

# CRIMINAL LAW AND PROCEDURE

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# STRATEGIES TO BROADEN CRIMES

- Great number of crimes adopted by Parliament.
- Very broad definitions of crimes (e.g., benefit from criminal activities).
- Criminalization of every day conducts (e.g., tacit consent in sexual relations).
- Ample interpretation of existing crimes.
  - Crimes interpreted even against legislative intent (e.g., luring).
- Overuse of court orders that criminalize conducts that are not in themselves crimes.

# STRATEGIES TO BROADEN CRIMES

- Adoption of crimes with no strong actus reus (e.g., conspiracy, benefiting from criminal activity).
- Erosion of mens rea.
- Erosion of principles of criminal law, such as attempted crimes.
- Adoption of offences to criminalize situations that would not be a crime in light of the principles of attempted crimes.
- Erosion of Charter Rights (e.g., Free Speech)
- Use of criminal offences for cases not originally foreseen by the legislator.
- Infrequent application of the *de minimis non curat lex* principle.

# CRIMINAL RESPONSIBILITY

## What conducts can be considered criminal?

John Stuart Mill

The state can only use its coercive power to prevent one person from harming another, but not for harming himself, nor for doing or thinking anything that does not amount to harming another, no matter how despicable the action might be.

**Is this right? Is this what actually happens in practice?**

**What is harm?**

# CRIMINAL LAW

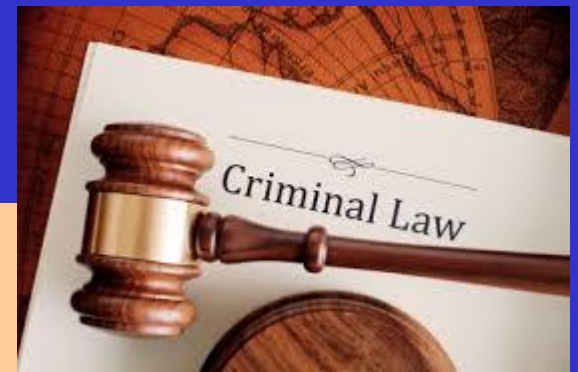
For the Civil Law legal tradition, the main function of Criminal Law is the protection of legal goods, and nothing else.

Anything that does not qualify as legal goods falls outside the scope of criminal law, and may not be criminalized.

**Is this right? Is this what actually happens in practice?**

**What is a legal good? What can be considered a legal good? Is there any limit?**

# Legal goods



**Entity**

**Interest**

**Norm**



**Legal good**

**Criminal definitional term**



**Criminally protected legal good.**

# Example

- Human life = **entity**
- The legislator has an **interest** in that entity because he/she values human life
- **Norm** to protect the entity (human life). The norm protects the entity by prohibiting killing human beings: “You shall not kill.” This norm is expressed into **laws**, statutes, or cases.
- Criminal protection: The adoption of definitional terms.
- The legal good “human life” becomes a **criminally protected legal good**.

# Theory of offence

## Goals

- To determine if a certain conduct is a crime or not.
- A limit to the punitive power of the state. The state criminalizes numerous behaviours. It does it in very broad terms. If everyone who commits the behaviours as simply written, as literally included in the Criminal Code, were to be criminally sanctioned, then we would all have to be punished by the state. The theory of offence acts as a barrier and narrows down those behaviours that may be sanctioned by the state.



# Theory of offence. Analysis

- **Conduct**

- Isolate the relevant conduct, i.e., the conduct that may potentially be criminal, from other conduct.
- Describe the conduct.
- Analyze the conduct (break it down in relevant –theory of offence- parts).

- **Definitional terms (legal rule)**

- Find the definition of the offence most likely to coincide with the conduct.
- Break down the elements of the offence as expressed in the legal rule.

- **Concurrence between conduct and definitional terms**

- Check to see if all the elements (determined in the definitional terms) are present in the conduct.

# Example 1

John is upset because his girlfriend, Lauren, doesn't answer his messages. John shouted at her and accidentally moved his arms too close to her. To John's surprise, his own hands touched Lauren's face.

Made-up assault crime is defined as: “causing injury to another human being”.

