

<ul style="list-style-type: none"> • I WHAT IS PUNISHMENT?
<ul style="list-style-type: none"> • A RETRIBUTION
<ul style="list-style-type: none"> • 1 According to Kant punishment is the right of the sovereign to inflict pain on the subject on account of a crime. Punishment takes two forms: <ul style="list-style-type: none"> • i Judicial Punishment (poena forensis): accused must be found guilty before any thought of punishment • ii Natural Punishment (poena naturalis): the vice itself punishes the actor • iii The principle of equality justifies punishment; "if you kill another, you kill yourself"; the right of retaliation; whoever has committed murder must die.
<ul style="list-style-type: none"> • 2 Moore holds that retributionist punishes only because offender deserves it. Society has a duty to punish. Hart's Theory of Retributive Justice: <ul style="list-style-type: none"> • i Person may be punished if and only if he has done something morally wrong • ii Punishment must match the crime • iii The return of suffering for moral evil voluntarily done is just and good
<ul style="list-style-type: none"> • 3 Variations on Retribution <ul style="list-style-type: none"> • i Vengeance: Revenge is personal, retribution objective - William Miller. Traditionally thought of as stamping a mark for life on the criminal - it is morally just to hate criminals. Relevant to "Victim Impact Statements" in which affect on victims is taken into account during sentencing. Is this just? • ii Social Functions: Hart holds that punishment is valuable in itself and valuable in that it leads to another valuable end; the voluntary reform of the offender; the recognition of moral error; and the vindication of the morality of the society • iii Mixed Theory: Mix of retribution and utilitarianism. Must consider what effects punishment will have on society and criminal, we do not simply impose an eye for an eye.
<ul style="list-style-type: none"> • 4 Critics of Retribution including Hart claim that retribution is moral alchemy. The act of punishment is a wicked act but it is transformed into a good through retributive theory. Moore holds that it is both a benefit and a burden. The benefits of non-interference from others is conditioned upon the assumptions of the burden to punish. Punishment restores the equilibrium in society by taking away an advantage gained unfairly through crime; restores the social order. Murphy criticizes "gentleman's club" of punishment. Social compact does not benefit the underclass of society so what debt do they owe to society (direct contradiction of Moore). If we are to be retributive we need to reorganize society first. Mackie writes that repaying harm with harm does not benefit society as a whole. Punishment takes away from criminal but does not give back to the community.
<ul style="list-style-type: none"> • B DETERRENCE
<ul style="list-style-type: none"> • 1 Punishment is a specific and general deterrent: Must earn reputation for punishing those who deserve it under rules perceived as just and protecting those who do not deserve punishment. • 2 Criticisms: Increasing risk of conviction is hard to do and increasing severity of punishment has doubtful consequence; Cost of punishment in trivial cases outweighs potential deterrence; Sometimes don't want to punish because punishment too stringent and more effective when less punishment but more consistent ; Prohibition went against norms and was not successful
<ul style="list-style-type: none"> • C REHABILITATION
<ul style="list-style-type: none"> • 1 Martinson - "Nothing Works" later rescinded when found some evidence but still permeates public mind • 2 Criticisms: Paternalistic has no proper role in punishment; Scarce resources taken away from people who need them; Value liberty and these people made their choices; Moral blindness; Programs work better when directly at subgroup screened that are amenable, resources. Is it fair to weed out some when intrinsic crime is the same
<ul style="list-style-type: none"> • D INCAPACITATION
<ul style="list-style-type: none"> • 1 Goal is prevention, prisons aren't the answer; Prisons are the answer to keep off the street.

<ul style="list-style-type: none"> • 2 Costs society at least twice as much to let a prisoner go than lock him up (criticized because released tend to be low level not the serious used in calculations and sometimes will find another to commit crime if a gang or mob situation)
<ul style="list-style-type: none"> • 3 Criticisms: Most effective would be to identify serious criminals and punish them the most and have fewer in prison; but would be based on predictions of future criminality, are associated with race, and predictions often wrong
<ul style="list-style-type: none"> • II THE ELEMENTS OF JUST PUNISHMENT (condemnation)
<ul style="list-style-type: none"> • A LEGISLATIVE DEFINITION OF CRIME: THE IDEA OF LEGALITY: general requirements=advance specification, by the legislature, of criminal conduct, with adequate clarity (plus mens rea)
<ul style="list-style-type: none"> • 1 Notice: (From Black's Dictionary) A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording.
