**HOMICIDE**

| **Common Law** | **Model Penal Code** |
| --- | --- |
| Act element is the same: cause the death of another human being (a result crime) |
| Mental State elements:**Murder 1:** malice aforethought (actual malice) AND premeditation & deliberation*“Malice”* can mean: * intention to kill
* intention to inflict grievous bodily injury
* *extremely* reckless disregard for the value of human life (“depraved heart murder”)
* intention to commit felony (completed or attempted) during which someone dies (“felony murder”)

*“Premeditation & deliberation”* Majority rule: must be some time more than an instantJurisdictions * “Interval of time of sufficient duration for the accused to be fully conscious of what he intended”—not a very good articulation, allows the jury to choose M1 or M2 at will.
* “Interval between initial thought and ultimate act long enough for an RP to subject the nature of his response to a ‘second look’”—provides a bit more guidance to the jury; would allow a jury to downgrade from M1 to M2 (*nullification*), but not upgrade from M2 to M1.
* Some jurisdictions: almost any amount of time will do to show premeditation
* “Traditional formula” factors showing premeditation & deliberation (circumstantial evidence)—much harder for jury to be whimsical:
	+ Planning itself (engaged in activity explicable as intended to engage in killing)
	+ Motive (obvious motive that someone would think about for awhile)
	+ Manner of killing (very directed manner—stab to heart, gun to head, poison—is better circ evid of premeditation & deliberation than frenzied, random violence)

POLICY: highly violent frenzied killers (kill child during a beating) get an easier time than a planned mercy killing (parent with painful cancer)*Felony murder* is a strict liability killing (no mental state requirement with regard the death)* Guilty of M1 because but for felonious action, other person would not be dead.
* P must prove elements of the felony AND causal link to death; no mental state required with regard to the death of another human being
* Judges don’t like felony murder so will gloss it… felony must be dangerous, must be independent of the cause of death (ie, no assault gone bad), in furtherance of the felony (limits potential exposure)
* May have accomplice liability for felony murder (so if jointly do a bank robbery and your accomplice kills someone in the process, you can face felony murder).
* Strict liability justified on deterrence grounds

**Murder 2:** malice aforethought either actual malice (without premeditation and deliberation) or implied malice. Implied malice is:* Abandoned and malignant heart malice (extreme recklessness to human life), or
* Intent to commit serious bodily injury

**Voluntary Manslaughter:** Adequate Provocation in the Heat of Passion (a defense to the mental state of malice); negativing defense to downgrade from M1/M2 (which require malice). (Note: a negativing defense but doesn’t result in acquittal if proven, unlike other negativing defenses we’ve looked at.) The classical model of APHP is as an affirmative defense, but some jurisdictions now allow a P to charge someone with voluntary mnslghtr.4 Steps in APHP defense: D must show all 4; P must disprove only 1 BRD to knock it out* Adequate provocation must be present (objective inquiry)
	+ Traditionally, provocation had to be one of an established class to be “adequate” and judge determined if it was. (Discovering spouse in flagrante delicto with another; mutual combat; assault and battery; injury to D’s relatives or another 3rd party; resistance to an illegal arrest.) In *Girouard* (2001), standard was changed to RP—*would an RP be provoked to homicidal passion by whatever D identifies as provoking?* (Very D friendly; expands possible circumstances.)
	+ However, CL tradition that words alone cannot provoke remains true (majority rule). Minority of jurisdictions changed this.
* Killing has to be done while D was in the heat of passion, suddenly (subjective inquiry); *was the D really in a homicidal rage when he killed? What was in his mind?* This is a factual inquiry for the jury.
* Heat of passion had to be sudden (come about very quickly after the adequate provocation) (objective inquiry)
	+ CL had (or has?) a concept called “cooling time”—as matter of law, judge could determine too much time had passed. Now handled as an RP matter (how much time would an RP take, considering what the provocation was, to cool down?) This is an RP inquiry for the jury (not judge).
* Provocation has to lead to the passion which lead to the killing (subjective inquiry); *was the passion really caused by the provocation and did it really cause the killing?* This is a factual inquiry for the jury.