Elements of offence	Legal rule	Conduct	Analysis (concurrency)
Actus reus			
Voluntary act	Causing injury to another human being	John's arms touch Lauren's face.	X
Social harm	Injury	Touching her face	X

## Example 2

Pamela is upset because her friend, Maria owes her money and hasn't paid off her debt. Pamela throws an ashtray at Maria. Maria gets a black eye.

Made-up crime is defined as: “Every person who touches with a part of the body any part of the body of another person commits a crime.”

## Example 3

Fred hates Barney. He wants to kill him because Barney stole his car. Fred took a baseball bat and hit Barney until he died.

Made-up murder crime is defined as: “Every person who kills another human being with a gun.”

# Example 4

Fred hates Barney. He wants to kill him because Barney has stolen his car. Fred took out a gun and shot Barney, who died right away.

Made-up firearm homicide is defined as: “Every person who kills another human being with a gun commits a firearm homicide.”

# Crime

- Actus reus
- Mens rea
- No defences

# Actus reus

- **Voluntary act**
  - Willed bodily movement.
  - Omissions
- **Causation**
  - Factual
  - Legal
- **Social harm**
  - Wrongful result
  - Wrongful conduct
  - Attendant circumstances



# Actus reus. Voluntary act

- It is simply a bodily movement, a muscular contraction. Examples would be to pull the trigger of a gun, to blink an eye, or simply put one leg in front of the other to walk.
- The concept of volition is tied to the notion that criminal law responsibility should only attach to those who are accountable for their actions in a very personal way.
- The threshold is very low. It simply requires a willed contraction of a muscle or a movement of the body which follows our volition.
- Volition is not the same as intention.

# Actus reus. Voluntary act

## Types of voluntary acts in the definitional terms

- Single
  - Example: applying force.
- Dual:
  - Conjunctive: breaking and entering
  - Alternative: applying force or injuring.

# Actus reus. Causation

- Factual: But-for test: but-for the criminal conduct, the harm would not have resulted. Criminal conduct does not have to be the sole cause.
- Legal: The most significant contributing cause. It is a judgment call (based on common sense or moral grounds).

# Actus reus. Factual causation

- “It is an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result.” (SCC).
- But-for test: but-for the criminal conduct, the harm would not have resulted.
- The accused actions are not required to be the sole cause of the victim’s death. Nor must the accused’s action have to be the immediate, direct, or most significant cause of the victim’s death.
- Rather, in order for factual causation to be established, it must be established that the victim would not have died “but for” the actions of the accused.

# Actus reus. Legal causation

- The most significant contributing cause.
- It is a judgment call (based on common sense or moral grounds).
- It addresses the moral element of whether the accused should be held responsible in law for the harm he/she caused.
- **Factual causation selects the pool of possible causing conducts and legal causation identifies the one that is the most significant.**
- Examining legal causation becomes paramount in situations where there is an intervening act between the accused's initial unlawful actions and the social harm.

# Actus reus. Legal causation. Intervening act

- The doctrine of intervening acts can limit the scope of legal causation. The law recognizes an intervening cause that breaks the chain of causation between the accused's acts and the social harm, in which case the accused's actions are not considered a significant contributing cause of social harm.

# Actus reus. Legal causation. Intervening act. Tools.

- Whether an intervening act was reasonably foreseeable:
  - intervening acts which are reasonably foreseeable will not usually break the chain of causation. “It is fair to attribute the victim’s death to the accused where it was reasonably foreseeable that another act may intervene, causing the victim’s death.” (SCC).
- or when the intervening act was independent.
  - the consequence of death should not be attributed to the accused because of some overriding independent act which severs causation. (SCC)
  - This doctrine of independent acts involves looking backwards from the moment of death, and then examining the relative weight of the respective causes. (SCC)

## Special causation rules (homicides).

- Act or omission that causes death even if death might have been prevented by resorting to proper means.
- Act or omission that causes death even if immediate cause of death is proper or improper treatment applied in good faith.
- Act or omission that accelerates death.
  - Accused takes victim with whatever disabilities the victim has.



# Social harm

- The negation, endangering or destruction of an individual, group or state interest which was deemed socially valuable.
- **Definitional vs. underlying social harm**
  - Definitional social harm: it is explicitly included in the definition of the offence.
  - Underlying social harm: it is implicit in the definition. There may be both a definitional social harm and a different underlying social harm.

