.

**1. Traditional view:** The traditional view, called the ***“alter ego”*** rule, is that D “stands in the shoes” of the person he aids. Under this view, if the person aided would not have had the right to use that degree of force in his own defense, D’s claim fails.

**Example:** D observes two middle-aged men beating and struggling with an 18-year-old youth; D reasonably concludes that these two are unlawfully attacking the youth. D hits X, one of the older men, in an attempt to get him off the youth; he breaks X’s jaw. It turns out that X and the other older man were plainclothes police officers trying to make a lawful arrest of the youth for an attempted mugging. Under the traditional “alter ego” view, since the youth did not have the privilege to hit back to prevent a lawful arrest, D did not have that privilege to do so for the youth’s benefit.

**2. Modern view:** But the modern view is that so long as D’s belief that unlawful force is being used against the aidee is ***reasonable***, D may assert a claim of defense of others even if his evaluation turns out to have been wrong. Thus the MPC gives the right based on “the circumstances as the actor believes them to be....” (*Example:* On the facts of the above example, the modern/MPC view would permit D to use the claim of defense of others.)

**VI. DEFENSE OF PROPERTY**

**A. Generally:** A person has a limited right to use force to ***defend his or her property*** against a wrongful taking.

**1. Non-deadly force: *Non-deadly force*** may be used to prevent a ***wrongful entry on one’s real property***, and the ***wrongful taking of one’s personal property***.

**2. Reasonable degree:** The degree of force used must not be ***more than appears reasonably necessary*** to prevent the taking. For instance, if one in D’s position should believe that a ***request to desist*** would be sufficient, force may not be used.

**Example of proper use of non-deadly force:** D sees X attempting to break into D’s car, parked on the street. At least if D has no reason to believe that words alone will dissuade X, D may punch X, spray mace at him, or otherwise use non-deadly force to stop the break-in.

**3. Subsequent use of deadly force:** If D begins by using a reasonable degree of non-deadly force, and the wrongdoer responds with a personal attack, then the rules governing self-defense come into play. It may then become permissible for D to use deadly force to protect himself.

**B. Deadly force:** In general, one may ***not use deadly force*** to defend personal property or real estate.

**1. Dwelling:** However, in limited circumstances, one may be able to use deadly force to defend ***one’s dwelling***.

**a. Modern view requires violent felony:** Under the modern view, deadly force may be used ***only where the intrusion appears to pose a danger of a violent felony***. Under this view, a homeowner may ***not*** shoot a ***suspected burglar***, unless the owner believes the burglar to be ***armed*** or ***dangerous to the safety of the inhabitants***.

**C. Mechanical devices:** A property owner may ordinarily use ***mechanical devices*** to protect his property.

**1. Non-deadly devices:** A device that is ***non-deadly*** (i.e., one that is not likely or intended to cause death or serious bodily harm) may be used whenever it is ***reasonable*** to do so. Thus a property owner may put ***barbed wire*** or a ***spiked fence*** (but not an electrical fence) around his property. (Under the MPC, the owner must give a ***warning*** to intruders about the device unless it is one that is “customarily used for such a purpose.”)

**2. Deadly force:** Courts are much less likely to allow a mechanical device that constitutes ***deadly force***.

1. **Traditional view:** Traditionally, D could use a mechanical deadly device if the situation were one in which D himself could use deadly force.

**Example:** D, a homeowner, sets up a spring gun attached to the door. The gun shoots X, who turns out to be an armed and dangerous burglar. Under the traditional view, D would not be guilty of anything, since he would have had the right to use deadly force against the burglar personally.

**b. Modern view prohibits:** But the ***modern*** view ***prohibits*** the use of such devices altogether, even if they happen to go off in a situation where the owner himself would have been justified in using deadly force.

**Example:** Under the modern/MPC view, on the facts of the above example, D would be guilty of murder if the gun went off and shot to death even an armed and dangerous burglar.

**D. Recapture of chattel and re-entry on land:** A person has a privilege to use reasonable force to ***re-take*** his personal or real property.

**1. Personal property:** Where personal property has been taken, all courts agree that D may use reasonable non-deadly force to ***recapture*** it, provided that he does so ***immediately*** following the taking.

**a. Interval:** But if a substantial period of time has ***elapsed*** since the taking, courts are split. The modern/MPC view is that D may use force to retake his property at any time, provided that the owner believes that the other has no “claim of right” to possess the object. (*Example:* D’s bicycle is stolen, and he sees X riding down the street on it several days later. If D reasonably believes he recognizes X as being the thief, he can use reasonable force to take back the bicycle. But if he sees that X is not the thief, and believes that X may have bought it from the thief, D cannot use reasonable force because X would be acting under a “claim of right to possession” of the bike, even though X does not have title.)

**2. Re-entry on real estate:** Similarly, under the modern view, D may use force to ***re-enter*** his real estate, even if there has been a lapse of time, if the non-owner has no claim of right to possession and it would be a hardship for the owner to wait to get a court order.

**VII. LAW ENFORCEMENT (ARREST; PREVENTION OF ESCAPE AND CRIME)**

**A. General privilege:** A person engaged in ***law enforcement*** has a general privilege to violate the law when it is reasonable to do so.

**Example:** D, a police officer, is chasing a fleeing convict. D may drive his car through a stop light, or 20 m.p.h. above the speed limit, provided that a reasonable officer in D’s position would believe that this was necessary to recapture the escapee.

**Use of force:** The main question that arises is whether an officer’s ***use of force*** was lawful. See below. [126]

**B. Arrest:** A law enforcement officer is privileged to use reasonable force in ***effecting an arrest***. However, this privilege exists only where the arrest being made is a ***lawful one***.

**1. Summary of arrest rules:** The rules for determining whether an arrest is lawful depend in part on whether the arrest is for a felony or a misdemeanor:

**a. Felony:** At common law, a police officer may make an arrest for a ***felony*** if: (1) it was committed in the officer’s presence; or (2) it was committed outside the officer’s presence, but the officer has reasonable cause to believe that it was committed, and by the person to be arrested.

* **Warrant not required:** In these situations, the arresting officer is ***not required*** to have a ***warrant***.

**b. Misdemeanor:** An officer may also arrest for a ***misdemeanor***.

* **Warrant:** If the misdemeanor occurred in the officer’s presence, no warrant is required. But at common law, if the misdemeanor occurred outside of the officer’s presence, then a warrant ***is*** required (though this rule has often been changed by statute).

**2. Arrest resisted:** If an officer who is attempting to make a lawful arrest meets resistance, he may use reasonable force to protect himself. In general, the rules applicable to self-defense apply here.

**a. No retreat:** There is one important difference: even in those states requiring one to retreat before using deadly force where it is safe to do so, an officer is ***not required to retreat*** rather than make the arrest.

**3. Fleeing suspect:** An officer may use ***non-deadly force*** wherever it is reasonably necessary to arrest a ***fleeing*** suspect. But there are important limits on the use of ***deadly*** force where the suspect is fleeing:

**a. Misdemeanor:** If the suspect is fleeing from an arrest for a ***misdemeanor***, deadly force may ***not*** be used against him.

