

# Criminal Law Outline

Study Guide: Wayne LeFave Crim Law Hornbook

## I. The Justification Of Punishment

### 1) Why punish? Imposing Punishment

Justifications for punishment fall into 2 categories:

- 1) Retributive- claims that punishment is justified b/c people deserve it. **Tend to be backward looking b/c seek to justify punishment on the basis of the offender's behavior in the past**
- 2) Utilitarian- Believes that justification lies in the useful purposes that punishment seeks. **Tend to be forward-looking b/c they seek to justify punishment on the basis of the good consequences it is expected to produce in the future.** The purposes are:
  - a. Prevention
  - b. Rehabilitation
  - c. Incapacitation

6 theories of criminal justice:

- 1) **Retribution** - eye for an eye; in the name of the state; act was so egregious that deserves punishment
- 2) **General Deterrence** - Punish person in order to send a message to the general population - show that if engage in certain activity, this is the punishment; use this person as an example for the rest
- 3) **Specific Deterrence** - punishing the same person so they will not do the same thing again
- 4) **Rehabilitation** – Incarcerate person to TREAT her so she will not do s/t like this again
- 5) **Restraint/Incapacitation** - (custody or restraint) - Incarcerate dangerous people to get them off the street and separate them from society, prevent future harm by these people
- 6) **Public Education** – Communicate what values are important as a society by determining what we punish. We d/n really know what we stand for until we in fact know what we will tolerate. Tells us what we as a society are all about.

Dudley and Stevens

- When the defense of necessity is asserted, it usually results in an acquittal
- **Cannot take someone else's life in order to sustain one's own life.**
- **THERE ARE NO ABSOLUTES IN CRIM LAW. IT IS ALL ABOUT RELATIVITY. THE SYSTEM LOOKS AT THE STATE OF MIND. THE COURSE IS ABOUT DRAWING LINES.**

## 2) What to punish?

**There is no criminal liability for failure to rescue unless there was a legal duty to rescue.**

- If looking at sources of criminal law, could come from religion, history and tradition
- The idea of things being immoral and how that manifests itself into making something criminal and illegal (Bowers v Hardwick)

**Generally: if there is NO HARM or NO DANGER then there is NO CRIME.**

## II. The Elements of a Just Punishment

### 1) Culpability: Actus Reus and Mens Rea

Three principles limit the distribution of punishment:

- 1) Culpability- the extent to which the act is committed due to defendant's fault
- 2) Legality- giving fair warning of the nature of the conduct declared to constitute an offense
- 3) Proportionality- to differentiate on reasonable grounds

#### A. Actus Reus- Culpable Conduct

Actus Reus- physical element of the crime.

**In order to have a crime, need:**

- 1) Actus Reus**
- 2) Mens Rea**
- 3) Actus reus and mens rea concurring in time**

*To find an actus reus ask 2 Q:*

- 1) If there was an ACT, was it VOLUNTARY?*
- 2) If there was an OMISSION, was there a LEGAL DUTY?*

### Act

**If act was involuntary = no AR = no crime**

- Thoughts alone cannot constitute a crime- in some states, exception for conspiracy

**\*If act not self-induced - if drunk, sleeping, unconscious, is a complete defense b/c no AR\***

**An act IS unconscious or involuntary if:**

- a) **The person does not remember it**
  - b) **The person could not control one's impulses**
  - c) **The act is unintentional or its consequences are unforeseen**
- 1) Habit is to be treated as voluntary.
  - 2) Possession is an act only if the person is aware she has the thing that she is charged with
    - a. Sometimes it is also sufficient that the D *should have* known
  - 3) Voluntary if you know that you are subject to certain automatic conditions that may pose a threat and you continue to engage in those instances
    - a. Ex – AR/Culpable if know are epileptic and drive with medication

Cases

- Crimes come from STATUTES
- Ct implied required voluntariness of act into statute
- Look to statute for AR
- **Under MPC, a REFLEX is INVOLUNTARY, and thus NOT an act, therefore no Actus Reus (no voluntary muscle contraction), and thus no crime.**

**Omission – no AR w/ omission unless there was a LEGAL DUTY**

4 situations in which the failure to act may constitute a breach of a legal duty

- 1) If there was a special relationship (through blood)
  - 2) If there was a statute imposing a duty to care
  - 3) If there was a contractual duty
  - 4) When one has voluntarily assumed the care of another- so as to preclude others to do that
- Roommates do not have a legal duty to one another

**B. Mens Rea - Culpable Mental States**

***\*\*Consider the extent to which a defendant's claim of mistake may negate the mens rea required by the statute\*\****

Examples of MR words: acting intentionally, knowingly, fraudulently, willfully, acting maliciously, acting corruptly, designedly, recklessly, acting wantonly, unlawfully, negligently, carelessly, purposely, acting forloneously, acting larcenously

***Best way to understand MR is as DEGREE OF CULPABILITY. MR determines what level of crime there is.***

**MR can be transferred – if in the course of committime one felony, a person happens to commit another bad thing, then she is guilty of committing that bad act.**

Tearing off gas meter case and woman asphyxiating:

1. Were  $\Delta$ 's actions *unlawful*? YES, b/c he stole the meter.
2. Were  $\Delta$ 's actions *malicious*? Trial court defined malicious as wickedness/recklessness or higher.

5 examples of wickedness:

- **Purposeful** wickedness:  $\Delta$  wanted  $\Pi$  to ingest the gas.
  - **Knowing** wickedness:  $\Delta$  hoped that by miracle that  $\Pi$  would not inhale, but knew it was certain that she would
  - **Reckless** wickedness:  $\Delta$  d/n know for certain that  $\Pi$  would inhale the gas, considered the possibility and decided to do so anyway
  - **Negligent** wickedness:  $\Delta$  d/n think of the possibility that  $\Pi$  would inhale the gas, but if he would have, he would have known she would
  - **Strict** wickedness:  $\Delta$  d/n realize the risk to  $\Pi$  and probably c/n have done so even if he would have used his ordinary common sense.
3. **Holding:** *The trial court found that it was NEGLIGENT wickedness and the appellate court overturned and said it was RECKLESS wickedness*, by stating that  $\Delta$  d/n intend to injure  $\Pi$ , but he nevertheless removed the gas meter.