# Social harm

- Wrongful result

An offense may be defined in terms of a prohibited result. Murder is a result crime, because the social harm is the death of another human being.

- Wrongful conduct

The social harm of the crime is expressed in terms of a conduct; and no harmful result is required, i.e., the offense is complete whether or not anyone or any property is tangibly injured. It is enough that socially valuable interests have been jeopardized. Example: drinking and driving.

- Attendant circumstances

It is a residual category. Some attendant circumstances may be included in the definition of a particular offense. For example, common law burglary is the breaking and entering in the dwelling house of another at nighttime.

# Omissions

An omission or failure to act is not a basis for criminal liability, except:

- Statute that specifically requires a person to act, e.g., file tax returns.
- Status relationship: a parent's duty to his child or husband's duty to his wife.
- Contractual obligation: a babysitter or nurse hired to protect a child.
- Voluntary assumption:
- Defendant's criminal or negligent act in creating the need for rescue: e.g., car accident?

# Types of mens rea

- General vs. specific
  - General: proof that the defendant has the required mens rea in the offence to commit the social harm.
  - Specific: proof of the general intent to commit the illegal act and proof of intent above and beyond the general intent to commit the illegal act, i.e., the intent to achieve a specific goal.
- Dual vs. single
- Silent mens rea:
- Court interpretation: Intention or recklessness.
- In the United States: intention is required.

# Mens rea

- **Intention**

- The purposeful or intentional mental state implies a purpose or willingness to commit the act, or make the relevant omission
- Transferred intent

- **Knowledge**

- Result: knowledge that the result is virtually certain to occur as a result of his conduct, e.g., airplane bomb.

- Attendant circumstances and conduct: awareness

- Wilful blindness

- **Recklessness**

- The perpetrator disregarded a substantial and unjustifiable risk of which he/she was aware (subjective test).

- **Negligence**

- A person's conduct is negligent if it constitutes a deviation from the standard of care that a reasonable person would have observed in the perpetrator's situation.

# Types of mens rea

**Intentional:** “I want to”.

**Knowing:** “OK, I know but I don’t mind. So be it”. [Also: “I don’t want to know.”]

**Recklessness:** the actor disregarded a substantial and unjustifiable risk of which he was aware (subjective test). “No, it won’t happen”.

**Negligent:** “I didn’t even think of it”. (objective test).

# Mens rea and manslaughter

- The *mens rea* of unlawful act manslaughter is **objective foreseeability of the risk of bodily harm** which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required.

# Negligence

- Controversial.
- It should not be considered a type of mens rea for criminal culpability.
- It punishes harmful acts that fall below objective standards of behaviour without regard to the defendant's subjective mental state.
- Only advertent conduct is blameworthy. They criticize objective mens rea offences for punishing inadvertent conduct.
- An act or omission is only blameworthy if it reflects a choice on the part of the defendant. Only those who deliberately choose to commit prohibited acts or omissions are blameworthy.



# Which elements of a criminal offense need mens rea?

- Scholars long ago settled on the view that the mens rea must apply to every objective element — every proscribed result, for example, and every attendant circumstance.
- Courts usually have held that only elements that “make the conduct criminal”, i.e., “statutory elements that criminalize otherwise innocent conduct” need mens rea.
- Criminal Law v. Constitutional Law in Canada.
- Model Penal Code: mens rea is required for every material element of the offence.
- US: Mens rea applies to every element except those designed exclusively to measure the degree of harm inflicted by the actor’s conduct.

# Mens rea symmetry

## Canada

Whereas criminal law theory requires that there must be symmetry between the *mens rea* and the prohibited consequences of the offence, in Canada, from a constitutional law perspective “absolute symmetry between moral fault and the prohibited consequences” does not exist, so Parliament is free to adopt offences which do not demand such symmetry (SCC).

In other words, there is no need to prove fault in relation to all aspects of the prohibited conduct (SCC).