**Example:** If the police are chasing a garden-variety speeder, they may not shoot at him or at his car. If they shoot at the tires and cause a fatal crash, they will be liable for manslaughter, since shooting a gun in the direction of a person, even without intent to hit him, is generally considered to be the use of deadly force.

**b. Non-dangerous felony:** Where the suspect is fleeing an arrest for a ***non-dangerous*** felony, the modern, and Supreme Court, view is that the police may ***not*** use deadly force to catch the suspect. [127 - 128]

**Example:** Where an officer is chasing an escaping burglar whom the officer has no reason to believe is armed, the officer may not shoot the burglar in the back. This is true even if the burglar ignores a command to stop and raise his hands. [*Tennessee v. Garner*, 471 U.S. 1 (1985)]

**c. Dangerous felony:** If the felony or the felon is a ***“dangerous”*** one, the arresting officer may use deadly force if that is the only way that the arrest can be made. The issue is whether the suspect poses a threat of ***serious physical harm***, either to the officer or to others. [128]

**Example:** The typical car thief or burglar is not “dangerous,” and thus cannot be stopped with deadly force. But the typical armed bank robbery suspect, and perhaps the typical rapist, is probably “dangerous” and thus may be stopped with deadly force.

**4. Arrest by private citizen:** A ***private citizen*** who is attempting to make a “citizen’s arrest” may use reasonable non-deadly force. The private citizen may also use deadly force, but only in extremely limited circumstances: the citizen takes the ***full risk of a mistake***.

**Example:** If it turns out that no dangerous felony was actually committed, or that the suspect was not the one who committed it, the citizen will be criminally liable for death or injury to the suspect.

**a. More extreme view:** Some states, and the MPC, go further: they do not allow private citizens to use deadly force *at all* to make a citizen’s arrest, even if the suspect really *has* committed a dangerous felony.

**b. Escape of non-deadly felon:** Virtually all courts agree that a private citizen, like a police officer, may not use deadly force to stop a fleeing felon if the felon poses ***no immediate threat*** to the citizen or to others. That is, the rationale of *Tennessee v. Garner* (see *supra*) presumably applies to attempted arrests by private citizens just as to attempted arrests by police officers. (Of course, this rule would be invoked only where the court rejects – as most courts do – the MPC’s blanket rule that the arresting citizen may *never* use deadly force, even to arrest a felon who *is* dangerous.) [129]

**C. Prevention of escape:** An officer may use reasonable force to ***prevent the escape*** of a suspect who has already been arrested. The above rules apply in this situation as well.

**D. Crime prevention:** Similarly, officers may use force to ***prevent a crime*** from taking place, or from being completed.

**1. Reasonable non-deadly force:** Both law enforcement officers and private citizens may use reasonable ***non-deadly force*** to prevent the commission of a felony, or of a misdemeanor amounting to a breach of the peace.

**2. Deadly force:** Deadly force may be used to prevent only ***dangerous felonies***.

**VIII. MAINTAINING AUTHORITY**

**A. Right to maintain authority generally: *Parents*** of minor children, ***school teachers***, and other persons who have a duty of supervision, have a limited right to use force to discharge their duties.

**B. Parents of minor:** Parents of a minor child may use a ***reasonable degree of force*** to guard the child’s welfare.

**Example:** A parent who hits or spanks his child will not be guilty of battery, provided that the purpose is to promote the welfare of the child, including preventing or punishing misconduct. However, the parent loses the privilege if the degree of force is unreasonable under the circumstances.

**IX. CONSENT**

**A. Effect of consent by victim:** Generally, the fact that the victim of a crime has ***consented*** does not bar criminal liability.

**Example:** Suppose V, who is terminally ill, consents to have D perform a mercy killing on V. This consent does not protect D from murder charges.

However, there are two major exceptions to this rule that consent does not bar criminal liability:

**1. Consent as element of crime:** First, some crimes are defined in such a way that lack of consent is an ***element of the crime***.

**Example:** Common-law rape is defined to include the element of lack of consent. Therefore, if V consents, there is automatically no crime, no matter how culpable D’s mental state.

**2. Consent as negating of harm:** Second, for some crimes, in some courts, the fact that V has consented prevents D’s conduct from constituting the ***harm*** from arising that the law is trying to prevent.

**a. Athletic contest:** Thus if the crime involves threatened or actual ***bodily harm***, consent is a defense if the bodily harm is ***not serious*** or is part of a lawful ***athletic contest*** or ***competitive sport***.

**Example:** D and V agree to a lawfully-sanctioned boxing match. D strikes V repeatedly, trying to injure V, knowing that V is already hurt. D will not be liable for battery, attempted murder, murder, or any other crime. See MPC §2.11(1).

**B. Incapacity to consent:** Even where the crime is one as to which consent can be a defense, consent will not be found where V is too ***young***, mentally defective, intoxicated, or for other reasons unable to give a meaningful assent.

**1. Fraud:** Similarly, if the consent was obtained by ***fraud***, it will generally not be valid. However, the fraud will negate the consent only where it goes to the ***essence*** of the harmful activity.

**C. Contributory negligence of V:** The fact that V may have been ***contributorily negligent*** will not, by itself, be a defense to any crime.

**Example:** D and V agree to drag race. D’s car slams into V’s, killing him. If D is prosecuted for criminally negligent homicide or voluntary manslaughter, V’s consent will not be a defense, though it might give D a chance to show that V’s negligence, not his own, was the sole proximate cause of the accident.

**D. Guilt of V:** The fact that V is himself engaged in the same or a different illegal activity will not generally prevent the person who takes advantage of him from being criminally liable. (*Example:* D and V agree to an illegal boxing match, during which V is killed. V’s equal culpability will not be a defense for D.)

**E. Forgiveness or settlement:** The fact that V forgives the injury, is unwilling to prosecute, or ***settles a civil suit*** against D, will ***not*** absolve D from liability. The crime is considered to be against the people, not against V as an individual.

**X. ENTRAPMENT**

**A. Entrapment generally:** The defense of ***entrapment*** exists where a ***law enforcement official***, or someone cooperating with him, has ***induced*** D to commit the crime.

**B. Two tests for entrapment:** There are two distinct tests used by courts for whether there has been entrapment:

**1. “Predisposition” test:** The majority test, and the one used in the federal system, is that entrapment exists where: (1) the government ***originates*** the crime and ***induces*** its commission; and (2) D is an ***innocent person***, i.e., one who is ***not predisposed*** to committing this sort of crime. This is the so-called ***“predisposition”*** test.

**Example:** X, an undercover narcotics operative, offers to sell V heroin for V’s own use. If the offer originated entirely with X, and V had never used or sought heroin, V would have a good chance at an entrapment defense, on the theory that he was an “innocent” person who was not predisposed to committing this sort of crime. But if the evidence showed that V had frequently purchased heroin from other sources, then V would not be entrapped under the “predisposition” test, even if the transaction between X and V was entirely at X’s instigation.

**2. “Police conduct” rule:** A minority of courts apply the ***“police conduct”*** rule. Under this rule, entrapment exists where the government agents originate the crime, and their participation is such as is likely to induce ***unpredisposed*** persons to commit the crime, regardless of whether D himself is predisposed. This test is usually easier for the defendant to meet.