Courts classify mens rea requirement into THREE GROUPS:

- 1) **General Intent Crimes** - intent to do the act. It is the intent to commit the forbidden act.
  - a. *The proscribed MR is the MR to commit the particular act, the MR that attaches to the AR.*
    - i. Ex - For criminal trespass, it is the intent to trespass on someone's property. For assault it is the intent to commit the harm on the person.
  - b. *If the MR is acting recklessly or negligently=General Intent*
    - i. **Negligence means should have foreseen**
      1. Negligence is a mens rea term but negligence does not mean guilty mind
      2. This does not involve a state of awareness.
      3. Person acts negligently when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware.
      4. There is a risk and the person should have been aware of the risk
    - ii. **Recklessness requires actual foresight**
      1. Recklessness requires conscious risk creation
      2. Here the person is aware of the risk and acted anyway
      3. The risk must be of a substantial order
      4. The risk must also be unjustifiable

- 2) **Specific Intent Crimes** - done with some specified purpose in mind. Intent to do something beyond just the forbidden act in particular.
  - a. *D had MR over and above the MR that attaches to the AR.*
  - b. *If the MR is acting purposely or knowingly= specific intent*
    - i. *For example, with the crime of burglary, burglary is breaking and entering the structure of another with the intent to commit a crime therein. The first MR is the intent to break and enter; the second is the intent to commit a crime once inside.*
    - ii. Another example is Kidnapping: intent of taking away, and intent.
    - iii. Ex- larceny, where you intend to take something from someone else and retain the property to deprive the other of it.

3) **Strict Liability Crimes** (see section below)

Purposefulness

→ An action is not purposive unless the act was done in conscious objection to perform an action of that nature or to cause such a result.

To act *knowingly*:

- 1) Act with positive knowledge
- 2) Act with an awareness of the high probability of the existence of the fact in question

To act with *willful blindness* - Where the D is not required to have actual knowledge or belief of a fact to be held to have acted knowingly

- It occurs when the D has a suspicion that something is the case, but in order to be able to deny knowledge, has purposefully refrained from making inquiries which would have led to the knowledge in question

Willful blindness instructions should not be given unless it can be established that:

- 1) The D was subjectively aware of a high probability of illegal conduct
- 2) The D purposefully contrived to avoid learning of the illegal conduct

→ The focus of willful ignorance cases is whether or not the actor deliberately avoided guilty knowledge.

The Model Penal Code sets forth 4 distinct states of mind that may give rise to culpability:

- 1) Purposely- person acts purposely when:
  - a. It is his conscious object to engage in the particular conduct in question or
  - b. To cause the particular result in question
- 2) Knowingly- person acts knowingly when:
  - a. He is aware that his conduct is of a certain kind or
  - b. That certain circumstances exist or
  - c. That he is practically certain that his conduct will cause that result

- d. *Jewell* – transporting pot across border after not looking in compartment. Ct found guilty → **deliberate ignorance/willful blindness IS knowledge**
- 3) Recklessly- consciously disregards a substantial and unjustifiable risk
  - a. The D must be aware if the high risk of harm
  - b. **In determining whether the risk was substantial and unjustifiable, all the circumstances known to the D must be considered.**
- 4) Negligently- negligent when should have been aware of a substantial and unjustifiable risk

### Mens Rea of Rape

- As long as the Δ honestly, reasonably believed that the victim consented, then there is **NO rape**.
- Rape is a **GENERAL INTENT** crime b/c it eliminates a defense based on unreasonable mistake of status.

### 3) Mens Rea and Mistake

→ *Ignorance or mistake is a defense only when it negates the existence of such a state of mind that is essential to the commission of an offense or when it establishes a state of mind that constitutes a defense under a rule of law relating to defenses.*

If there is strict liability, the mistake defense will fail:

- If the statute charges mens rea of purposely or knowingly then it is a specific intent crime
- If the statute charges recklessly or negligently, then it is a general intent crime
- The defense of mistake of fact requires that the accused act in good faith and with reasonableness.
- Mistake is never a defense to rape; rape is a general intent crime.
- FEWER defenses for general intent, MORE for specific intent crimes

### Mistake of Fact

- a) A pure factual mistake
- b) A fact is something that you can tell with your five senses. If you need a judicial ruling to figure out the answer to the question then it is not a pure fact.
- c) Specific Intent crimes- Reasonableness not required
  - 1. **Any mistake of fact, reasonable or unreasonable, is a defense to specific intent crime.**

### Mistake of Law

- a) Pure legal mistake; Ex- “I didn’t know that there was a law on the books.”
- b) *Lambert* – felon charged with not registering
  - a. **EXCEPTIONS**
    - i. **A person has a valid defense of ignorance of the law if:**
      - 1. It is a crime of OMISSION; and

2. A reasonable person would not have been on notice of the existence of this law.

ii. **A person has a valid defense of ignorance of the law if:**

1. **The D relied on the official interpretation of the law by someone who is charged with interpreting the law. (ASK)**

**Mistake of Legal Status**

- a) Both mistake of law and mistake of fact → *Application* of the law to the facts
- b) Need a judicial ruling such as ownership, consent etc
  - a. If someone takes her own stuff and thinks that she is stealing from another, she will still be charged with attempted larceny.
  - b. Questions of ownership, *questions of consent*, validity, abandonment. Anything that requires a legal determination is a mistake of legal status. Example: divorce decree that only says “divorce decree”

**Hypos**

- a. Defendant is charged with receiving stolen property, knowing it to be stolen. Defendant knew that the goods had been stolen, but believed them to be television sets, when in fact they were radios. What result?
- b. Defendant is charged with possession of marijuana. Her defense is that she thought they were regular cigarettes. What result?
- c. Charged under a statute that reads, "Whoever sells liquor to a minor shall be guilty of a misdemeanor," defendant claims that she believed the minor was of age. What result?
- d. D, in a jurisdiction that makes burglary of a dwelling a more serious offense than burglary of a store, reasonably believes that the building she has entered is a store, when in fact it is a dwelling. What result?
  - *Burglary of Dwelling: MR-no, AR-yes*
  - *Burglary of Store: MR-yes, AR-no*
  - *However, may have the general crime burglary for which there is MR and AR.*
- e. Defendant wishes to put up some signs that she is in the business of officiating at marriage ceremonies. She is unsure of the legality of the signs, so she checks with her attorney, who assures her that the signs are legal. She erects the signs, and subsequently is charged with violating the local ordinance that prohibits "unlawful erection of signs intended to aid in the solicitation or performance of marriages." What result?
- f. A statute makes it a criminal offense to vote in an election unless the voter had lived in the district for not less than six months. On the advice of a respected neighbor, D voted at the next election, although she had not been in the district for the required period. D honestly believed that she had a right to vote. Charged with violation of the statute, what result?