# Mens rea: Criminal Law vs. Constitutional Law

- Tension between Criminal Law and Constitutional Law principles.
- Criminal law principles:
  - Subjective fault is the only standard of culpability.
  - Mens rea for every element of the offence.
- Constitutional Law in Canada:
  - Modern societies regulate risk and use criminal sanction to demand that all individuals regulate their own risky behaviour.
  - Courts abandoned the demand of subjective fault and adopted negligence as a form of criminal fault as well as blended forms of subjective and objective fault.
  - However, Canada has struck down felony murder and statutory rape.

# Proof of mens rea

- **Intent** (subjective test)

Subjective mens rea focuses on the actual state of mind of the subject of the prosecution, namely, the accused.

Since what someone thinks or wants or knows is personal to him unless communicated, subjective mens rea ordinarily must be gleaned **circumstantially**, including by **using the common sense inference that persons usually intend the natural consequences of their acts.**

**Also, it is enough to prove that the accused foresaw the consequence as a substantial certainty.**

- **Knowledge** (subjective test)

Since the state of “knowledge” is not often manifested circumstantially the way apparent intent is, the law **will assume that the accused knew of the elements of the offence unless the so-called “defence of mistake of fact” is made out.**

# Proof of mens rea

- **Recklessness** (subjective test)
  - Representation of risk
  - Disregard of risk
- **Negligence** (objective test)
  - The court must see if the accused's conduct deviates from the standard of the reasonable person.
- **Objective foresight of risk of harm**
  - **Inferred from the facts.** The standard is that of the reasonable person in the circumstances of the accused. If a *prima facie* case for *actus reus* and *mens rea* is made out, it is necessary to ask a further question: Did the accused possess the requisite capacity to appreciate the risk of harm flowing from his/her conduct? If this question is answered in the affirmative, the necessary moral fault is established and the accused is properly convicted. If not, the accused must be acquitted.

# Silent mens rea

- Despite the importance of *mens rea* for criminal liability, the lawmaker sometimes neglects to include the required *mens rea* in the definition of the offence or simply neglects to include a type of *mens rea* for every element of the crime.
- “Criminal statutes usually emerge from the legislature only half-formed.”
- In general, where an offence does not specify the type of *mens rea* required, and the courts have not specifically mandated the inclusion of a certain type of *mens rea*, the common rule states that intention or recklessness will suffice.
- “The general mens rea which is required and which suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the **intentional or reckless** bringing about of the result which the law, in creating the offence, seeks to prevent.” (SCC).

# **Interpretation of criminal laws**

## **Public incitement of hatred**

Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of an indictable offence.

# Interpretation of criminal laws: Actus reus

## Voluntary act

- Incite hatred against any identifiable group by communicating statements in any public place.
- Incitement of hate must be done through communication in a public place.
  - Not a clear physical element, it may raise Charter issues as it criminalizes communication (speech).
  - It contradicts principles of Criminal Law, which require a clear act.
  - Can't be committed by omission.



# Interpretation of criminal laws: Actus reus

## Causation

The incitement is likely to cause a breach of peace, even if the incitement does not actually cause the breach of peace.

There may be no actual causation, only the likelihood of causation.

Determined in an objective way but with regard to the audience.

An intervening act appears not to be susceptible of breaking the chain of causation as the offence requires only the likelihood of causation.

# Interpretation of criminal laws: Actus reus

## Social harm

- Definitional: likelihood of causing a breach of peace.
- Weak social harm, only the likelihood of breach of peace. It can't be wrongful result. It is only the possibility of a wrongful result. It is not a conduct, either. So, it is formulated as an attendant circumstance.
- This makes it an inchoate (incomplete) offence.
- Attendant circumstances: identifiable group
- Attendant circumstances: public place
- The criminally protected legal good: peaceful cohabitation between majority and minority groups.

# Interpretation of criminal laws

## Mens rea

- No mens rea in the definitional terms. Problematic as someone may incite hatred intentionally, knowingly, recklessly, or negligently. No precedent determining the type of mens rea for the offence. So, the general rule for silent mens rea applies, i.e., recklessness or intent.
- Symmetry: Since mens rea is silent, it is not possible to say whether the presumed type of mens rea applies to every element of the actus reus.

# Defences

- Justifications: conduct is not wrong in the context.
- Excuse: conduct is wrong, but actor is excused from criminal liability. Defenses include both justifications and excuses.