**C. Other aspects of entrapment:**

**1. False representations regarding legality:** A separate kind of entrapment exists where the government agent knowingly makes a ***false representation*** that the act in question is ***legal***.

**2. Violent crimes:** Some courts refuse to allow the entrapment defense where the crime is one involving ***violence***.

**3. Distinguished from “missing element” cases:** Distinguish entrapment situations from cases where, because of the participation of government agents, an ***element*** of the crime is ***missing***.

**Example:** X, a government agent, suspects that D is a confidence man who swindles people out of their property. X pretends to go along with D’s scheme, and gives D money which D appropriates. D is not guilty of obtaining money by false pretenses, because one of the elements of that crime is reliance on the part of the victim, and X was not really fooled.

**VI. Specific Offenses - Rape**

**A. Rape defined:** Rape is generally defined as ***unlawful sexual intercourse with a female without her consent***.

**1. Intercourse:** It is not necessary that D achieve an emission. All that is required is that there be a sexual ***penetration***, however slight.

**2. The spousal exception:** Common-law rape requires that the victim be one ***other than the defendant’s wife***. However, this complete spousal exemption at common law has been weakened by statutory reform.

**a. Forcible rape even while living together:** A substantial minority of states now permit prosecution for ***forcible rape*** even if H and W are living together. In other words, in these states, the spousal exemption is virtually eliminated.

**b. Separated or living apart:** An additional substantial minority eliminate the spousal exemption based on the parties’ current living arrangements or marital status. Some of these eliminate the exemption where the parties are ***not living together***. Others eliminate it only if the parties are separated by court order, or one has filed for divorce or separation.

**3. Without consent:** The intercourse must occur without the woman’s ***consent***.

**a. Victim drunk or drugged:** If D causes V to become ***drunk***, ***drugged*** or ***unconscious***, the requisite lack of consent is present. In some but not all states, consent is lacking if the woman is drunk, drugged or unconscious even if this condition was not induced by D.

**b. Fraud:** If consent is obtained by ***fraud***, the status depends on the nature of the fraud. Where D tells a lie in order to induce V to agree to have what V knows is intercourse with him, the fraud is “in the inducement” and does ***not*** vitiate the consent. (*Example:* D says to V, “Have sex with me, and I promise we’ll get married tomorrow.” Even if D is knowingly misleading V about the probability of marriage, D has not committed rape.)

* **Fraud in the essence:** But if the fraud is such that V does not even realize that she is having intercourse at all (“fraud in the essence”), this will suffice for rape. (*Example:* D, a doctor, has sex with V by telling her that he is treating her with a surgical instrument. This is rape.) [269]

**c. Mistake as to consent:** If D makes a ***reasonable mistake*** as to whether V consented, he does ***not*** have the *mens rea* for rape. If D’s mistake, however, is a negligent or reckless one, courts are split about whether it furnishes a defense.

**4. Force:** The vast majority of rape statutes apply only where the intercourse is committed by ***“force”*** or “forcible compulsion.” In other words, it is not enough that the woman fails to consent; she must also be “forced” to have the intercourse. (If the woman is unconscious or drugged, or is under-age, force is not an element of the crime; but in other instances of rape, force is required.)

**a. Threat of force:** D’s ***threat*** to commit ***imminent serious bodily harm*** on the woman will be a substitute for the use of actual physical force, in virtually all states. Some states also recognize the threat to do other kinds of acts not involving serious bodily harm (e.g., a threat of “extreme pain or kidnapping” may suffice under the Model Penal Code).

* **Implied threats or threats of non-imminent harm:** On the other hand, ***implied threats***, or threats to commit harm on some ***future occasion***, or ***duress*** stemming from the victim’s circumstances, are all things that will ***not suffice***, because they are not threats to use force on the particular occasion.

**b. Resistance:** Traditionally, rape did not exist unless the woman ***physically resisted***. This requirement is gradually being weakened.

* **Reasonable resistance:** No state requires that the woman resist “to the utmost” anymore, as some states used to. Typically, the woman must now make merely ***“reasonable”*** resistance, as measured by the circumstances. (*Example:* Where D is threatening V with a gun or knife, presumably it is “reasonable” for V not to resist at all.) [270]

**5. Homosexual rape:** Because common-law rape is defined so as to require both penetration and a female victim, there can be no common-law ***homosexual rape***. (However, a majority of states have amended their rape statutes to be gender-neutral, so that homosexual rape is now the same crime as heterosexual rape in most states.)

**B. Statutory rape:** All states establish an ***age of consent***, below which the law regards a female’s consent as ***impossible***. One who has intercourse with a female below this age is punished for what is usually called “statutory rape.”

**1. Reasonable mistake:** In most states, even a ***reasonable belief*** by D that the girl was over the age of consent is not a defense.

* **MPC allows:** But the Model Penal Code allows the “reasonable mistake as to age” defense, at least where the offense is garden-variety statutory rape (intercourse with a girl under the age of 16). [272]

**2. Encouragement by girl:** The fact that the under-age girl has ***encouraged*** the sex is irrelevant. Also, the fact that the girl has lied about her age is no defense (unless it contributes to D’s reasonable mistake as to age, in a state recognizing reasonable mistake as a defense).

**VII. Specific Offenses - Homicide**

**A. Different grades of homicide:** Any unlawful taking of the life of another falls within the generic class ***“homicide***.***”*** The two principal kinds of homicide are ***murder*** and ***manslaughter***.

**1. Degrees of murder:** In many jurisdictions, murder is divided into first-degree and second-degree murder. Generally, first-degree murder consists of murders committed “with premeditation and deliberation,” and killings committed during the course of certain felonies.

**2. Two kinds of manslaughter:** Similarly, manslaughter is usually divided into: (1) ***voluntary*** manslaughter (in most cases, a killing occurring the “heat of passion”); and (2) ***involuntary*** manslaughter (an unintentional killing committed recklessly, grossly negligently, or during commission of an unlawful act.)

**3. Other statutory forms of homicide:** Additional forms of homicide exist by statute in some states. Many states have created the crime of ***vehicular homicide*** (an unintentional death caused by the driver of a motor vehicle). Similarly, some states, and the MPC, have created the crime of “negligent homicide.”

**II. MURDER — GENERALLY**

**A. Definition of “murder”:** There is no simple definition of “murder” that is sufficient to distinguish killings that are murder from killings that are not. At the most general level, murder is defined as the ***unlawful killing*** of ***another person***.

**1. Four types:** In most states, there are four types of murder, distinguished principally by the defendant’s mental state:

[1] ***intent-to-kill*** murder;

[2] ***intent-to-commit-grievous-bodily-injury*** murder;

[3] ***“depraved heart”*** (a/k/a “reckless indifference to the value of human life”) murder; and

[4] ***felony-murder***, i.e., a killing occurring during the course of a dangerous felony.

Each of these types is discussed in detail below.