	<b>Specific Intent Crimes:</b> need actual belief that was committing that crime	<b>General Intent Crimes:</b> The mistake must be reasonable	<b>Strict Liability Crime:</b> All that is need is AR, no MR defense is needed
<b>Honestly held unreasonable belief</b>	Good Defense	X	X
<b>Honestly held</b>	Good Defense	Good Defense	X

reasonable belief			
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### 3) Strict Liability

**\*\*How can you tell — precisely — whether a particular statute will be deemed to have created a *strict liability crime*?**

**\*\*With SL, liability is imposed even without any demonstrated culpability or negligence → NO mens rea, convict on actus reus alone.**

#### Types of SL Crimes:

- 1) Public welfare crimes/offenses
  - 2) Regulatory crimes
  - 3) “Civil” crimes
  - 4) Malum prohibitum crimes- crimes that society prohibits
  - 5) Malum in se- Crimes that are bad in themselves
- a) There is no strict liability for murder or kidnapping b/c the highest levels of crime have the highest levels of mens rea

#### 4 Hints that a crime might be strict liability

- 1) **Look at the Language of the Statute** - if it mentions mens rea then it is not strict liability; knowingly, purposefully, recklessly, negligently are all MR terms so NOT SL crime.
  - i. Converse not necessarily true, if d/n have MR terms, NOT automatically SL crime.
- 2) **Look at the Legislative History**
- 3) **Look at the Penalty** (if not that severe, then more likely to be strict liability)
- 4) **8 categories** from Professor Sayer to see if crime belongs
  - i. **Illegal sales of intoxicating liquor**
  - ii. **Sales of impure or adulterated food or drugs**
  - iii. **Sales of misbranded articles**
  - iv. **Violations of anti-narcotic acts**
  - v. **Criminal Nuisances**
  - vi. **Violations of traffic regulations**
  - vii. **Violations of motor-vehicle laws**
  - viii. **Violations of general public regulations, passed for community safety**

Violations of general police regulations, passed for the safety, health or well being of the community

As societies became more complex , strict liability was developed in order to:

- 1) Make it easier to prove violations
- 2) Deter people from breaking regulation
- 3) Creating an extra-ordinary level of care (b/c people know that they will be strictly liable and so they will be extra careful)

→ The only way to avoid liability in strict liability crimes is to not commit the actus reus

#### 4. Proportionality and Legality

*The punishment must be proportional to the seriousness of the offense*

1. NO Ex-Post Facto laws
  - a. No person may be punished under a law that didn't exist at the time the person acted.
  - b. Also can't increase the penalty for a crime after its commission
  - c. Can't make laws retroactive as this violates the principle of legality
2. Due Process
  - a. 5<sup>th</sup> and 14<sup>th</sup> Amends
  - b. **Void for Vagueness Doctrine**
    - i. A law is unconstitutional under the due process clauses 5<sup>th</sup> and 14<sup>th</sup> amend if it is unduly vague or over-broad. *A criminal statute must clearly inform a person of ordinary intelligence of the conduct that is being prescribed.* There are two reasons why:
      1. To give them fair notice → No criminal penalty can be imposed without fair notice that the conduct is forbidden
      2. To avoid arbitrary arrests/enforcement by police, would give police unfettered judgment to pick people up.
  - c. Vagrancy laws are vague
3. Cruel and Unusual Punishment
  - a. *Status Crimes* - are unconstitutional, can not be convicted for who you are. Can punish people for driving while drunk, or using drugs, but c/n punish for being drug addict or alcoholic.
  - b. *Proportionality*- eye for an eye concept for retribution, d/n allow punishment that is disproportionate to the crime
    - i. No death penalty for rape conviction
    - ii. 3 strikes constitutional, NOT disproportionate
    - iii. No death penalty for mentally disabled person

### III. Homicide

#### 1) Introduction to Homicide and Premeditation and Deliberation

Unlawful homicide may be:

- a) Murder
  - First degree
  - Second degree

- b) Manslaughter
  - Voluntary- a killing occurring in the heat of passion
  - Involuntary- an intentional killing committed recklessly, negligently, or during the commission of an act
- c) Suicide
- d) Infanticide

1. **First Degree Murder - Intentional killing of another human being with premeditation AND deliberation**

- a. **MUST have BOTH premed and delib**
- b. **Both require some opportunity/time b/t the formation of intent and the actual killing which indicates that the killing is by prior calculation**
- c. Does not matter if the premeditation occurred during a very brief period of time as long as it was intentional, willful, deliberate and premeditated (Some Jd say these)
  - i. **Premeditation – Forethought - thinking in advance about doing it.**
    - 1. **How much time does it take to premeditate? A fraction of a second is enough, but CANNOT BE SIMULTANEOUS. Thinking about it before actually doing it.**
    - 2. Carroll Case → D shot sleeping wife in back of head twice, FRACTION OF A SECOND is enough time, “no time is too short for a wicked man to frame in his mind the scheme of murder”
    - 3. Defendant’s **best defense** – was an “automatic reflex,” no voluntary movement, so no AR, so no crime
  - ii. **Deliberation – WEIGHING pros and cons, pondering it, taking options, calculating the consequences, and ultimately deciding to go ahead with the murder**
    - 1. Anderson Case → Boyfriend killed daughter, 60 stab wounds, blood all over house
      - a. Ct → NO Premed and Delib b/c no planning, facts from D/V prior relationship that indicate motive, evidence of killing does not look deliberate
    - 2. **THREE PART TEST**
      - a. **Evidence of Planning (this factor alone can be enough, other two alone are NOT enough)**
      - b. **Facts about prior relationship that indicate Motive**
      - c. **Evidence that the killing was Deliberate**

3. **Second Degree Murder - Intentional killing of another human being WITHOUT premeditation and deliberation**

→ The specific intent to kill which is necessary to constitute murder in the first degree, may be found from a D’s words or conduct or from the attendant circumstances together with all of the reasonable inferences and may be inferred from the intentional use of a deadly weapon on a vital part of the body of another human being

Need to distinguish b/t murder and manslaughter - *malice aforethought* (all murders have it, all manslaughters do not).

1) Provocation - **\*\* Words are not enough for provocation\*\***

*Provocation can mitigate murder to manslaughter if one of the following applies:*

- 1) Extreme assault and battery on D
- 2) Mutual Combat
- 3) D's illegal arrest
- 4) Injury or serious abuse of a close relative of D's
- 5) Sudden discovery of spouse's adultery

Three Kinds of Voluntary Manslaughter

- Heat of Passion Provocation → This is what we are talking about with provocation
- Mistaken Justification/Imperfect Self-Defense
- Diminished Capacity (least important of the 3, exists in only 2-3Jds)

**Tests for Finding Voluntary Manslaughter due to Provocation:**

*Legally Sufficient JD* (Have to have the right answers to all of these) -

1. Do we have legally sufficient provocation?
  - a. I.e. - Is it on the list?
  - b. If not on the list, jury cannot consider provocation. Judge decides if there is legally sufficient provocation.
  - c. Must have been done before a reasonable time has elapsed
  - d. Under the influence of heat of passion and blood.
  - e. Result of temporary excitement
  - f. No wickedness or cruelty of heart
  - g. Here people are thinking from passion rather than from judgment
2. Would the *reasonable person* have been provoked to heat of passion on these facts?
3. Was this *defendant actually* provoked to heat of passion?
4. Would the reasonable person have *cooled off* in the given time period?
  - a. Too long a cooling time will render the defense inadequate
5. Did this *defendant actually cool off*?