**Involuntary Manslaughter:** recklessness or *extreme* negligence regarding risk of causing death * Failure to reflect on risks that you are aware of
* Misdemeanor manslaughter (in some juris, if commit a misdemeanor and someone dies, it’s a strict liability involuntary manslaughter, like felony murder)

[*Regular* negligence: civil liability or, in some jurisdictions, negligent homicide where defendant should have been aware of risk of causing death.] | Mental State elements:**Murder 210.2(1)(a):** “committed purposely or knowingly”**Murder 210.2(1)(b):** “committed recklessly under circs manifesting extreme indifference to human life.” Trans.: extreme recklessness* Recklessness and extreme indifference are presumed if actor engages in or attempts, is accomplice to, or flight after actual or attempted rape, arson, burglary, kidnapping or felonious escape. This is now a rebuttable presumption.
* Note: CL felony murder comes in here.

**Manslaughter 210.3(b):**  “homicide which would otherwise be murder, but committed under influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”* “Reasonableness of explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under circs as he believes them to be.” Very D friendly. Commentary: no idiosyncratic beliefs; if D has made a mistake it must be reasonable.
	+ NY MPC law (*Casassa)* has 3 step process
	+ What is D’s internal state? (Subjective) [homicidal rage]
	+ What is D’s external state? (Subjective) [She jilted me]
	+ Is the externalized explanation for D’s internal state reasonable? [is it reasonable to go into a homicidal rage if someone jilts you? No.]
* Note that no provocation is required.
* This is a collateral defense—burden may be on D.

**Manslaughter 210.3(a):** “committed recklessly” or extreme negligence. Degree of risk and the badness of reason for taking it.[Negligent Homicide 210.4: negligently cause death; also: civil liability.] |
| “Implied Malice”/Extreme Recklessness (M2) v . Recklessness (Involuntary Manslaughter)Explaining differences:* Awareness of risk of causing death
* Reason for taking the risk (might differentiate between the degrees)
* Different degrees of risk of death (Driving 40 mph in a 25 zone v. doing 70 mph)
* Illegality of the activity that risks death
* (Something about the conduct comes in to play

Gradations of mental state in CL

|  |  |  |
| --- | --- | --- |
| Degree of risk of death (substantialness) | D’s awareness of the risk (recklessness) | Extent to which D should have been aware (RP) (negligence) |
| High (“gross”) | Gross Recklessness = Implied Malice, M2 | Gross Negligence =Invol Manslaughter |
| Medium | No degree falls here. Look at reason for taking the risk. If understandable, bump down ↓; if stupider (Russian roulette), bump up ↑ |
| Low | Ordinary Recklessness =Invol Manslaughter | Ordinary Negligence = Civil liability (or negligent homicide if statute provides) |

 | Mental state definitions/gradations of recklessness and negligence MPC 2.02(c) *Recklessly*: gross deviation of standard of conduct that a law-abiding person would observe in the actor’s situation* Extreme recklessness (Murder) distinguished from ordinary recklessness (Manslaughter). Extreme recklessness is acting in conditions that manifest extreme indifference to human life.

MPC 2.02(d) *Negligently*: gross deviation from the standard of care that a reasonable person would observe in the actor’s situation |

**REASONABLE PERSON**

| **Common Law** | **Model Penal Code** |
| --- | --- |
| Reasonable Person Standard; policy issues are the same in all jurisdictions*Recall that the RP can be used as circumstantial evidence of what the D was thinking; that’s different from RP as a standard.*POLICY: is the RP the “average” person? The person we know we should be, the goal we should try to live up to?POLICY: does the RP have an age, a sex, an ethnicity, any physical characteristics, a particular temperament, any personal history, a culture other than that of the jurisdiction?POLICY: how do stereotypes fit into our understanding of what a reasonable person would do?*Camplin*, 1978, is a point of reference, not a rule. Per *Camplin*, should assess the D against the standard of the RP for* Gravity of the provocation: All of the characteristics of the D are relevant to understand how grave the provocation was.
* Degree of self-control: We only personalize for age and gender.
* General agreement that the RP is not overly sensitive or drunk.