**B. Taking of life:** Murder exists only where a life has been taken. Therefore, be ready to spot situations where there is no murder because either: (1) the victim had not yet been born alive when D acted, and was never born alive; or (2) the victim’s life had ended before D’s act.

**1. Fetus:** A ***fetus*** is not a human being for homicide purposes, in most states. Thus if D commits an act which kills the fetus, this does not fall within the general murder statute in most states.

**Example:** D shoots X, a pregnant woman. The bullet goes into X’s uterus and instantly kills V, a fetus which has not yet started the birth process. In most states, D has not committed garden-variety murder of V, though he may have committed the separate statutory crime of feticide, defined in many states.

**Fetus born alive:** But if the infant is ***born alive*** and then dies, D is guilty of murdering it even though his acts took place before the birth. (*Example:* Same facts as in the above example. Now, however, assume that the shooting causes X to go into premature labor, V is born alive, and immediately thereafter V dies of the bullet wound. D has murdered V.)

**2. End of life:** Traditionally, ***death*** has been deemed to occur only when the victim’s heart has stopped beating. The modern tendency, however, is to recognize ***“brain death”*** as also being a type of death.

**Example:** D, a physician, concludes that V is “brain dead,” and thus removes V’s heart to use it in an organ transplant. Most courts today would probably hold that D has not murdered V, because V was already dead even though her heart was still beating.

**C. Elements of murder:** Here are the elements which the prosecution must prove to obtain a murder conviction:

***Actus reus:*** There must be ***conduct by the defendant*** (an ***“actus reus”***) either an affirmative act by D an omission by D where he had a duty to act.

**2. *Corpus delecti:*** There must be shown to have been a ***death*** of the victim. Death is the *“corpus delecti”* (“body of the crime”) of murder. But the prosecution does ***not*** have to produce a ***corpse***. Like any element of any crime, existence of death may be proved by ***circumstantial evidence***.

**Example:** D and V are known to be getting along badly, and D has a motive — financial gain — for wanting V dead. V is last seen alive while about to visit D’s remote mountain cabin. V is never seen again, and no body is ever found. V’s wallet is found in the cabin. Seven years have gone by without a trace of V. A jury could probably reasonably conclude that V is now dead, and that D caused the death by methods unknown.

**3. *Mens rea:*** D must be shown to have had an appropriate ***mental state*** for murder. The required mental state is sometimes called ***“malice aforethought***,***”*** but this is merely a term of art, which can be satisfied by any of several mental states. In most jurisdictions, any of the four following intents will suffice:

**a.** An intent to ***kill***; [233 - 234]

**b.** An intent to ***commit grievous bodily injury***; [234 - 235]

**c. *Reckless indifference*** to the ***value of human life*** (or a ***“depraved heart***,***”*** as the concept is sometimes put); [235 - 236] and

**d.** An intent to commit any of certain non-homicide ***dangerous felonies***. [237 - 246]

**4. Proximate cause:** There must be a ***causal relationship*** between D’s act and V’s death. D’s conduct must be both the “cause in fact” of the death and also its “proximate cause.”

**a. Year-and-a-day rule:** Most states continue a common-law proximate cause rule that applies only in murder cases: V must die within a ***year and a day*** of D’s conduct.

**Note on four types of murder:** Anytime D can be said to have killed V, you should go through all four types of murder before concluding that no murder has occurred. In other words, examine the possibility that D: (1) intended to kill V; (2) intended to inflict serious bodily harm upon V; (3) knew V or someone else had a substantial chance of dying, but with “reckless indifference” or “depraved heart” ignored this risk; or (4) intended to commit some dangerous felony, not itself a form of homicide (e.g., robbery, rape, kidnapping, etc.) Only if D’s intent did not fall within any of these cases can you be confident that V’s death does not constitute murder.

**D. Intent-to-kill murder:** The most common state of mind that suffices for murder is the ***intent to kill***.

**1. Desire to kill:** This intent exists, of course, when D has the ***desire*** to bring about the death of another.

**2. Substantial certainty of death:** The requisite intent also exists where D knows that death is ***substantially certain*** to occur, but does not actively desire to bring about V’s death. (*Example:* D, a terrorist, puts a bomb onto an airliner. He does not desire the death of any passengers, but knows that at least one death is almost certain to occur. D has the state of mind needed for “intent to kill” murder.)

**3. Ill-will unnecessary:** The requisite intent to kill may exist even where D does not bear any ***ill will*** towards the victim. (*Example:* D’s wife, V, is suffering from terminal cancer, but still has at least several weeks to live. D feeds her poison without telling her what this is, in order to spare her suffering. As a strictly legal matter, D has the mental state required for “intent to kill” murder, though a jury might well decide to convict only of manslaughter.)

**4. Circumstantial evidence:** Intent to kill may be proved by ***circumstantial evidence***. (*Example:* If death occurs as the result of a deadly weapon used by D, the jury is usually permitted to infer that D intended to bring about the death.)

**5. Compare with voluntary manslaughter:** It does not automatically follow that because D intended to kill and did kill, that D is guilty of murder. (For instance, most cases of ***voluntary manslaughter*** — generally, a killing occurring in a “heat of passion” — are ones where D intended to kill.) In a prosecution for intent-to-kill murder, the mental state is an intent to kill ***not accompanied by other redeeming or mitigating factors***.

**E. Intent-to-do-serious-bodily-injury murder:** In most states, the *mens rea* requirement for murder is satisfied if D intended not to kill, but to do ***serious bodily injury*** to V.

**Example:** D is angry at V for reneging on a debt. D beats V with brass knuckles, intending only to break V’s nose and jaw, and to knock out most of his teeth. In most states, D has the mental state required for murder of the “intent to do serious bodily injury” sort. Therefore, if V unexpectedly dies, D is guilty of murder in these states.

**1. Subjective standard:** Most states apply a ***subjective*** standard as to the risk of serious bodily harm — D has the requisite mental state only if he ***actually*** ***realized*** that there was a high probability of serious harm (not necessarily death) to V, and the fact that a “reasonable person” would have realized the danger is not sufficient.

**2. “Serious bodily injury” defined:** Some courts hold that only conduct which is likely to be ***“life threatening”*** suffices for “intent to commit serious bodily injury.” Other courts take a broader view of what constitutes serious bodily harm. However, all courts recognizing this form of murder hold that a mere intent to commit some sort of bodily injury does not suffice.

**Example:** D punches V in the face, intending merely to knock V down. V strikes his head while falling, and dies. Probably no court would hold that D is liable for “intent to do serious bodily harm” murder on these facts, though he would be liable for manslaughter under the misdemeanor-manslaughter rule.

**3. Model Penal Code rejects:** The Model Penal Code does ***not*** recognize “intent to do serious bodily harm” murder. The MPC regards the “reckless indifference to value of human life” or “depraved heart” standard, discussed below, as being enough to take care of cases where D willfully endangers the life or safety of others and death results.

**F. “Reckless indifference to value of human life” or “depraved heart” murder:** Nearly all states hold D liable if he causes a death, while acting with such great ***recklessness*** that he can be said to have a ***“depraved heart”*** or an ***“extreme indifference to the value of human life***.***”***

**1. Illustrations:** Here are some illustrations of “depraved heart” or “extreme indifference” murder:

**Example 1:** D sets fire to a building where he knows people are sleeping; he does not desire their death, but knows that there is a high risk of death. One inhabitant dies in the fire.