*Non-Legally Sufficient JD*

Steps 2-5 are the same as in non-legally sufficient jurisdictions  
ONLY difference is there is no #1 b/c NO LIST.

### **Model Penal Code**

*“Whether the D acted under the influence of extreme emotional disturbance for which there is reasonable explanation or excuse” and this distinction shall be made “from the viewpoint of a person in the actor’s position under the circumstances he believes them to be.”*

Hypo - Prim, proper Sunday school teacher working in law office and when she bent over man pinched her behind. She grabbed a letter-opener and stabbed him to death. Her attorney wanted reasonable to be someone as religious as she, Ct said NO. She got first-degree murder.

## 1) Unintended Killings: Creation of Homicidal Risk

Involuntary manslaughter- is risk creation

### ***Conscious disregard of a substantial and unjustifiable risk***

→ The mens rea for IVM is something more than ordinary negligence.

- The mens rea is that the person consciously disregarded a substantial and unjustifiable risk that death would occur
- a) Knowing facts that would cause the reasonable person to know the danger is equivalent to knowing the danger
- b) To constitute wanton or reckless conduct, grave dangers to others must have been apparent and the D must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm
- c) If the grave danger was in fact realized by the D, his subsequently voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not
- d) A man may be reckless within the meaning of the law although he himself thought he was careful

Model Penal Code says: Requires the D to act recklessly so as to require a gross deviation from the standard of a law abiding citizen.

***→ Treats unintended killing as murder when it is committed recklessly and under circumstances manifesting extreme indifference to the value of human life.***

Objective or reasonable standards- determine liability on the basis of general norms of proper and reasonable behavior.

- a) The provocation standard imports an objective standard insofar as the law requires that what provoked the D to kill would have severely tested self-control of a reasonable person
- b) Negligence is an objective standard insofar as liability turns on whether the action of a D created a risk of a kind and degree which a reasonable person would not have taken.

Subjective or internal standards:- look to the individual characteristics of the actor

- a) Premeditation and deliberation are subjective standards since they look at what the particular D experienced

Rule from Malone (440)- *When an individual commits an act of gross recklessness for which he must reasonably anticipate that death to another is likely to result, he exhibits wicked disposition of heart etc...*

Difference b/w IVM and second degree murder:

- a) There is a sliding line b/w the two
- b) Second degree is recklessness plus and IVM is negligence plus
- c) Can have second degree murder that is intentional and unintentional

## 2) Unintended Killings: The Felony Murder Rule

**Felony murder is an accidental death of another human being committed in the course of a felony**

- Felony murder conviction – in the course of committing a felony, someone is accidentally killed
  - i. The intent to harm or not does not matter. If the killing occurs, then have a felony murder

→ Any act known to be dangerous to life and likely in itself to cause death, done for the purposes of committing a felony which causes death should be murder.

- Although a D can be held liable for the accidental death caused, the prosecution must still show that the D caused the death.
  - i. The D's acts must both be "but for" cause of harm and "proximate" cause of harm.
  - ii. Proximate cause of the harm is that the harm was the natural and probable consequence of the criminal act.

Reasons for felony murder rule:

- a) Deterrence
- b) Punishment
- c) we are treating this as murder and it is easier to prove the existence of a crime when have strict liability (b/c don't need to prove premeditation and deliberation)

→ In many states, a misdemeanor resulting in death can provide a basis for an involuntary manslaughter conviction without proof of recklessness or negligence  
"Misdemeanor/manslaughter rule" is also known as the unlawful act doctrine

Unlawful act doctrine-in the course of committing an unlawful act you kill a human being.

**\*\* Felony murder rule applies only when the crime committed is the proximate cause of the death\*\***

- **the underlying felony must be inherently dangerous to human life- must be one of the BREAKRSS**

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BREAKRSS felony- Burglary, robbery, escape from lawful authority, arson, kidnapping, rape, sodomy, other serious sex crimes OR an attempt to commit any one of these crimes

- It is possible to have a second degree felony murder which would be an accidental killing in the course of a dangerous felony but not an inherently dangerous murder. It has the same fiction and same sort of strict liability notion.
- All of the BREAKRSS also have an independent felonious purpose and so it is no longer the case that any killing in the course of any felony will result in felony murder.

- The inherent danger of the underlying felony and whether the underlying felony merges into the felony

?

- There must be some purpose independent of injuring or killing the defendant and the felony must be inherently dangerous to human life in the abstract or the attempt of.
- **If there is no purpose of the underlying felony other than to cause death or injury, can't use that felony as a proper foundation for felony murder because the underlying felony merges with the felony**
- Can't use underlying felony unless the underlying felony has an independent felonious purpose other than that to cause death or injury.

A. Agency theory- If the act or killing is done by a co-felon or someone acting in concert with a co-felon then the felony murder rule will apply. The D must have been the actual one to have done the killing.

- When the killing is done by a police officer or bystander, the felony murder rule is not applicable

C. Proximate cause theory- The D must have created circumstances that proximately lead to the death of the victim.

- a. Here, the central issue is the killing, no matter by whose hand, is within the foreseeable risk of the commission of the felony.
- b. In Proximate cause J, if felon created the circumstances that the person could die then will still be liable

The death must have been caused in the commission of the felony.

Limitations on felony murder:

- 1) It has to be an inherently dangerous felony (BREAKRSS)
- 2) There must be an independent felony and it must not be done to kill someone

- a. The purpose of the underlying felony must not be to cause death

→ Proximate cause theory and the agency theory are the limitations on the doctrine

- Agency theory is the stronger limitation b/c one of the felons must have been the one who did the killings

Redline Doctrine- exception to the proximate theory doctrine. *If the death was justifiable then they should not be liable. (Bank robber and police officer). You can't turn a justifiable murder into a felony murder*

- Redline is good in many J

### III. The Significance of Resulting Harm

#### 1) Attempt and Solicitation

3 inchoate crimes: Attempt, solicitation and conspiracy

Attempt- has actus reus and they must occur in time

- Courts don't convict on acts for preparation, they convict on acts of perpetration.