<ul style="list-style-type: none"> • 2 Fair Warning: The requirement that a criminal statute define an offense with enough precision so that a reasonable person can know what conduct is prohibited
<ul style="list-style-type: none"> • i Keeler v. Superior Court (1970): Man charged with killing the fetus of his ex-wife by viciously shoving his knee into her abdomen. He was charged with murder under California Penal Code Section 187, "Murder is the unlawful killing of a human being with malice aforethought". Legal question - is a fetus a "human being". Court held that extension of section 187 to fetuses would not have been foreseeable to the defendant and that its adoption would therefore deprive him of due process of law. Cites Bouie v City of Columbia (see below). alternative reasons for holding
<ul style="list-style-type: none"> • a legislatures make crimes, not courts
<ul style="list-style-type: none"> • b federal due process clause (dictum)
<ul style="list-style-type: none"> • 3 Ex Post Facto: A law [passed by the legislature] that impermissibly applies retroactively, esp. in a way that negatively affects a person's rights, as by criminalizing an action that was legal when it was committed. • Ex post facto criminal laws are prohibited by the U.S. Constitution. But retrospective civil laws may be allowed.
<ul style="list-style-type: none"> • i Bouie v City of Columbia (1964): SCOTUS reversed SC criminal trespass conviction of two black men in sit-in b/c of notice issue
<ul style="list-style-type: none"> • a SC construed the statute to prohibit not only the act of entering after notice not to do so [of which there was none] but also the wholly different [new] act of remaining on the property after being asked to leave.
<ul style="list-style-type: none"> • b SCOTUS: ex post facto clause bars a legislature from making the punishment for a crime more serious than it was when the crime was committed, "it must follow that a State Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction."
<ul style="list-style-type: none"> • 1 procedural reason (notice) bc didn't want racism, but couldn't apply 14th amendment/due process bc private, not state, action
<ul style="list-style-type: none"> • 2 court reaches limits of applicability of fair notice
<ul style="list-style-type: none"> • c This premise lay entrenched in the case law for three decades until Rogers v. Tennessee.
<ul style="list-style-type: none"> • ii Rogers v. Tennessee (2001): SCOTUS upholds conviction under abolishment of year and a day rule, 150
<ul style="list-style-type: none"> • a Rogers stabbed Bawdery, who went into a coma and died 15 months later. Old Tennessee common law rule held that victim had to die within a year and a day in order for assailant to be charged with murder.
<ul style="list-style-type: none"> • b SCOTUS (O'Connor) held that "judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue"

<ul style="list-style-type: none"> • c Justice Scalia dissented holding that ex post facto laws are contrary to the first principles of social compact, and to every principle of social legislation. Says courts shouldn't have more latitude than legislature
<ul style="list-style-type: none"> • d Since it's interpreting common law vs. statute, gives courts more power to interpret
<ul style="list-style-type: none"> • iii Rogers changed the Bouie law, gave more judicial power. Would it make Keeler constitutional?
<ul style="list-style-type: none"> • 4 Vagueness: vagueness raises due-process concerns if legislation does not provide fair notice of what is required or prohibited, because enforcement may be arbitrary. A statute can be challenged for vagueness on its face (must demonstrate that no matter how harmful a person's conduct may be, one can never tell whether the statute covers the situation or not) or as applied (statute does not have a clear meaning in the particular situation), can be unconstitutionally vague for either (Morales). NOT NECESSARILY LACK OF CLARITY
<ul style="list-style-type: none"> • i Papachristou v. City of Jacksonville (1972): FL vagrancy ordinance void for vagueness
<ul style="list-style-type: none"> • a Eight defendants convicted in a Florida municipal court of violating a Jacksonville, FL, vagrancy ordinance appealed to SCOTUS. Justice Douglass held that the statute was void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," [US v. Hariss] and because it encourages arbitrary and erratic arrests and convictions. [Thornhill v. Alabama]. The preceding has become the standard to part void for vagueness test.