**Example 2:** D fires a bullet into a passing passenger train, without any intent to kill any particular person. The bullet happens to strike and kill V, a passenger.

**Example 3:** D, trying to escape from pursuing police, drives his car at 75 mph the wrong way down a one-way residential street that has a 30 mph speed limit. D hits V, a pedestrian.

**2. Awareness of risk:** Courts are split as to whether D shows the requisite “depravity” where he is ***not aware*** of the risk involved in his conduct.

**a. MPC view:** The Model Penal Code follows the “subjective” approach to this problem: D shows the required extreme recklessness only if he “***consciously disregards*** a substantial and unjustifiable risk.”

**b. Intoxication:** If D fails to appreciate the risk of his conduct because he is ***intoxicated***, even courts (and the MPC) that would ordinarily follow a “subjective” standard ***allow a conviction***.

**III. FELONY-MURDER**

**A. Generally:** Under the ***felony-murder rule***, ***if D, while he is in the process of committing certain felonies, kills another (even accidentally), the killing is murder***. In other words, the intent to commit any of certain felonies (unrelated to homicide) is sufficient to meet the *mens rea* requirement for murder.

**1. Common law and today:** The felony-murder rule was applied at common law, and continues to be applied by most states today.

**Example:** D, while carrying a loaded gun, decides to rob V, a pedestrian. While D is pointing his gun at V and demanding money, the gun accidentally goes off, and kills V. Even though D never intended to kill V or even shoot at him, D is guilty of murder, because the killing occurred while D was in the course of carrying out a dangerous felony.

**B. Dangerous felonies:** Nearly all courts and legislatures today restrict application of the felony-murder doctrine to ***certain felonies***.

**1. “Inherently dangerous” felonies:** Most courts today use the ***“inherently dangerous”*** test — only those felonies which are inherently dangerous to life and health count, for purposes of the felony-murder rule.

**a. Two standards:** Courts are ***split*** about how to determine whether a felony is “inherently dangerous.” Some courts judge dangerousness in the ***abstract*** (e.g., by asking whether larceny is in general a dangerous crime), whereas others evaluate the felony based on the ***facts of that particular case*** (so that if, say, the particular larceny in question is committed in a very dangerous manner, the felony is “inherently dangerous” even though most other larcenies are not physically dangerous).

**b. Listing:** In courts that judge “inherent dangerousness” in the abstract, here are felonies that are typically considered inherently dangerous: ***robbery***, ***burglary***, ***rape***, ***arson***, ***assault*** and ***kidnapping***. By contrast, the various theft-related felonies are generally not considered inherently dangerous: larceny, embezzlement and false pretenses.

**C. Causal relationship:** There must be a ***causal relationship*** between the felony and the killing. First, the felony must in some sense be the “but for” cause of the killing. Second, the felony must be the ***proximate cause*** of the killing.

**1. “Natural and probable” consequences:** The requirement of proximate cause here is usually expressed by saying that D is only liable where the death is the ***“natural and probable consequence”*** of D’s conduct.

**2. Robberies and gunfights:** Most commonly, proximate cause questions arise in the case of ***robberies***.

**a. Robber fires shot:** If the fatal shot is fired by the ***robber*** (even if accidentally), virtually all courts agree that D is the proximate cause of death, and that the felony-murder doctrine should apply. This is true whether the shot kills the robbery victim, or a ***bystander***.

**Example 1:** On a city street, D points a gun at V, and says, “Your money or your life.” While V is reaching into his pocket for his wallet, D drops his gun. The gun strikes the pavement and goes off accidentally, killing V. D’s acts of robbery are clearly the proximate cause of V’s death, and D is guilty of murder under the felony-murder rule.

**Example 2:** Same facts as above example. Now, assume that when the gun strikes the pavement and goes off, it kills B, a bystander 20 feet away. D’s acts are the proximate cause of B’s death, so D is guilty of murdering B under the felony-murder doctrine.

**b. Victim or police officer kills bystander:** Where the fatal shot is fired by the ***robbery victim*** or by a ***police officer***, and a ***bystander*** is accidentally killed, courts are split as to whether the robber is the proximate cause of the death. California, for instance, does not apply the felony-murder doctrine in any situation where the fatal shot comes from the gun of a person other than the robber. In other states, the result might depend on whether the robber fired the first shot, so that if the first shot was fired by the victim and struck a bystander, the robber would not be guilty.

**c. Robber dies, shot by victim, police officer or other felon:** Where the person who dies is ***one of the robbers***, and the fatal shot is fired by another robber, the robbery victim or by police officers, courts are even more reluctant to apply the felony-murder doctrine. Some courts hold that the felony-murder doctrine is intended to protect only innocent persons, so it should not apply where a robber is killed. Where a robber is killed not by one of his cohorts but by the robbery victim or the police, the case for applying the felony murder rule is the weakest of all.

**Example:** D and X are co-robbers. X is killed by a police officer who is trying to apprehend the pair. *Held*, D is not guilty of felony murder. [*Comm. v. Redline*, 137 A.2d 472 (Pa. 1958)]

**Note on “depraved heart” as alternative:** In any robbery situation, in addition to the possibility of “felony murder” as a theory, examine the possibility of using “depraved heart” as an alternate theory. For instance, if D, while committing a robbery, initiates a gun fight, and a police officer shoots back, killing a bystander, it may be easier to argue that D behaved with reckless indifference to the value of human life (thus making him guilty of “depraved heart” murder) than to find that the felony murder doctrine should apply (since many courts hold that the felony-murder doctrine applies only where the killing is by the defendant’s own hand or the hand of his accomplice).

**D. Accomplice liability of co-felons:** Frequently, the doctrine of felony-murder combines with the rules on ***accomplice*** liability. The net result is that if two or more people work together to commit a felony, and one of them commits a killing during the felony, the others may also be guilty of felony-murder.

**1. “In furtherance” test:** In most courts, all of the co-felons are liable for a killing committed by one of them, if the killing was: (1) committed ***in furtherance of the felony***; and (2) a ***“natural and probable” result*** of the felony.

**a. Accidental killing:** Thus one felon will commonly be guilty of murder based on another felon’s ***accidental*** killing.

**Example:** A and B decide to rob a convenience store together. A carries no gun. A knows that B is carrying a loaded gun, but also knows that B has never used a gun in similar robberies in the past, and that B does not believe in doing so. During the robbery, B accidentally drops the gun, and the gun goes off when it hits the floor, killing V, the convenience store operator. Because B was holding the gun “in furtherance” of the robbery when he dropped it, and because an accident involving a loaded gun is a somewhat “natural and probable” consequence of carrying the loaded gun during the felony, there is a good chance that the court will hold not only that B is guilty of felony-murder, but that A is also guilty of felony murder as an accomplice to B’s act of felony murder.