→ Under the Model Penal Code, it is not any act for the crime, but it is a substantial step towards committing the crime

Attempt- Requires a purpose or specific intent to produce the proscribed result even when recklessness or some lesser mens rea would suffice for conviction of the completed offense.

Attempt- A criminal attempt is an act, although done with the intention of committing a crime, falls short of completing the crime.

An attempt consists of two elements:

- 1) A specific intent to commit the crime and
- 2) An overt act in furtherance of it

→ Once attempt is successful, can't be charged with attempt anymore.

#### **The mens rea of attempt – Specific intent.**

- For attempt, the acts must come or advance very near to the accomplishment of the intended crime

1) Substantial Step Test- (adopted by the model penal code)- Requires that the act or omission constitute a substantial step in a course of conduct planned to culminate in the commission of the crime.

- An act will not qualify as a substantial step unless it is strong corroboration of the actor's criminal purpose.

2) Proximity Test- Courts have evaluated the act based on how close the D came to completing the offense.

b. Here, the D must be dangerously close to success

3) Equivocality Test- The act must demonstrate that the D had unequivocal intent to commit the crime. How clear it is from the D's act that he intended to commit the crime.

→ Before the D can be convicted of attempt, he must have committed some act in furtherance of his plan of criminality

- 1) The D must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting
- 2) The D must have engaged in conduct which constitutes a substantial step toward the commission of the crime.
  - a. A substantial step must be conduct strongly corroborative of the firmness of the D's criminal intent

Solicitation- (getting someone else to do the crime)- Many J have held that mere solicitation unaccompanied by an act moving directly toward the commission of the intended crime is not an overt act constituting an element of the crime of attempt

### Abandonment

- The general rule is that abandonment is never a defense
- The Model Penal Code says that withdrawal will only be a defense if:
  1. It is fully voluntary (and not made b/c of the difficulty of completing the crime or b/c of the increased risk of apprehension)
  2. It is a complete abandonment of the plan under the circumstances manifesting a renunciation of criminal purpose and not just a decision to postpone committing it

### Defenses to Attempt- Impossibility

- 1) Legal Impossibility- usually allowed as a defense
  - a. Here, the D has done all the acts intended, but his conduct does not constitute a crime
  - b. Even had the facts been as the D supposed them to be, no crime would have been committed
  - c. When unknown to the actor, what the actor planned to do had not been made criminal

- i. Ex- thinking that in area where selling alcohol is against the law when it is really not
- 2) Factual Impossibility- Usually not allowed as a defense
  - a. The D is unable to accomplish his criminal purpose b/c of facts not known to him.
  - b. Had the D not been mistaken , he would have known that his attempt had no possibility of success
  - c. D himself has to believe that his actions will cause the given result but it just so happens that the facts are missing to accomplish that result
  - d.
    - i. Ex- pickpocket who picks an empty pocket

### **Professor Robbins reasoning-**

→ A person be guilty of attempt only when he “purposely does or omits to do anything that, under the circumstances as a reasonable person would believe them to be” is a substantial step in a course of conduct planned to culminate in commission of the crime.

## IV. Group Criminality

### 1) Accomplice Liability

At common law, there are 4 categories to accomplice liability

- 1) Principal first degree- person at the scene of the crime who commits the crime. He is the perpetrator of the crime.
  - a. Ex- at a bank robbery, would be the person at the window or who points the gun etc
- 2) Principal Second degree- Person at the scene of the crime assisting in some way but is not the perpetrator
  - a. Ex- in the bank robbery-could be the driver of the getaway car or something
- 3) Accessory before the fact- someone who is not at the scene of the crime but knows about it in advance and provides assistance
  - a. Ex- could be the person who does not want to go to the bank but will help with hiding etc
- 4) Accessory after the fact- Not present at the scene and does not know about the crime until after it has been committed and then aids and provides assistance after the crime has been committed.

→ Today, the principal in the first three categories have been merged. Only the accessory after the fact is treated differently and is less culpable. There are still some J that have 4 categories

Actus Reus of Accomplice Liability- Assisting someone else in committing the crime. Person becomes an accomplice to a crime upon aiding or abetting or facilitating or counseling or commanding another to commit the crime

Mens Rea for Accomplice Liability- It is the specific intent that the target crime be carried out

→ Accomplices are punished the same as principals.

Scope of liability for accomplices- An Accomplice is responsible for the crimes he did or counseled and for any other crimes committed in the course of committing the crime contemplated, as long as the other crimes were probable or foreseeable.

## 2) Conspiracy: Uses and Abuses

A. Conspiracy- an agreement b/w two or more people to do either an unlawful act or a lawful act by unlawful means

- a) Conspiracy is a felony
- b) Conspiracy is an inchoate crime and the target crime does not have to be committed.
- c) The best strategy is to try the D all together
- d) The best strategy for the D is to file a motion for severance
- e) Hearsay testimony is usually inadmissible in court
  - a. If the hearsay statement was made in the furtherance of the conspiracy then it will be admissible in court
- f) Once a conspiracy is formed, it remains in effect until its objectives have either been met or abandoned.
- g) SOL for conspiracy begins when the conspiracy is terminated
- h) Conspiracy may be punishable from the time the conspiracy is made.

**B. Pinkerton's Rule- (Idea of vicarious liability) A party to a conspiracy is responsible for any criminal act committed by an associate**

- a. A co-conspirator is liable for any act committed by the other if it falls within the scope of the conspiracy or**
- b. Is a foreseeable consequence of the unlawful agreement**
  - i. As long as the conspiracy was not terminated, any crime that was committed, even if the person did not commit it or was not there at the scene, would be attributable to the other person

\*\*\*An overt act of one partner may be the act of all without any new agreement specifically directed to that act. It does not have to be communicated. It can be done through actions as well.\*\*\*

Inchoate crime- don't have to wait for the crime to be committed in order to be prosecuted

C. There are 5 aspects of conspiracy law that makes it a potent weapon for the prosecution:

- 1) Conspiracy permits punishment prior to the actual commission of the substantive crime
- 2) Conspiracy permits increase and sometimes double punishment relating to the commission of a crime- **Conspiracy does not merge with the completed crime**- Can have the sentences for both run consecutively
- 3) Conspiracy is a felony even if the target crime is a misdemeanor

- 4) Conspiracy gives the prosecutors some procedural advantages and is detrimental to the defense.
  - a. Gives them joinder (D would want to file separately b/c that is better for them)
  - b. Hearsay testimony is admissible in trial against any other conspirator
    - i. 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
  - c. Venue can be anywhere depending on the number of conspirators- it can be where the agreement occurred, where the crime happened, or where any conspirator did an overt act for the execution of the conspiracy
- 5) Pinkerton's rule- can get all those who were part of the conspiracy

→ Once the conspiracy is over, any later testimony can't be admitted.