POLICY issue; courts take different approaches to admitting evidence of the RP:How subjective is the RP question? (“An RP in the D’s circumstances…..”)1. Wholly subjective [no courts agree]
2. Mainly objective [all courts agree that objective references are fine; and a few subjective factors may come in, as listed below]
	1. Relative size of V and D
	2. Age
	3. Handicap
	4. Gender (often)
	5. Personal history?? Where do we draw the line? Does it start to shift into excuse rather than justification when offered as defense). Courts may allow age/gender to come in as a proxy for personal history.
	6. Battered Women’s Syndrome??: akin to kidnap victim/can’t escape/can predict next beating, extreme threat
3. Mixed subjective and objective [big issue: what’s allowed to come in?]
 |

**COLLATERAL DEFENSES**

| **Common Law** | **Model Penal Code** |
| --- | --- |
| Defenses are either negativing (prevents P from meeting burden of persuasion) or collateral (burden on D). There is no constitutional requirement that P prove or disprove anything in a collateral defense (legislature or court can put burden anywhere). Collateral defenses: either excuse or justification. * Justification: D did the right thing. Can exonerate.
	+ Self-defense
	+ Necessity
	+ Internal structure of a justification defense: Triggering Conditions; Necessity; Proportionality; Mental State
* Excuse: D did the wrong thing, but we understand why he did it. Can lower degree of crime.
	+ Duress
	+ Severe mental illness
	+ Intoxication/Diminished capacity

CL: APHP has elements of both—other person did something bad (commit adultery, fight with you), but you also did the wrong thing. |
| Self-Defense: JUSTIFICATION* Triggering Conditions (V is initial aggressor; likely must also be the first party to introduce deadly threat)
* Necessity (D acts to degree necessary to prevent harm to self)
* Proportionality (D used force proportional to force V threatened; was deadly force appropriate?)
* Mental State (D’s mistake, if any, about Trigger, Necessity, Proportionality)
 |
| Self-defense (analysis) JUSTIFICATION* Triggering Conditions
	+ Was V first to introduce level of threat that D ultimately used?
* Necessity
	+ Threat must be imminent [this is only in CL]
	+ D may only use amount of force necessary
	+ Retreat rule applies in many juris (castle doctrine exception: don’t have to retreat in your own home, unless in some juris, attacker also lives there)
* Proportionality
	+ CL definitions of deadly force: “capable of causing death or serious bodily injury”; “force used with intent to cause death or serious bodily injury”; “force which an RP believes could cause death or serious bodily injury”
* Mental State
	+ If D makes mistake about trigger, necessity, proportionality, it must be reasonable.
 | Self-defense (analysis) JUSTIFICATION* Triggering Conditions
	+ Was V first to introduce level of threat that D ultimately used?
* Necessity
	+ MPC 3.04(b) limits amount of force
	+ MPC 3.04(b)(ii)(1) is the retreat rule
* Proportionality
	+ MPC 3.11(2) defines deadly force: “forced used with the purpose of causing, or which actor knows to create substantial risk of causing, death or serious bodily injury.”
* Mental State
	+ MPC Art. 3 talks about D’s “belief” (ex: 3.04), subjective, but...
	+ If D makes mistake about trigger, necessity, proportionality, apply MPC 3.09. If offense has m/s of negligence, must have been non-negligent in the mistake; if has m/s of recklessness, must have been non-reckless in the mistake. Bottom line: a reasonable mistake (a non-negligent one) will be excused for any level of offense. An honest mistake will excuse if offense has m/s of purposefully.
 |
| Necessity (elements) JUSTIFICATION1. Significant evil, immediate and dire *[Trigger]*
2. Caused by natural forces [specific to CL; some juris say “situational” forces] *[Trigger]*
3. Harm D caused must be the lesser evil *[Proportionality]*
	* D does not get to weigh the evils; even a reasonable mistake in balancing the evils is not allowed.
4. No reasonable alternative *[Necessity]*
* Some jurisdictions require that the D’s action must be efficacious (separate element); some combine that in here
1. Any mistake must be reasonable *[Mental State]*