**b. Intentional killing:** Similarly, if the killing by one co-felon is ***intentional*** rather than accidental, the other co-felons will probably still be liable under accomplice principles as long as the killing was committed “in furtherance” of the felony. This will normally be true even though the other co-felons can show that they did not desire or foresee the killing. But if the other co-felons can show that the killing was ***not committed for the purpose of furthering the felony***, they may be able to escape accomplice liability.

**Example:** A and B rob a convenience store together; as A knows, B is carrying a loaded gun, but B has never used the gun on any previous robberies and is generally opposed to violence. Unknown to either, the new owner of the store is V, an old enemy of B’s. B decides to shoot V to death during the course of the robbery, even though V is not threatening to call the police or resisting the robbery in any way. A will have a good chance of persuading the court that the killing was not “in furtherance of” the robbery, and thus of escaping accomplice liability for felony-murder.

**E. “In commission of” a felony:** The felony-murder doctrine applies only to killings which occur ***“in the commission of”*** a felony.

**1. Causal:** There must be a ***causal relationship*** between felony and killing.

**2. Escape as part of felony:** If the killing occurs while the felons are attempting to ***escape***, it will probably be held to have occurred “in the commission of” the felony, at least if it occurred reasonably close, both in ***time and place***, to the felony itself.

**3. Killing before felony:** Even if the killing occurs ***before*** the accompanying felony, the felony-murder doctrine will apply if the killing was in some way in furtherance of the felony.

**Example:** D intends to rape V. In order to quiet her, he puts his hand over her mouth, thereby asphyxiating her. D is almost certainly liable for felony-murder, even though he killed V before he tried to rape her, and even though the final felony was only an attempted rape (since one cannot rape a corpse).

**F. Felony must be independent of the killing:**  For application of the felony-murder doctrine, the felony must be *independent* of the killing. This prevents the felony-murder rule from turning virtually any attack that culminates in death into automatic murder.

**Example 1:** D kills V in a heat of passion, under circumstances that would justify a conviction of voluntary manslaughter but not murder. Even though manslaughter is obviously a “dangerous felony,” the felony-murder rule will not apply to upgrade the manslaughter to felony-murder. The reason is that the underlying felony must be independent of the killing, a requirement not satisfied here.

**Example 2:** D intends to punch V in the jaw, but not to seriously injure him or kill him. V, while falling from the blow, hits his head on the curb and dies. Even though D was committing the dangerous felony of assault or battery, this will not be upgraded to felony-murder, because the felony was not independent of the killing.

**G. Model Penal Code approach:** The Model Penal Code does ***not*** adopt the felony-murder rule *per se*. Instead, the MPC establishes a ***rebuttable presumption*** of “recklessness... manifesting extreme indifference to the value of life” where D is engaged in or an accomplice to robbery, rape, arson, burglary, kidnapping or felonious escape. Thus if an unintentional killing occurs during one of these crimes, the prosecution gets to the jury on the issue of “depraved heart” murder. But D is free to ***rebut*** the presumption that he acted with reckless indifference to the value of human life. The MPC provision is thus quite different from the usual felony-murder provision, by which D is *automatically* guilty of murder even if he can show that he was not reckless with respect to the risk of death.

**IV. DEGREES OF MURDER**

**A. Death penalty:** At least 35 states now authorize the ***death penalty*** for some kinds of murder.

**1. Not necessarily “cruel and unusual”:** The death penalty is not necessarily a “cruel and unusual” punishment, and thus does not necessarily violate the Eighth Amendment. [*Gregg v. Georgia*, 428 U.S. 153 (1976)]

**2. Must not be “arbitrary or capricious”:** However, a state’s death-penalty scheme must not be ***“arbitrary or capricious***.***”*** That is, the state may not give too much discretion to juries in deciding whether or not to recommend the death penalty in a particular case. Typically, the state avoids undue discretion by listing in the death penalty statute certain ***aggravating circumstances*** (e.g., the presence of torture) — then, if the jury finds one or more of the aggravating circumstances to exist beyond a reasonable doubt, the jury may recommend the death penalty. In general, this “aggravating circumstance” approach has been upheld by the Supreme Court as constitutional.

**3. Mandatory sentences not constitutional:** By contrast, it is usually ***unconstitutional*** for a state to try to avoid undue jury discretion by making a death sentence ***mandatory*** for certain crimes (e.g., killing of a police officer, or killing by one already under life sentence). The Supreme Court has held that the states must basically allow the jury to consider the ***individual circumstances*** of a particular case (e.g., the presence of extenuating circumstances), and a mandatory-sentence scheme by definition does not allow this. [*Woodson v. North Carolina*, 428 U.S. 280 (1976)]

**4. Racial prejudice:** A defendant can avoid a death sentence by showing that the jury was motivated by ***racial*** considerations, in violation of his Eighth Amendment or equal protection rights. However, the Supreme Court has held that any proof of impermissible racial bias must be directed to the ***facts of the particular case***, and may not be proved by large-scale ***statistical studies***. [*McCleskey v. Kemp*, 481 U.S. 279 (1987).]

**5. Non-intentional killings:** The Eighth Amendment appears to prevent use of the death penalty against a defendant who does not himself kill, attempt to kill or intend that a killing take place, or that lethal force be employed. [*Enmund v. Florida*, 458 U.S. 782 (1982).]

**Example:** D drives a getaway car while his two accomplices go into a farm house and murder the inhabitants. *Held*, since D did not commit the killing or desire it, he may not be executed, even though he is guilty of murder by virtue of the felony-murder doctrine and the rules on accomplice liability. [*Enmund*, *supra*]

**6. Non-murder cases:** The Supreme Court probably will not allow the death penalty for crimes ***other than murder***. Thus capital punishment may not constitutionally be imposed on one who commits ***rape***. [*Coker v. Georgia*, 433 U.S. 584 (1977)]

**B. First-degree murder:** Most states recognize at least two degrees of murder. ***First-degree murder*** in most states is a killing that is ***“premeditated and deliberate***.***”***

**1. Only short time required for premeditation:** Courts do not require a long period of premeditation. Traditionally, no substantial amount of time has needed to elapse between formation of the intent to kill and execution of the killing. Most modern courts require a reasonable period of time during which deliberation exists, but even this is not a very stringent requirement — five minutes, for example, would suffice in most courts even today.

**a. Planning, motive or careful manner of killing:** Like any other form of intent, premeditation and deliberation can be shown by circumstantial evidence. Typical ways of showing that D premeditated are: (1) ***planning activity*** occurring prior to the killing (e.g., purchase of a weapon just before the crime); (2) evidence of a ***“motive”*** in contrast to a sudden impulse; and (3) a ***manner*** of killing so precise that it suggests D must have a preconceived design.

**2. Intoxication as negating deliberation:** If D is so ***intoxicated*** that he lost the ability to deliberate or premeditate, this may be a defense to first-degree murder (though not a defense to murder generally, such as second-degree murder).

**3. Certain felony murders:** Statutes in some states make some or all ***felony-murders*** (typically, those involving rape, robbery, arson and burglary) first-degree.

**4. Model Penal Code:** The Model Penal Code does ***not*** divide murder into first- and second-degree, and attaches no significance to the fact that D did or did not premeditate/deliberate.