# Defences

- In Canada, the general rule is that the accused does not have to prove his or her defence; it is enough merely to produce some evidence that raises a reasonable doubt about the accused's guilt in the mind of the trier of facts. Before a judge allows a jury to consider a defence, the accused must first prove to the courts that there is an air of reality for the defense to be admitted.
- Exception: mental disorder and intoxication. The accused must prove these defences on a balance of probabilities.

# Defences

- Mental disorder
- Intoxication
- Duress
- Necessity
- Entrapment
- Self defense
- Defence of others
- Defence of property
- Mistake of fact
- De minimis

# Mental disorder

- **Canada Criminal Code:** No person is criminally responsible for an act or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
- **Burden of proof of insanity:** The accused on a balance of probabilities. There is a presumption of sanity, so defense must prove on a balance of probabilities that he/she is insane (the prosecutor does not have to prove beyond reasonable doubt that accused is sane).
- Mental disorder is a question of law for the judge to decide.

# Mental disorder. Disposition of defendants

- Before automatic indeterminate detention
- Now, hearing.
- The accused is not a significant threat to society, he is released or he is released with conditions, e.g., follow a treatment.
- If threat to safety of public, a disposition that is the least onerous and restrictive to the accused (if detained in a hospital, detention ends when he is cured or ceases to be a danger to the public).



# Intoxication

- **Involuntary**

- Almost the same as mental disorder.
- Valid defence.

- **Voluntary**

- General rule: no excuse for criminal conduct.
- It cannot negate general intent crimes e.g. sexual assault is general intent, except for those crimes not involving personal violence. It can negate specific intent crimes, e.g., breaking and entering (entering with intent to commit an offense).
- So, the defense applies to general intent crimes that do not involve personal violence and to specific intent crimes with respect to the ulterior intention.

# Duress

- When the defendant was coerced to commit a crime by the use of, or a threat to use, unlawful force (death or bodily harm) against his person or a third party.
  - Objective test: what would a reasonable person have done in the circumstances?
- There may not be a safe avenue to escape.
  - Objective test to determine safe avenue.
- Threat need not be immediate. The threat can be for the future.
- The person applying the duress is guilty, frequently as a first degree principal.

# Necessity

- The danger is caused by natural forces or by human conduct other than intentional threat of bodily harm.
  - The wrongful action is morally involuntary, which is measured on the basis of society's expectation of appropriate and normal response to pressure.
  - It applies to normatively involuntary behavior (e.g., natural disasters).
- The risk must be imminent; and the action is taken to avoid a direct and imminent peril.
- There may not be a legal, reasonable alternative; and no legal way out or no safe way to escape. It applies only when the accused has no realistic choice but to violate the law and there is no other safe avenue.
  - Objective test: to determine the existence of the legal and reasonable alternative.

# Entrapment

- Government gives the accused the opportunity to commit a crime.
  - This defense is aimed strictly at governmental misconduct.
  - Policy: to prevent the government from manufacturing crime.
- Valid governmental conduct: if reasonable suspicion that:
  - The person was engaged in criminal activity; or
  - in a good faith criminal inquiry in a high criminal area.
  - In any case, government may not go beyond providing the opportunity to commit crime, i.e., it may not induce the crime.
- Invalid, i.e., the accused may raise the defence of entrapment, in all other cases, e.g., the government gave more than the opportunity to commit the crime and actually induces the commission of the crime or the accused was not under investigation or the area was not a high criminal area.

# Self defense and Defence of others

- A **reasonable perception of force** or a threat of force against the person or another person) (subjective perception of the accused, objectively verified);
- A **defensive purpose** associated with the accused's actions (accused's subjective state of mind); and
- The accused's actions must be **reasonable in the circumstances** (objective assessment).

# Defence of others

Alter ego doctrine. Third party is placed in the shoes of the one being defended or the third party may defend another person if it reasonably appears to the intervenor (third party) that using force is justified in defense.

# Defence of property

- A person in a peaceable possession of property may commit a reasonable act, including the use of force, for the purpose of protecting that property from being taken, from being damaged, or trespassed upon.
- Property includes both real and personal.