(Note that self-defense would fit in 1, 3, 4; but over the years CL language has jelled differently for different justification defenses) | Necessity (elements) JUSTIFICATION1. MPC 3.02(1) Avoid harm or evil to self/others *[Trigger]*
* No mention of dire or immediate
* Doesn’t require created by natural forces—could be situational or created by another person
* 3.02(2) requires “clean hands”
1. MPC 3.02(1)(a-c) *[Proportionality]*
2. No reasonable alternative *[Necessity]*
	* MPC 3.02 says “necessary”, basically same considerations as CL “no reasonable alternative”
3. 3.02(2) has its own mistake section—do NOT look at 3.09 *[Mental State]*
 |
| Duress EXCUSEBlack-letter law:1. Duress is not available to defend against murder in the CL
2. Immediate threat of death or serious bodily injury
	* Many juris require threat to be to D or D’s relative
3. Well-grounded fear that threat would be carried out
4. No reasonable chance to escape
5. D was not at fault in exposing self to the threat [required in many juris]
6. Any mistake by D had to be reasonable
 | Duress EXCUSENote that MPC does not require that a bad situation be created by nature, so facts that fit Duress might also fit Necessity.MPC 2.09:1. No restriction as to crime\*
2. Use or threat to use unlawful force against D or any other person
	* Doesn’t have to be threat of death or serious bodily injury
3. [Nothing about well-grounded fear]\*
4. [Nothing about chance of escape]\*
5. Must have clean hands (MPC 2.09(2))
	* No stair-steppping; if you were reckless in exposing self to threat you lose the defense for any level of crime. If you were negligent, lose defense for any offense requiring negligence.
6. [No mention of mistake]
* POLICY ISSUE: How would a court assess a mistake under 2.09? This is an open question. Could apply “personal of reasonable firmness” standard to evaluate the mistake. Or, could make some analogy to clean hands provision—honest mistake is ok for any crime; a reasonable (non-negligent) mistake is ok for a crime requiring a m/s higher than negligence, etc.

\* MPC 2.09 refers to a “person of reasonable firmness” but no bright line test |
| Severe Mental Illness EXCUSE1. Competency to Stand Trial
* Issue: D’s psych condition at time motion is made. Mental condition at time of the crime is irrelevant.
* Can D aid and assist defense attorney? Can D provide info, enter a plea, decide to have a trial, waive jury, or take stand?
1. Civil Commitment
* Issue: is D now a danger to self or others, or unable to care for basic needs? Therapeutic intervention, often for stated time or until no longer a danger/able to care for self
* Evidence of criminal act may be presented to show danger to others, but this is not a criminal proceeding.
* Alternative to prosecution/criminal trial (if civilly committed, not convicted). Prosecutors will often go here, especially for misdemeanors. Lower standard of proof, general lack of affordable mental health treatment.
* Entitled to representation
1. Insanity Defense
* Collateral defense, burden on D; it’s all about expert testimony
* Issue: D’s mental state at the time of the crime
* Although committed the crime, D is not morally culpable because of mental condition
* When allowed, it’s permitted for severe mental illness (psychosis) or really serious organic brain syndrome (damage). No personality disorders. Legislatures have drawn lines around this. Man up and deal with your quirks. Only allow insanity when you are really far gone.
* In some states, public mental health hospital makes call for public defendants; other states (incl. Oregon) have funds to pay for forensic psych exam
* Even states that won’t allow the insanity D (or refuse expert testimony) allow psychiatric testimony for a negativing defense related to mental health
* May be called Not Guilty By Reason of Insanity, Guilty But Mentally Ill, Guilty But For Insanity
1. Disposition after successful Insanity Defense
* If NGRI, some juris automatically put into a very secure mental health facility; other juris have a separate hearing to determine if D is still mentally ill and dangerous (like a Civil Commitment hearing); other juris have a Psych Security Review Board determine what level of facility to treat in.
* If acquitted, can still be subject to a Civil Commitment hearing (issue is mental state now, not at time of crime)
 |
| TestsM’Naghten Rule* Condition: Defect of reason from disease of the mind
* Effect: D did not know nature and quality of his act; or, didn’t know act was wrong
* Purely cognitive focus (complete destruction of mind)

Control Test (aka Irresistable Impulse—which is a misnomer)* Condition: Defect of reason from disease of the mind
* Effect: Unable to control behavior
* Focus on governing power of the mind (complete destruction of mind)
* Used with M’Naghten, not instead of it.
* Many juris have eliminated this test because of the impossibility of distinguishing between “irresistible” and “not resisted”

Product Test* Condition: Mental disease or defect
* Effect: [No effects listed]; “unlawful act was a product of the mental disease”
* No guidance for jury—trial by labels
 | MPC 4.01 (test)MPC* Condition: Mental disease or defect
* Effect: D “lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”
* Don’t need to establish complete inability to know what’s going on or control own behavior. Substantial <> complete; appreciate allows for a fuller appraisal of understanding than “know.”
 |
| Intoxication and Diminished CapacityDepending on jurisdiction and law, these could be either collateral or negativing defenses, depending on the facts. Could negative the act element (voluntariness) or mental state (impacted enough not to understand what’s happening around them. |
| IntoxicationVoluntary* May be a negativing defense for mental state in a specific-intent crime, but not in a general-intent crime. (Like mistake of other law.)
* General intent: RP analysis cannot be the Reasonable Drunk
* Some juris allow to reduce the degree of homicide (a specific intent crime), rather than negative mental state.