- SOL starts to run from the commission of the last overt act committed by any one of the conspirators

#### D. Aiding and Abetting

→ A person may become liable for the substantive crimes of another by furnishing assistance to that person.

### 3) Conspiracy: Mens Rea

#### **The mens rea of conspiracy is intent**

In order to make a supplier a participant in a criminal conspiracy need:

- 1) Knowledge of the illegal use of the goods or services and
- 2) The element of intent to further that use must be present

How can intent be established?

- 1) Intent may be inferred from knowledge, when the purveyor of legal goods for illegal use has acquired a stake in the venture
  - a. Ex-inflation of the charges
- 2) Intent may be inferred from knowledge, when no legitimate use for the goods or services exists
- 3) Intent may be inferred from knowledge, when the volume of business with the buyer is grossly disproportionate to any legitimate demand or when sales for illegal use amount to a high proportion of the seller's total business
  - a. Here, intent to participate in the illegal enterprise may be inferred from the quantity of the business done.

The intent of a supplier who knows of the criminal use to which his supplies are put to participate in the criminal activity connected with the use of his supplies may be established by:

- 1) Direct evidence that he intends to participate or
- 2) Through an inference that he intends to participate based on
  - a. His special interest in the activity or
  - b. The aggravated nature of the crime itself

\*\*\* Issue that is always missed on the exam\*\*\*

→ **When someone knows of the existence of a crime in process, and furnished goods or services to one of the conspirators or someone who is going to commit a crime, have to ask if the person who supplies is also a conspirator-supplier with knowledge.**

\*\*When have supplier with knowledge person (or even one person that is going to commit a crime)- this is a Lauria issue\*\* Always ask knowledge of what?

- Get from Lauria that knowledge alone is not enough but if never get to intend then don't have conspiracy

??Powell Doctrine- A conspiracy to be criminal must be animated by a corrupt motive to do wrong→ If people agree to commit a certain crime and it ends up worse than it was meant to be, tough luck

Feola is an exception to the general specific intent by imposing strict liability for the crime of conspiring to assault an officer which would be just the intent to commit an assault.

- Here, they didn't know that the person was a police officer but they were still convicted of conspiring to assault an officer. Can still be convicted if, had you known, you would not have assaulted the officer

### 3) Conspiracy: Requirement of an Agreement

Actus reus of conspiracy is the agreement itself. Without an agreement, there can be no conspiracy.

**\*\*Knowledge by a D of all details or phases of a conspiracy is not required. It is enough that he knows the essential nature of it.\*\***

*All participants in a conspiracy need not know each other. All that is necessary is that each know that it has a scope and that for its success it requires an organization wider than may be disclosed by personal participation.*

- A cannot escape criminal responsibility on the grounds that he did not join the conspiracy until well after its inception or because he plays only a minor role in the total scheme.

Conspiracy v Accomplice Liability

- 1) For conspiracy one needs an agreement but the target crime does not have to be completed
- 2) For accomplice liability, don't need an agreement but just need the mens rea of intending that the target crime be carried out.
  1. You need the actual crime committed or attempted.

### Scope of the Conspiracy

- 1) Number of conspiracies
- 2) Number of Parties

### Conspiracy: Single or Multiple

→ *The number of agreements determines the number of conspiracies.*

- If there is an initial agreement among the parties to engage in a course of criminal conduct constituting all the crimes, then there is only one conspiracy

Test for wheel conspiracy to be single: **Need both parts**

- 1) Each spoke must know that the others exist or not necessarily their precise identity.
  - 2) Various spokes must realize that they have a community of interest with the others
- Each spoke must realize that the success of the venture depends on the success of the other spokes- this is the test that puts the rim around the wheel.

Test for the chain conspiracy: **Need both parts**

- 1) Knowledge of the existence of the others
  - a. Here, each end must recognize the existence of the others
- 2) Community Interest

### 3) Conspiracy: The Parties

A. Bilateral definition of conspiracy- an agreement b/w two or more persons to commit a crime with the proper mens rea and actus reus.

- In these instances, where the person or persons with whom the D conspired only feigned the person, courts have held that neither person could be convicted of conspiracy b/c there was no conspiratorial agreement

MPC supports the unilateral approach. Most J have adopted the unilateral approach to conspiracy.

B. Unilateral approach- Under this, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned.

### Gebardi Rule

→ A person cannot be considered of conspiracy when there is a recognized rule of justice or policy exempting him from prosecution from a substantive crime. (Man is guilty of adultery but woman is not b/c she is not married and so is not cheating on anyone).

### Wharton's Rule

→ If the substantive offense is defined so as necessarily to require more than one person, the prosecution must be brought for the substantive crime and not for the conspiracy.

- Exception- If a crime has been defined so as to require a minimum number of people and have more than the minimum number that is necessary then can charge them all with conspiracy b/c that goes beyond the group danger that was figured into the crime itself.

- MPC rejects the Wharton rule

### Abandonment of Conspiracy

- 1) Courts have required that a D take an "affirmative action" to announce his withdrawal to all others in the conspiracy. Usually means that notice must be given to each co-conspirator
- 2) Other Courts have held that D should announce withdrawal and spoil success of the conspiracy as well
- 3) The Model Penal Code allows for renunciation under some circumstances
  - a. Code allows defense only if the circumstances manifest renunciation of the actor's criminal purpose and the actor succeeds in preventing commission of the criminal objectives
- 4) Common law holds that conspiracy is complete once the agreement is made and so the abandonment is irrelevant.

## v. Exculpation

### 1) Justification: Self Defense

Justifications and excuses don't seek to refute any required element of the prosecution's case. Rather, they suggest further consideration that negate culpability even when all elements of the offense are clearly present

- Claims of self-defense and insanity suggest reasons to bar conviction even when it has been clearly proved that the D killed someone intentionally.