# Defence of property. Elements of the defence

- The accused reasonably believes he/she is in a peaceable possession of the property;
- The accused reasonably believes that another person is about to enter, take, or damage the property, is doing so, or has just done so;
- The act of the accused is for the purpose of preventing the other person from entering, taking, or damaging the property; and
- The act of the accused is reasonable in all circumstances.



# Self-defence

- **Excessive self-defence**

- No unsuccessful or putative self-defence in Canada. In other jurisdictions, those who engage in excessive and unreasonable self-defence have a partial defence that reduces murder to manslaughter.

- **Excessive use of force**

- Excessive use of authorized use of force is not justified and can lead to murder if the requirements of the murder offence are met.

# Mistake

- **Mistake of fact**

- A mistake of fact is an error as to some circumstance.
- The mistake of fact was an honest one;
- No offence would have been committed if the circumstances had been as the accused believed them to be (subjective test).

- **Mistake of Law**

- Ignorance of the law is no excuse.

# De minimis

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

- was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
- did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
- presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

## Attempted crimes. Actus reus

- An act or omission proximate to the commission of the offence, which requires that the act or omission be beyond preparation. The *actus reus* must be more than mere preparation to commit a crime.
- Mere preparatory acts for the commission of the offence do not constitute attempt.
- Whether an act is an attempt or mere preparation is a question of law.

# Attempted crimes

## Elements:

- The intent to commit the offence (and the intent to go beyond mere preparation);
- Some act or omission toward the commission of the offence; and
- Non-completion of the offence.

# Stages of criminality

- Idea of committing a crime
- Decision to act
- Plan
- Preparation of the commission of a crime
- Next step: attempted crime
- Commencement of the commission
- Completion of commission (achievement of goal)

X

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idea    decision    plan    preparation                      commission start    result

## Attempted crimes. Mens rea

- The mens rea is dual. It consists of the intention to commit the act or omission beyond mere preparation and the specific intent to commit the full offence.
- No attempted crime for less than intent.

## Attempted crimes. Abandonment

- Abandonment is only allowed when it is **voluntary** and occurs before commission of the intended crime.
- A voluntary abandonment is one that is motivated by a change of heart, timidity, or lack of perseverance.
- Renunciation is not voluntary if motivated by circumstances that increase the probability of apprehension or that make the performance of the attempted crime more difficult.
- The abandonment defence is very limited in Canada.



## **Attempted crimes. Impossibility**

If it is impossible to commit the target offence, but the accused went beyond preparation and had the intention to commit the target offence, the accused has committed an attempted crime. For example, if a pickpocket put his hand inside someone else's coat pocket in order to steal money, but the victim had no money at all, then the accused committed attempted theft.

# Criminal participation. Perpetrator

- The perpetrator commits the offence by himself/herself; or
- The perpetrator uses an innocent instrumentality.
  - The doctrine of innocent agency is predicated on the notion that a person who committed an offence by means of an innocent agent has to be deemed to be the actual perpetrator.
- Co-principal (joint perpetrator)
  - Two or more perpetrators carry out the actus reus, e.g., they all hit the victim until she/he dies. No need to prove who stuck the fatal blow.
  - The actus reus is divided between each party, who act in concert to commit a criminal offence as a joint enterprise. A contribution to the *actus reus* with the requisite mens rea will be sufficient.

# Aiding and abetting. Actus reus

- The assistance provided, such as the aiding, abetting, encouraging or advising during the commission of the crime.
  - The assistance may either be physical or psychological conduct.
  - Any aid, no matter how trivial, suffices to consider the person providing the help as an aider or abettor.
    - No but-for-test
  - This would include, for example, applauding, adding numerical strength, or cheering.
  - The assistance has to be given in the presence of the perpetrator. This presence may be actual or constructed.
- If the commission of an offense continues: those who aid are aiders and abettors until all of the acts constituting the crime have ceased, e.g. getaway car in theft: aider and abettor, but getaway car in murder is accessory after the fact.

# Aiding and abetting. Dual mens rea

- The intention to assist the perpetrator to engage in the conduct that constitutes a crime and the knowledge that an offence is planned or is taking place; and
- Specific mens rea of intention that the perpetrator actually commit the offence.