Involuntary* Coerced intoxication, intoxication by innocent mistake, pathological intoxication (atypical reaction), unexpected intoxication as result of prescription drug
* Very little caselaw, but probably acquitted for general intent crime as well as specific intent.

SCOTUS: it’s constitutional not to allow an intoxication defense | IntoxicationSelf-Induced (Voluntary)* MPC 2.08(2): not a defense to a reckless crime if D would have been aware of the risk at issue when he was sober
* Not a defense to offense with mental state of negligence (applying RP standard—or rather, there is not Reasonable Drunk standard)
* May be a defense to purpose or knowledge
 |
| Diminished CapacityMens Rea Variant (Negativing)* Most juris allow evidence on this, but a small group does not
* Courts may also confuse this with partial responsibility
* *Clark,* Souter opinion re three kinds of evidence re diminished capacity:
	+ Observation, what D said and did
	+ Expert opinions about mental disease (was D mentally ill?)
	+ Expert opinions about capacity (could D exercise cognitive and judgment functions?)
	+ Juris may allow only the first and prohibit others without violating constitution; observation evidence can come in without any psychological explanations

Partial Responsibility Variant (Collateral)* Not widely accepted; where it is allowed, applies only to murder >>> reduce it to manslaughter
* Insanity defense lite (don’t need same degree of mental illness; don’t need to meet the tests)
 | Diminished CapacityMens Rea Variant (Negativing)* 4.02 admits evidence of “mental disease or defect” whenever it can be negativing of a mental state element.

Partial Responsibility Variant (Collateral)* If a juris accepts the Partial Responsibility Variant, it’s generally because it adopted MPC
* MPC 210.3(1)(b) allows murder reduced to manslaughter where D acted under “influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.”
 |

**ACCOMPLICE LIABILITY**

| **Common Law** | **Model Penal Code** |
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| * Principal in 1st Degree: Perpetrator
* Principal in 2nd Degree: Abettor—actually or constructively present on the site (ex.: driving getaway car or standing watch)
* Accessory Before the Fact (ABF): Aid or encouragement before the crime (ex.: loaned the getaway car)
* Accessory After the Fact (AAF): helps avoid capture or prosecution, shares in the spoils; not convicted of same crime as Princ1. [We did not study AAF.]

Accomplice liability derives from accomplice’s own acts and mental state, both of which exist in relationship to the Princ1’s actions. *Derived (derivative)* liability, not vicarious liability. There must be a Princ1 from whom the D derives liability.P must* Prove there was a Princ1 who did the act and had the mental state
	+ P does NOT have to identify Princ1 or prosecute/convict them
* Prove Accomplice did the act that satisfies the accomplice statute AND prove Accomplice had the mental state in the statute
* P has same burden of production/persuasion as when prosecuting Princ1
* In many jurisdictions, P does not have to allege accomplice liability in the indictment

Abandonment defense: not enough to leave scene of crime, must call police as well |
| Act Element How minimal can act be? * Encouragement/solicitation—verbal acts—are enough
* Mere presence/passive behavior is not enough
* In some jurisdictions, presence plus previous conspiracy (unrelated to current offense) which suggests tacit agreement may be enough.
* Jazz case: nodding, clapping, facial expressions can be minimally adequate acts of aid
* Act behavior can be proved by circumstantial evidence
 |
| Mental StateBasic rule: Accomplice liability is a specific-intent crime * Circumstantial evidence can be used to prove specific intent

Can either be an intent that the Princ1 commit the crime, OR(*Lauria)* Can infer intent from knowledge that the Princ1 is committing the crime PLUS* Accomplice’s “special interest”
	+ acquiring a stake in the venture (can be as a result of supplying lawful goods or services to further a criminal enterprise)
	+ no legitimate use for the goods/services exists
	+ volume of business with Princ1 is grossly disproportionate to any legitimate demand
* Aggravated nature of Princ1’s offense (felony)
	+ INTENT MAY NOT BE INFERED FOR A MISDEMEANOR

But… (*Rilely)* in the case of a crime with a “reckless” mental state for Princ1, how can Accomplice had specific intent that Princ1 act recklessly? How can Accomplice have purpose that Princ1 cause serious injury recklessly?* Accomplice may be guilty if he had the same mental state that the target crime requires for that element (for the Princ1)
 | Mental StateBasic rule: Mental state for accomplice liability is “purpose of promoting or facilitating” (MPC 2.06(3)(a))* D must have conscious object of promoting or facilitating the offense (knowledge and goal orientation).
* Circumstantial evidence can be used to show D’s conscious object.