**C. Second-degree murder:** Murders that are not first-degree are second-degree. These typically include the following classes:

**1. No premeditation:** Cases in which there is ***no premeditation***.

**2. Intent to seriously injure:** Cases where D may have premeditated, but his intent was not to kill, but to do ***serious bodily injury*** (a *mens rea* sufficient for murder).

**3. Reckless indifference:** Cases in which D did not intend to kill, but was ***recklessly indifferent*** to the value of human life.

**4. Felony-murders:** Killings committed during the course of felonies other than those specified in the first-degree murder statute (i.e., typically felonies other than rape, robbery, arson and burglary).

**V. MANSLAUGHTER — VOLUNTARY**

**A. Two types of manslaughter:** In most states, there are two types of manslaughter: (1) ***voluntary manslaughter***, in which there is generally an ***intent to kill***; and (2) ***involuntary manslaughter***, in which the death is ***accidental***.

**B. “Heat of passion” manslaughter:** The most common kind of voluntary manslaughter is that in which D kills while in a ***“heat of passion***,***”*** i.e., an extremely ***angry*** or disturbed state.

**1. Four elements:** Assuming that the facts would otherwise constitute murder, D is entitled to a conviction on the lesser charge of voluntary manslaughter if he meets four requirements:

**a. Reasonable provocation:** He acted in response to a ***provocation*** that would have been sufficient to cause a ***reasonable person*** to ***lose his self-control***.

**b. Actually act in “heat of passion”:** D was ***in fact*** in a “heat of passion” at the time he acted;

**c. No time for reasonable person to cool off:** The lapse of time between the provocation and the killing was not great enough that a ***reasonable person*** would have ***“cooled off***,***”*** i.e., regained his self-control; and

**d. D not in fact cooled off:** D did not ***in fact*** “cool off” by the time he killed.

**2. Consequence of missing hurdle:** If D fails to clear hurdles (a) or (c) above (i.e., he is actually provoked, and has not cooled off, but a reasonable person would have either not lost his self-control or would have cooled off), D will normally be liable only for ***second-degree*** murder, not first-degree, since he will probably be found to have lacked the necessary premeditation. But if D trips up on hurdles (b) or (d) (i.e., he is not in fact driven into a heat of passion, or has in fact already cooled off), he is likely to be convicted of ***first-degree*** murder, since his act of killing is in “cold blood.”

**C. Provocation:** As noted, D’s act must be in response to a ***provocation*** that is: (1) sufficiently strong that a ***“reasonable person”*** would have been ***caused to lose his self control***; and (2) strong enough that ***D himself*** lost his self-control.

**1. Lost temper:** The provocation need not be enough to cause a reasonable person to kill. The provocation merely needs to be enough that it would make a reasonable person ***lose his temper***.

**2. Objective standard for emotional characteristics:** Courts generally do ***not*** recognize the peculiar ***emotional*** characteristics of D in determining how a reasonable person would act. (*Example:* All courts agree that the fact that D is unusually bad-tempered, or unusually quick to anger, is not to be taken into account.)

**3. Particular categories:** Courts have established certain rules, as a matter of law, about what kind of provocation will suffice:

**a. Battery:** More-than-trivial ***battery*** committed on D is usually considered to be sufficient provocation.

**Example:** V, a man, slaps D, a man, because D has failed to pay back a debt. This will probably constitute adequate provocation, so if D then flies into a rage and kills V, this will be manslaughter rather than murder.

**i. D initiates:** However, if D brought on the battery by his own initial aggressive conduct, he will ***not*** be entitled to a manslaughter verdict.

**ii. Assault:** If V ***attempts*** to commit a battery on D, but fails (thereby committing a criminal assault), most courts regard this as sufficient provocation.

**b. Mutual combat:** If D and V get into a ***mutual combat***, in which neither one can be said to have been the aggressor, most courts will treat this as sufficient provocation to D.

**c. Adultery:** The classic voluntary manslaughter situation is that in which Husband surprises Wife in the act of ***adultery*** with her paramour, and kills either Wife or Lover. This will almost always be sufficient provocation. (But courts do not necessarily recognize provocation where the couple is ***unmarried***.)

**d. Words alone:** Traditionally, ***words alone*** cannot constitute the requisite provocation — no matter how abusive, insulting or harassing, D will be guilty of murder, not manslaughter, if he kills in retaliation.

**i. Words carrying information:** But if the words ***convey information***, most courts today hold that the words will suffice if a reasonable person would have lost his self-control upon hearing them.

**Example:** V says to D, formerly his best friend, “You know, I’ve been having an affair with your wife for the last six months. She’s a heck of a girl, and we’d like you to give her a divorce so that we can get married.” This is probably sufficient provocation, so that if D kills V, he is probably entitled to a manslaughter verdict.

**4. Effect of mistake:** If D ***reasonably*** but ***mistakenly*** reaches a conclusion which, if accurate, would constitute sufficient provocation, courts will generally allow manslaughter. (*Example:* Based on circumstantial evidence, D reasonably but erroneously suspects that his wife has been sleeping with his best-friend. Probably this will suffice as provocation.)

**5. Actual provocation:** Remember that the provocation must be not only sufficient to cause a reasonable person to lose his self-control, but also sufficient to have ***in fact*** enraged D.

**Example:** D finds his wife together with V, his best friend. D has in fact suspected the affair for some time, and thus coolly says to himself, “Now’s my chance to kill V and get off with just voluntary manslaughter.” He cold-bloodedly shoots V in the heart. Even though the provocation would have been sufficient to cause a reasonable person to lose control, D does not qualify for manslaughter here because he was not in fact enraged at the moment of the shooting.

**D. “Cooling off” period:** The ***time*** between D’s discovery of the upsetting facts and his act of killing must be sufficiently short that: (1) a ***reasonable person*** would not have had time to “cool off”; and (2) D himself did not ***in fact*** cool off.

**1. Rekindling:** But even if there is a substantial cooling-off period between the initial provocation and the killing, if a ***new provocation*** occurs which would ***rekindle*** the passion of a reasonable person, the cooling-off rule is not violated. This is true even if the new provocation would not ***by itself*** be sufficient to inflame a reasonable person.

**E. Other kinds of voluntary manslaughter:** In addition to manslaughter based upon a “heat of passion” killing, there are a number of other situations in which voluntary manslaughter may be found.

**1. “Imperfect” defenses:** Mostly, these other kinds of voluntary manslaughter are situations in which what would otherwise be a ***complete defense or justification*** does not exist due to D’s unreasonable mistake or for some other reason:

**a. Imperfect self-defense:** Thus some states give D a manslaughter verdict for ***“imperfect self-defense,”*** where D killed to defend himself but is not entitled to an acquittal because: (1) he was unreasonably mistaken about the existence of danger; or (2) he was unreasonably mistaken about the need for deadly force; or (3) he was the aggressor.