<ul style="list-style-type: none"> • b has some elements of legal crime: statute, passed in advance by legislature
<ul style="list-style-type: none"> • c has some problems: notice problem, discriminatory enforcement
<ul style="list-style-type: none"> • ii City of Chicago v. Morales (1999): SCOTUS upheld IL ruling that anti-gang loitering ordinance was vague on its face
<ul style="list-style-type: none"> • a Found that ordinance violated both the fair warning test and the arbitrary enforcement test (it only needs to violate one to be unconstitutionally vague).
<ul style="list-style-type: none"> • b A law that directly prohibited gang loitering would be constitutional, but this one covers many other activities. Shouldn't criminalize innocent behavior (not really a holding). Major concern about police discretion
<ul style="list-style-type: none"> • c elements of the crime (each to be proven beyond a reasonable doubt): preventative in nature, trying to get at future criminal conduct
<ul style="list-style-type: none"> • 1 reasonably believe one person was a gang member
<ul style="list-style-type: none"> • 2 loitering: no apparent reason (how do you know what this is?)
<ul style="list-style-type: none"> • 3 public place
<ul style="list-style-type: none"> • 4 another person (not necessarily gang member)
<ul style="list-style-type: none"> • 5 order to disperse
<ul style="list-style-type: none"> • 6 somebody does not disperse
<ul style="list-style-type: none"> • d dissent: wait to see if vague as applied. but how would you prove that white people were NOT arrested? Impractical
<ul style="list-style-type: none"> • iii principles of vagueness
<ul style="list-style-type: none"> • a uses in enforcing laws that are undermined by vagueness:
<ul style="list-style-type: none"> • 1 in normal life, to define what i can do
<ul style="list-style-type: none"> • 2 in charging with crime, to know what actions were illegal
<ul style="list-style-type: none"> • 3 to govern law enforcement: provide guidance to police and prosecutors
<ul style="list-style-type: none"> • b reasons we might allow some vagueness (as in Nash, anti-trust)
<ul style="list-style-type: none"> • a Does the crime enforce an important policy?
<ul style="list-style-type: none"> • b if the parties have time/resources to consult lawyers
<ul style="list-style-type: none"> • 1 is it possible without excessive cost for potential D to avoid coming close to the line? (antitrust)
<ul style="list-style-type: none"> • c might not have been possible for legislature to do a better job
<ul style="list-style-type: none"> • d how likely it is to be abused in discriminatory way
<ul style="list-style-type: none"> • e how likely is it to capture innocent behavior

<ul style="list-style-type: none"> • f does the law regulate favored activity? • g (associated penalty?)
<ul style="list-style-type: none"> • iv Nash (p 166): anti-trust, can't unduly restrict competition (vague, but tolerated)
<ul style="list-style-type: none"> • a companies have lawyers (time, resources to consult) • b might not have been possible for legislature to do a better job, and it was important social policy • c less likely to be abused in discriminatory way • d probably not getting a lot of innocent people
<ul style="list-style-type: none"> • 5 Rule of Lenity: In Daury the court defines it as a requirement that "in criminal prosecutions... ambiguities in the statute must be resolved in the defendant's favor" Note that the rule of lenity gets no special consideration from the MPC nor from many state statutes. Originates in 17th/18th C. England when any felony was subject to capital punishment. Modern justification: in face of political pressure to deal with a problem, guards against deterioration of vagueness doctrine, protects defendants, second line against discrimination, etc.
<ul style="list-style-type: none"> • i McBoyle v. United States (1931): transporting airplane across state lines
<ul style="list-style-type: none"> • a Holmes held that McBoyle could not be convicted under the act since the use of the word "vehicle" was meant to apply to vehicles moving on land. • b The airplane was not of the same Ejusdem Generis as the vehicles listed in the statute: "automobile, automobile truck, automobile wagon, motor cycle or any other self-propelled vehicle not designed for running on rails". (canon of construction) • c Concern with Fair Warning or with protecting the prerogatives of the legislature.