MPC 2.06(4): mental state for a result crime. |
| Natural and Probable Consequences DoctrineEx. *Linscott* the would-be robbery of another drug dealer; turned to homicide1. There was a Princ1 who committed the primary offense
2. The D was an accomplice to the primary offense
3. Princ1 committed a second crime
4. Was the second crime a reasonably foreseeable consequence to the primary offense? (This is a negligence standard)
	* If yes, D is accomplice to the second crime… has intent or knowledge of the second crime

Upshot: D can be convicted of a crime requiring intentional/knowing mental state even though the most the P must show is negligence with respect to mental state.POLICY: although arguably punishes more bad intent/culpability than D had, but good as deterrence policy *if everyone is a rational actor.* | [No comparable MPC provision] |
| Attempt to AidRULE: attempt to aid is not enough under CL.Do attempt analysis: * + CL beyond mere preparation (to aid)

The assess if accomplice* + Did an act of aid or assistance
		- If did not do the act, only attempted to do the act of aid, it is not enough under CL.
	+ Had intent that Princ1 commit the offense
 | Attempt to AidDo attempt analysis: * + Incomplete attempt: MPC substantial step (to aid)
	+ Complete attempt: MPC beyond mere preparation (to aid)

Then assess if accomplice* + Incomplete attempt: MPC 5.01(3) (this provision does the analysis assuming that crime was committed by a Princ1, even if it wasn’t—kicks to 2.06)
	+ Complete attempt: MPC 2.06(3)(a)(ii) (“aid or attempts to aid”)
 |
| * If Princ1 has a justification defense (Princ1 did the right thing), there is no crime and no Princ1. So there can be no accomplice liability.
* If Princ1 has an excuse defense, there is still a crime (even if Princ1 escapes punishment or liability for some reason). So there can still be an accomplice.
 |
| Summary

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| --- | --- | --- |
| Accomplice’s Mental State | Common Law | MPC |
| M/S with regard to Princ1 conduct | Specific intent that Princ1 engage in that conduct | Purpose (of promoting or facilitating); Purpose that Princ1 engage in that conduct (2.06(3)(a)) |
| M/S with regard to result element of target crime | Majority view: same mental state as target crime (can be recklessly)Minority view: specific intent that Princ1 cause the result element | Same mental state as target crime (2.06(4)) |
| M/S with regard to attendant circumstances of target crime | No clear answer about what P has to show[Compare with policy  |

 |
| Differences between Princ1 and Accomplice?It’s ok for Accomplice to be guilty of a lesser crime or lesser degree of offense than Princ1Generally, Accomplice cannot be convicted of greater offense than Princ1, but in some jurisdictions it is allowed for homicide. | Differences between Princ1 and Accomplice?MPC 2.06(7) allows Princ1 and Accomplice to have different degrees of same crime. Means that Accomplice could be guilty of a great degree than Princ1. |

**ATTEMPT**

| **Common Law** | **Model Penal Code** |
| --- | --- |
| *Mere preparation**Attempt**Complete attempt**Incomplete attempt*D forms intent to commit crimeTarget crime completedAct tests determine where this line is. Before the line there is no crime; across the line may be able to abandon attempt—a defense.An incomplete attempt is one foiled by intervention.A complete attempt is marred by error; D did everything D meant to do but still did not complete the crime.Distinction between complete and incomplete matters a lot for the MPC, much less for CL.Dual focus: Evaluate Act and Mental State with respect to actual behavior AND with respect to the Target Crime (4 things to evaluate)

|  |  |  |
| --- | --- | --- |
|  | D’s Actual Behavior | Target Crime |
| Act Element | 1. Did D perform a voluntary act or omission of a legal duty?
 | 1. Did D’s behavior go beyond “mere preparation” to commit TC?
 |
| Mental State Element | 1. Did D have the purpose/intent to do what D did? [Rarely an issue; people presumed to intend what they do.]
 | 1. Did D have required mental state regarding TC?
 |

 |
| Mental State re Target CrimeAttempt is specific intent to commit the target crime; even when the TC is general intent, attempted TC is still specific intent. That is, specific intent for conduct and result elements of TC.* POLICY: since there is no actual harm in an attempt crime, we want a higher level of certainty that D actually intended harm.