# Aiding and abetting. Doctrine of natural and probable consequences

- An aider and abettor is guilty not only of the target offence, i.e., the intended crime, but also of any other offense that objectively was a natural and probable consequence of the crime aided and abetted [i.e., the non-target offense].
- A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.
- Because the non-target offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the non-target crime.
- Accessory during the fact does not require the conviction of the perpetrator.

# Criminal participation. Accessory before the fact

- AR: The solicitation, procuring, or instigation to another person to commit a crime.
  - to advise, recommend, hire, procure, instigate, persuade, solicit, or incite the principal to commit an offence.
- Dual MR:
  - the intention to solicit the offence
  - plus the specific intent that the other person actually commit the crime; OR
  - Recklessness about whether the offence would be committed.
- Doctrine of natural and probable consequences for counsellors.
- Counselling is always an attempted conspiracy, and if and when agreed, it becomes a conspiracy.
- A counsellor is a party to the offence even if the crime is committed in a way different from what was suggested, because counselling constitutes an offence in itself.
- A counsellor is a party to the offence even if the counselled crime is not committed.
- Accessory before the fact does not require the conviction of the perpetrator
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# Criminal participation. Accessory after the fact

- AR: receiving or assisting the person to escape.
  - An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.
  - The notion of escape is to be interpreted in a broad manner and includes avoidance of arrest, trial, and conviction.
- MR: the knowledge or willful blindness that the perpetrator has committed a crime, and the intention to assist the principal to escape.
- Sanction: An accessory after the fact is not a party to the offence but is punished with the penalty for the attempt of the offence he helped with.
- Accessory after the offence is an independent offence, so it does not require the conviction of the perpetrator.

# Regulatory offences (R v. Sault Ste. Marie)

- The purpose is to regulate some aspect of human activity, not to attach blameworthiness. The activity is not illegal, but it is regulated to ensure public safety.
- Created by provincial or federal statutes and municipal bylaws.
- Strict liability vs absolute liability.



# Regulatory offences (R v. Sault Ste. Marie)

- Strict liability: Crown must prove the actus reus beyond a reasonable doubt; and the defendant may use the defence of due diligence (and prove that he or she was not negligent on a balance of probabilities):
  - Two requirements:
    - The accused acted as a reasonable person in the circumstances; or
    - Had an honest but mistaken belief in facts that if they had been true, would have rendered the act innocent.
  - Prevails in Canada.
  - There is a presumption that a regulatory offence will be a strict liability offence unless there is clear legislative intention to create one of absolute liability or one requiring mens rea by using words such as knowledge, intention, or recklessness.

# Regulatory offences (R v. Sault Ste. Marie)

- Absolute liability: the Crown must prove the actus reus, and there is no possibility for the defendant to use the due diligence defence. Offences that have very minor fines as punishment.

# Corporate criminal responsibility

- **Identification doctrine.** Corporations and other organizations have criminal responsibility when a crime is committed by senior executives or employees that are **the directing mind** of the corporation (Canada).
- Vicarious liability approach whereby a corporation potentially faces liability for offences committed by any of its employees (United States).

# Corporate criminal responsibility. Elements

- Senior employee who is the directing mind of the corporation (alter ego)
  - The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis
- Senior employee must generally be liable, too.
- Link between the actions of the employee and the corporate.
- The identification theory attributes **primary** liability to the corporation.
  - This effective merging of legal (the corporation) and natural (the directing mind) persons was a necessary legal fiction created to facilitate the attribution of criminal responsibility to the corporation.

# Corporate criminal responsibility. Conditions

- The action taken by the directing mind was within the field of operation assigned to him;
- The action was not totally in fraud of the corporation; and
- The action was by design or result partly for the benefit of the company.

# Corporate criminal responsibility. Defences

- The individual who committed the act was not a directing mind, i.e. did not have the authority to devise or develop corporate policy, or make corporate decisions. Thus, the identification doctrine is confined to the company's executive ranks.
- The directing mind acted wholly in fraud of the company, without the company benefiting from the action. This is a high standard for the defendant to meet, since it is not a sufficient defence to prove merely that the manager acted in disobedience to explicit instructions not to disregard the law.