**Justification** is a complete defense-results in acquittal. (complete defense)

**Excuse**-is conviction of a lesser crime. (Mitigating factor)

Self defense applies only where the D is resisting force that is unlawful → The other party must be committing a crime or tort

Types of defenses (summary)-

- defenses involving protection of competing interest (society will justify what would otherwise be a crime if D's actions were in protection of some other societally recognized interest). Self defense, defense of others.
- Defenses where defendant must commit a crime in order to prevent committing a greater crime. Necessity and duress.
- where D tries to negate element of the crime charged.
- affirmative defenses-like impossibility, abandonment, renunciation or withdrawal from conspiracy.
  - intoxication is sometimes an affirmative D
- insanity

**Rules for self-defense:**

1. The D must have been resisting the present/imminent use of unlawful force.
2. The D must have used no more force than was reasonably necessary to defend against the threatened harm.
3. The force used by the D may NOT be deadly, unless the danger being resisted was also deadly force. (are exceptions in some J for kidnapping, sexual crime)
4. D must NOT have been the initial aggressor, unless he was a non-deadly aggressor confronted with the unexpected use of deadly force OR he withdrew after his initial aggression and the other party continued to attack.
5. The D must NOT have been in position from which he could retreat with complete safety, unless he was at home or (in many Js) at his place of work

When Two other features of self-defense:

1. **Defense of others**-when successful gets outright acquittal. Two ways to look at:
  - a. "stands in the shoes of the other person"-if that other person would have satisfied elements of self defense, then the person coming to aid of the other person would be justified in using self defense. OR
  - b. "reasonableness" test- a person can get the benefit of defense of others when it is reasonable to do so-with no further refinement.

→In the case of someone who kills another, ask whether use of deadly force was reasonable. What if D really thought it was deadly force, but reasonable person wouldn't have (if D overreacted?)--can get **imperfect self defense**. (ex- mistaken justification). If person believes that he is justified in killing other person in self defense, but jury disagrees, the result is lesser conviction--voluntary manslaughter. (\*another category of involuntary manslaughter--mistaken justification self defense).

The MPC limits the use of deadly force to cases where the threatened danger is death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat.

- Under this approach, a necessary condition for claiming self-defense is that the D actually believed in the necessity to use defensive force.

Some factors that go into determining reasonableness:

- a) D's physical disadvantages- look at the physical attributes and the surrounding circumstances
- b) D's knowledge and past experiences
- c) Belief must be honest

### Battered Woman Syndrome

It has to be imminent and immediate harm for there to be an acquittal (keep in mind that this syndrome is admissible as evidence)

→ Does not change the reasonableness standard to a totally subjective standard but it is admissible as evidence which go to show knowledge and circumstances.

- A. Most cases in which the woman kills the other person, turn on the reasonableness of the woman's conduct.
  - a. Courts have not used too much subjectivity into the analysis of reasonableness.
    - i. Usually the test is: What would a reasonable woman do in the D's position, taking into account the prior history of abuse, taking into account the particular psychology of the woman herself.

### 2) Rape Revisited: Definitional and Other Issues

Actus Reus of rape- physical penetration

An essential element of rape is forcible compulsion. Also, if victim is put in fear of great and immediate bodily harm, then that might suffice as rape as well.

→ Rape is a general intent crime. The D's reasonable belief that the victim consented will be a defense but the D's unreasonable belief will not

- 1) For crime of rape, always look at the statute and then go from there
- 2) There is rape when a person has sex knowing that the other person did not consent
- 3) There is a prevailing view, that there can be no rape which is achieved through fraud etc

\*\*Force is an element of rape and to justify a conviction, the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety.\*\*

→ Lack of consent can be established through proof of resistance or by proof that the victim failed to resist b/c of fear

- Many J say that the victim's fear needs to be reasonably grounded in order to obviate the need for either proof of actual force on the part of the assailant or physical resistance on the part of the victim.

MPC permits a conviction for gross sexual imposition in cases where submission is compelled by the threat of force or by any threat that would prevent resistance by a woman of ordinary resolution

- Some state extend this idea to situations where consent is obtained through duress, coercion or using position of authority.

How to try to show rape?

- 1) Woman should show reasonable resistance as measured by the circumstances
- 2) If woman is incapable of consenting, then that would also be rape
- 3) Justification: Necessity

MPC principle of necessity is subject to a number of limitations:

- 1) The actor must actually believe that his conduct is necessary to avoid an evil
  - a. It is not enough that the actor believes that his behavior possibly may be conducive to improving certain evils but that it is necessary to avoid those evils.
- 2) The necessity must arise from an attempt by the actor to avoid an evil or harm that is greater than the evil or harm sought to be avoided by the law defining the offense charged

MPC suggests → balancing of evils is the basic defense

**To invoke a necessity defense, the D must show that:**

- 1) They were faced with a choice of evils and chose the lesser evils**
- 2) They acted to prevent imminent harm**
- 3) They reasonably anticipated a direct causal relationship b/w their conduct and the harm to be averted and**
- 4) They had no legal alternatives to violating the law**

Elements:

- 1) The harm sought to be avoided must be greater than the harm committed
- 2) No alternative- no third alternative that is less criminal and can also avoid the harm
- 3) Imminence- harm must be imminent and no speculative future harm
- 4) Situation must not have been brought about by the defendant's carelessness or recklessness
- 5) Can't have successful necessity defense if take the life of an innocent person (intentional or unintentional)
  - a. Dudley and Stevens
  - b. Abortion doctors (won't work b/c it is lawful and so not murder and so not a harm)

- A. Civil Disobedience- willful violation of a law undertaken for the purpose of social or political protest.
- B. Indirect civil disobedience- involves violating a law or interfering with a government policy that is not the object of protest itself
- C. Direct civil disobedience- seek to challenge the very laws under which they are charged

#### 6) Excuse: Duress

**Duress does not excuse the killing of an innocent person even if the accused acted in response to immediate threats.**

- a) Defense of duress is available where there is an allegation that an act was committed in response to a threat of present, imminent and impending death or serious bodily harm.
  - a. Threats of destruction to property or slight injury are not enough.
  - b. Concern for the well being of another, particularly a near relative, can support a defense of duress if the other requirements are met.

**\*\*Duress shall be a defense to a crime other than murder if the D engaged in conduct b/c he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist\*\***

#### Compare Duress to Necessity

- 1) Duress- there is no balancing test.
- 2) Necessity is a comparison of harms. You chose the lesser of the two evils.
- 3) Necessity is a justification and duress is sometimes a justification and sometimes it is an excuse
- 4) With necessity, the threat comes from a circumstance, with duress, the threat or force comes from another human being
- 5) Duress defense is sometimes called a compulsion or coercion defense

- **Duress is usually a good defense but you can't kill an innocent person**

#### *Elements of Duress:*

- 1) Threat- A threat by a third person
- 2) Fear- which produces a reasonable fear in the D
- 3) Imminent danger- that he will suffer immediate, or imminent (bodily harm)
- 4) Bodily Harm- death or serious bodily injury

#### Effect of mistake-

- 1) If the mistake was reasonable, then the defense will be allowed
- 2) If the mistake was unreasonable, then the defense will not be allowed.