For Attendant Circumstances elements, CL juris are split on whether D needs specific intent or only the mental state required by the TC.* POLICY: choice of law issue exists. D wants specific intent (reflect policy like conduct and result) and P wants TC mental state (uphold protection of victim)

Remember: specific intent is negatived by an honest mistake of fact. | Mental State re Target Crime See Handout 10, page 2)MPC 5.01 is one of the worst written MPC provisions ever (and that’s saying something). Don’t rely on it literally.Attendant Circs/Free Floating Mental State Elements5.01 intro: P must show D had the mental state required by the target crime for the Attendant Circs and any Free Floating Mental State* *For both complete and incomplete attempts*

Conduct and Result Elements in *Complete Attempts*5.01(1)(a) Complete attempt; conduct element offense* P must show D had purpose to do what D did (engage in the conduct set out in the TC)
	+ “if AC’s were are D believed them to be”—eliminates impossibility defense

5.01(1)(b) Complete attempt; result element offense* P must show D had the purpose to cause, or the belief that the conduct (or omission) would cause the result

*If offense has both conduct AND result elements, apply both.*Conduct and Result Elements in *Incomplete Attempts** P must show D had purpose to do what D did
	+ “if AC’s were are D believed them to be”—eliminates impossibility defense
* “Planned to culminate”:
	+ For a conduct crime, P must show purpose to do the conduct
	+ For a result crime, P must show the belief or purpose that the conduct (or omission) would cause the result
 |
| Beyond Mere Preparation?Objectivist: approach to attempt that lets us intervene in a dangerous situation* Focus is on a dangerous situation created by D
* Look forward: How much more is left to do? (If a lot is left, not a dangerous situation)
* Role of mental state is secondary; used to confirm danger if situation is ambiguous

Subjectivist: approach that says even if the situation is not dangerous yet, if we know we have a dangerous person, we want to intervene.* Focus is on whether we have a dangerous person (D)
* Look backward to what D has already done (If hasn’t done much, isn’t a dangerous person)
* We look at actions only to assess the firmness of D’s intent (mental state)

If police intervention is too early, there’s no crime. If it’s too late, there’s a disaster. |
| Physical Proximity Test* Objectivist test
* How close in space and time did D get to committing TC?

Dangerous Proximity Test* Objectivist test
* Proximity varies with type of crime; must be close for little crimes, can be further away for big ones. (Greater the gravity and probability of the offense, and nearer the act is to a crime, stronger case to call the act an attempt.) Gravity=causing “deep apprehension” in the public.

Indispensable Element Test* Objectivist test
* How close to getting control over something must have to commit TC

Probable Desistance Test* Subjectivist test
* Has D gone beyond where an RP would desist? (Hard b/c an RP would not have gone down this road at all)
* In practice, applied like proximity tests.

Last Proximate Step (Last Act)* Subjectivist test
* Attempt happens when D does last step she thinks she needs to do to commit TC.

Res Ipsa Loquitor (Unequivocality)* Objectivist test
* Pretend you are watching a silent movie. Watch what D does. At point where it is so clear what the D does that you go “oh,” it’s beyond mere preparation.
 | Substantial Step / MPC 5.01(1)(c)* Subjectivist test
* Looks at intent and D’s acts to corroborate intent
* If D “purpose does or omits to do anything which, under the circs as D believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in D’s commission of the crime.”

Note: in MPC all *complete* attempts are beyond mere preparation. Therefore, this analysis is only necessary for *incomplete attempts.**Complete attempts*: MPC 5.01(1)(a) and (b)*Incomplete attempts*: MPC 5.01(1)(c) and 5.01(2) |
| Impossibility* Factual Impossibility: some CL juris have a defense to attempt; if it was impossible for D to commit TC, can’t have attempted it. Generally, though, this is not a defense (someone wants to committee a crime—a dangerous situation) [Not avail in MPC]
* Inherent Impossibility: Most juris allow defense if D tried inherently impossible way to commit TC (tried to kill with a voodoo doll)
* Legal Impossibility: if the thing D attempted to do was not actually criminal (but D thought it was), some juris would allow a defense. Some would not.
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