**b. Imperfect defense of others:** Similarly, if D uses deadly force in ***defense of another***, but does not meet all of the requirements for exculpation, some courts give him the lesser charge of voluntary manslaughter. (*Example:* If D witnesses a fight between V and X, and honestly but unreasonably concludes that X was the aggressor, D may be entitled to manslaughter for killing V.) [255]

**c. Other situations:** If D comes close to qualifying for the defense of ***prevention of crime***, or ***necessity*** or ***coercion***, he may be similarly entitled to reduction to manslaughter.

**2. Mercy killings:** Some courts — and many juries — frequently give D a lesser verdict of voluntary manslaughter when he commits a ***mercy killing***, i.e., a killing to terminate the life of one suffering from a painful or incurable disease.

**3. Intoxication rarely suffices:** Most states do ***not*** permit D’s voluntary ***intoxication*** to reduce murder to manslaughter.

**VI. MANSLAUGHTER — INVOLUNTARY**

**A. Involuntary manslaughter based on criminal negligence:** A person whose behavior is ***grossly negligent*** may be liable for ***involuntary manslaughter*** if his conduct results in the accidental death of another person.

**1. Gross negligence required:** Nearly all states hold that ***something more than ordinary tort negligence*** must be shown before D is liable for involuntary manslaughter. Most states require ***“gross negligence”***. Usually, D must be shown to have disregarded a very substantial danger not just of bodily harm, but of ***serious*** bodily harm or death.

**a. Model Penal Code:** The MPC requires that D act ***“recklessly***.***”*** (The MPC also requires that D be aware of the risk, as discussed below.)

**2. All circumstances considered:** The existence of gross negligence is to be measured in light of ***all the “circumstances***.***”*** The ***social utility*** of any objective D is trying to fulfill is part of the equation.

**Example:** D kills V, a pedestrian, by driving at 50 mph in a 30 mph residential zone. D’s conduct may be grossly negligent if D was out for a pleasure spin, but not if D was rushing his critically ill wife to the hospital.

**3. “Inherently dangerous” objects:** Where D uses an object that is ***“inherently dangerous***,***”*** the courts are quicker to find him guilty of involuntary manslaughter. This is especially true where the accident involves a ***firearm***.

**4. Defendant’s awareness of risk:** Courts are split as to whether D may be liable for manslaughter if he was ***unaware*** of the risk posed by his conduct.

**a. Awareness usually required:** As noted, most states require D to have acted with “gross negligence” or “recklessness.” In these states, courts usually require that D have been ***actually aware*** of the danger.

**i. Model Penal Code agrees:** The MPC, which requires “recklessness” for involuntary manslaughter, similarly requires actual awareness. Under the MPC, a person acts recklessly only when he ***consciously disregards*** a substantial and unjustifiable risk.

**5. Victim’s contributory negligence:** The fact that the ***victim*** was ***contributorily negligent*** is ***not*** a defense to manslaughter. (However, the victim’s negligence may tend to show that the accident was proximately caused by this action on the victim’s part, rather than by any gross negligence on D’s part.)

**6. Vehicular homicide:** Many states have defined the lesser crime of ***vehicular homicide***, for cases in which death has occurred as the result of the defendant’s poor driving, but where the driving was not reckless or grossly negligent. (Most successful involuntary manslaughter cases also involve death by automobile.)

**a. Intoxication statutes:** Also, some states have special statutes which make it a crime to cause death by ***driving while intoxicated***.

**b. Criminally negligent homicide:** Additionally, some states define the crime of ***“criminally negligent homicide***,***”*** whose penalties are typically less than the penalties for involuntary manslaughter. These statutes are not limited to vehicular deaths. (*Example:* The MPC defines the crime of “negligent homicide,” which covers cases where D behaves with gross negligence, but is ***not aware*** of the risk posed by his conduct.)

**B. The misdemeanor-manslaughter rule:** Just as the felony-murder rule permits a ***murder*** conviction when a death occurs during the course of certain felonies, so the ***“misdemeanor-manslaughter”*** rule permits a conviction for ***involuntary manslaughter*** when a death occurs accidentally during the commission of a misdemeanor or other ***unlawful act***.

**1. Most states apply:** Most states continue to apply the misdemeanor-manslaughter rule.

**2. Substitute for criminal negligence:** The theory behind the rule is that the unlawful act is treated as a ***substitute for criminal negligence*** (by analogy to the “negligence *per se*” doctrine in tort law).

**3. “Unlawful act” defined: *Any misdemeanor*** may serve as the basis for application of the misdemeanor-manslaughter doctrine. Also, some states permit the prosecution to show that D violated a ***local ordinance*** or ***administrative regulation***. And if a particular ***felony*** does not suffice for the felony-murder rule (e.g., because it is not “inherently dangerous to life”), it may be used.

**a. Battery:** The most common misdemeanor in misdemeanor-manslaughter cases is ***battery***.

**Example:** D gets into an argument with V, and gives him a light tap on the chin with his fist. D intends only to stun V. Unbeknownst to D, V is a hemophiliac and bleeds to death. Since D has committed the misdemeanor of simple battery, and a death has resulted, he is guilty of manslaughter under the misdemeanor-manslaughter rule. The same result would occur if as the result of the light tap, V fell and fatally hit his head on the sidewalk.

**b. Traffic violations:** The violation of ***traffic laws*** is another frequent source of misdemeanor-manslaughter liability.

**Example:** D fails to stop at a stop sign, and hits V, a pedestrian crossing at a crosswalk. V dies. Even if D does not have the “gross negligence” typically required for ordinary voluntary manslaughter, D’s violation of the traffic rule requiring that one stop at stop signs will be enough to make him guilty of manslaughter under the misdemeanor-manslaughter rule.

**4. Causation:** There must be a ***causal relation*** between the violation and the death.

**a. *Malum in se:*** In the case of a violation that is ***“malum in se”*** (dangerous in itself, such as driving at an excessive speed), the requisite causal relationship is often found so long as the violation is the “cause in fact” of the death, even though it was not “natural and probable” or even “foreseeable” that the death would occur. That is, in *malum in se* cases, the usual requirement of “proximate cause” is often suspended.

**b. *Malum prohibitum:*** But if D’s offense is “*malum prohibitum*,” (i.e., not dangerous in itself, but simply in violation of a ***public-welfare*** regulation), most states do require a showing that the violation was the proximate cause of the death.

* **“Natural” or “foreseeable” result:** Some courts impose a requirement of proximate cause by holding that the death must be the ***“natural”*** or ***“foreseeable”*** consequence of the unlawful conduct. (*Example:* D fails to renew his driver’s license, and then runs over V, a pedestrian. A court might well hold that since failure to renew a driver’s license is *malum prohibitum*, and since V’s death was not a “natural” or “probable” consequence of D’s failure, D is not guilty under the misdemeanor-manslaughter rule.)
* **Violation irrelevant:** Other courts simply do not apply the misdemeanor-manslaughter rule at all to conduct that is *malum prohibitum* — D’s conduct must be shown to amount to actual criminal negligence, just as if there had been no violation.

**5. Model Penal Code abolishes:** The Model Penal Code ***rejects*** the misdemeanor-manslaughter rule in its entirety. However, under the MPC, the fact that an act is unlawful may be ***evidence*** that the act was reckless (the Code’s *mens rea* for manslaughter).