## 7) Intoxication

**Voluntary intoxication can be a good defense to a crime if it negates the mens rea of the crime (if it negates the specific intent needed to commit the crime)**

- Defense does not work if D had previously formed the mens rea and then started drinking in order to gain the courage and get rid of his inhibitions. This would be a case of transferred intent

→ Voluntary intoxication may be a defense to specific intent crimes but may not be a defense to a general intent crime.

- 1) Purposefully and knowingly- usually specific intent crimes
- 2) Recklessly and negligently- usually general intent crimes

	General Intent	Specific Intent	Strict Liability
Voluntary	No	Good defense	No (no mens rea)
Involuntary	Might be a good defense	Good defense	No

→ Evidence of intoxication may be used to demonstrate that premeditation and deliberation have not been proven so that a second degree murder cannot be raised to a first degree murder or to show that the intoxication lead to a fixed state of insanity.

- Intoxication may also be used to show that the D never participated in the crime.
- Under some circumstances, intoxication may be relevant to demonstrate mistake.

Voluntarily induced: If the intoxication was “self induced,” he may argue

- 1) That he would not have committed the crime if had not been intoxicated, and therefore that he should not be punished merely b/c he was drunk
- 2) Alternatively, he may make the more forceful argument that his intoxication prevented him from having the requisite mens rea for the crime.
- 3) He may argue that as a result of his intoxication he did not “know right from wrong” and should therefore be treated like an insane person

→ Courts have generally decided that intoxication will never be considered to negate the existence of recklessness.

- Intoxication will not negate the mens rea of crimes that may be committed through recklessness
- Intoxication is also not accepted to negate criminal negligence.

## 8) Excuse: Insanity

- Insanity line is b/w punitive model of criminal law and rehabilitative treatment model on the other hand

- We only care about whether or not the D was insane at the commission of the actus reus of the crime. There are many tests to determine that. There are 4 tests, irresistible impulse test, durham test, model penal code test, and M'Naghten test.

→ *Insanity is an affirmative defense*

### 1) M'N Test

At the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind as:

- a) Not to know the nature and quality of the act he was doing or
- b) If he did know it, that he did know what he was doing was wrong.

To win under this test, must show that:

- a) Mental disease or defect
- b) That as a result, either
  - a. He did not understand the nature and quality of his act or
  - b. He did not know that his act was wrong

→ *M'N test is lack of ability to know difference of knowing what is right and wrong.*

- What does it mean to be wrong? There are two interpretations: 1) Wrong means against the law (legal wrong) 2) Wrong means immoral- might know it is against the law but thought that it was the right thing to do at the time (moral wrong)
  - There are two interpretations, legal wrong and morally wrong

→ Two schools of thought on M'N rule.

- 1) Strict M'N- focuses on legal wrong (against the law)
- 2) Loose M'N- focuses on the moral wrong (against morals)

→ At least half of the states employ this test

- M'N focuses on one thing and that is the inability to reason and b/c it focuses on that thing, this has also been its major criticism b/c they say that it is not broad enough b/c what about person who knows the difference but can't control his actions.

→ Under this test, loss of control is no defense (it is irrelevant that the D may not have been able to control himself)

### 3) Irresistible Impulse Test

- It is the response to the criticism of M'N. This focuses on the inability to control. About half of those states that follow M/N test have added this test as well. Test says, if a as a result of mental disease, D was unable to control conduct, that is insanity.

- 1) Have mental disease

2) See how the disease manifested itself. If it did so with inability to control conduct then have insanity.

- Irresistible impulse does not have to be an impulse. B/c a D would argue that there was no actus reus b/c this is no better than a reflex

→ *A D is entitled to an acquittal if the proof establishes that b/c of the mental illness he was unable to control his actions or to conform his conduct to the law*

- a) Some J say that there must be a total inability to control and others say that there must be a partial inability to control.
- b) Strict and loose here as well.
  1. Loose- something short of a total inability to control.
    - a. His inability to control himself was substantially impaired
  2. Strict- must be a total inability to control
    - a. Police man at the elbow test- If D committed act even if there was a police man at elbow, then you have satisfied insanity under the strict insanity test.

- The most important point is that it is not a stand alone test. M’N can be a stand alone test. The irresistible test does not stand alone and no J has this as the sole criteria. This actually developed as a reaction to the M’N test

- Many J but not all that have M’N have added to it the irresistible impulse test
- From D perspective, much better to be in a impulse J, but from gov’t to be in a M’N J b/c there is one way to satisfy this test
- Most J say that the burden is on the gov’t to prove sanity and some J say that D must show insanity

### 3) **Durham Test** (“Product Test”)

- M’N is the ability to know-reason and Irresistible test is the ability to control conduct
- This test came about b/c lawyers, jurors and judges don’t know about D’s insanity etc and so should allow psychiatrists should be allowed to come in and talk about the D’s totality
  - One objective of this rule was to permit psychiatrists, testifying as expert witnesses, to give a broader range of information to the jury than they could under the M’N test (under which they were forced to restrict their opinion to whether the D “knew right from wrong.”)

→ **An accused is not criminally responsible if his unlawful conduct was the product of mental disease or defect.**

*A crime is a “product of mental disease or defect” if it would not have been committed but for the disease.*

- Only NH uses this test now.
  - Many J don’t use this test b/c they feel that it is too broad in that virtually everything will fall under regardless of whether there was a close connection with the ensuing act or not.

**4) MPC Test**

- Like Durham, this is a combo of M’N and the irresistible test b/c it combines

*Under this test, the D is entitled to an acquittal if the proof shows that he suffered from a mental disease or defect and as a result lacked substantial capacity to either:*

- a) Appreciate the criminality (wrongfulness of his conduct) or*
- b) Conform his conduct to the requirements of the law*

- Which test favors the D? Loose M’N. Durham is the most D favoring test

Which is the hardest test to satisfy? No irresistible test b/c there is a two part test. Test that is most government favoring is strict M’N.

- The loosest combination of M’N and irresistible is about approximation of model penal code

M’N	Irresistible Impulse	Durham	MPC
MD or D	MD or D	MD or D	MD or D
Human Reason/ Cognition	Ability to Control	Act, ↔ Product	-Lacks substantial capacity -To appreciate criminality (wrongfulness) or -Conform one’s conduct to the requirements of the law

Federal Test- It is an affirmative defense that at the time of the commission of the acts constituting the offense, the D as a result of severe mental disease or defect was unable to appreciate the nature and quality or the wrongfulness of his acts.

- Mental disease or defect does not otherwise constitute a defense