<ul style="list-style-type: none"> • B Introduction to the Elements of an Offense: (Tanya Terrorist example in AM) (see also MPC 1.13 above)
<ul style="list-style-type: none"> • 1 Non-Material Elements (Procedural; not dependent on culpability) <ul style="list-style-type: none"> • i statute of limitations • ii jurisdiction • iii venue
<ul style="list-style-type: none"> • 2 Material Elements (Dependent on culpability) <ul style="list-style-type: none"> • i conduct • ii result (real-world effect; always has some attendant uncertainty but shouldn't affect liability where knowledge is specified as culpability requirement (from notes 9/10/08) • iii circumstance
<ul style="list-style-type: none"> • C THE ACT REQUIREMENT
<ul style="list-style-type: none"> • 1 Requirement of overt and voluntary conduct. For there to be criminal liability, the defendant must have either performed such an act or failed to act under circumstances imposing a legal duty. A crime's required act is the actus reus of the crime. LEGAL question of voluntariness (informed by morality, philosophy, science, etc.)
<ul style="list-style-type: none"> • i A Voluntary Act is a Conscious and volitional movement. Impulse, unintentionally, habit (like drunkenness, you put yourself in that state) are all voluntary. Movements during sleep, conduct during hypnosis, reflex, convulsion, and other mentally unconscious states are not voluntary acts because they are not volitional. Involuntary acts are not punished because actor lacks culpability and is not deterrable. Presence of a voluntary act is a burden of proof beyond a reasonable doubt for the prosecution (unless legislature has converted mens rea element to affirmative defense). Must be voluntary and at fault.
<ul style="list-style-type: none"> • ii MPC §1.13(2) - "act" or "action" means a bodily movement whether voluntary or involuntary
<ul style="list-style-type: none"> • iii MPC §2.01 Voluntary Act Requirement [Notice that MPC does not define "voluntary"] <ul style="list-style-type: none"> • a A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable. <i>note that only one act must be voluntary</i> • b The following are not voluntary acts within the meaning of this section: [very narrow]

<ul style="list-style-type: none"> • 1 a reflex or convulsion;
<ul style="list-style-type: none"> • 2 a bodily movement during unconsciousness or sleep;
<ul style="list-style-type: none"> • 3 conduct during hypnosis or resulting from hypnotic suggestion
<ul style="list-style-type: none"> • 4 a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.
<ul style="list-style-type: none"> • c MPC commentary on purpose of act requirement: 1) thoughts alone shall not be punished; 2) deterrence cannot apply to involuntary acts. MPC does not define voluntary but lays out actions which are not voluntary.
<ul style="list-style-type: none"> • 2 Martin v. State (1944): reversal public drunkenness conviction after taken outside by police
<ul style="list-style-type: none"> • i convicted of drunkenness in a public place under Alabama Code 1940, Title 14, Section 120.
<ul style="list-style-type: none"> • ii Conviction reversed; "Under the plain terms of the statute, a voluntary appearance is presupposed". Court assumes voluntary interpretation if it is not mentioned. Voluntary appearance cannot be established for purposes of criminality when defendant is involuntarily and forcibly carried to that place by arresting officer.
<ul style="list-style-type: none"> • iii elements of crime (gvt has to prove all beyond reasonable doubt) <ul style="list-style-type: none"> • a intoxicated • b appeared in public place • c manifested by boisterous/profane
<ul style="list-style-type: none"> • iv not necessarily exculpated by MPC, since he was voluntarily profane, but exculpation permitted by mpc
<ul style="list-style-type: none"> • v holding says that one particular element (appearing) always has to be voluntary, whereas DM says he doesn't know if this is right
<ul style="list-style-type: none"> • vi See also Kelman on 190,
<ul style="list-style-type: none"> • 3 People v. Newton (1970): Reversal of voluntary manslaughter conviction bc of failure to instruct jury on unconsciousness as an affirmative defense
<ul style="list-style-type: none"> • i appeal: prejudicial error in the trial court's failure to instruct the jury on the subject on unconsciousness as a defense to a charge of criminal homicide. Newton got into struggle with police, was shot in stomach and then killed a police officer. Claim of unconsciousness supported by expert testimony of reflex shock condition as response to stomach wound.
<ul style="list-style-type: none"> • ii Under California Penal Code "Where not self induced as by voluntary intoxication or the equivalent unconsciousness is a complete defense to a charge of criminal homicide.
<ul style="list-style-type: none"> • iii Newton's conviction reversed because it would be unfair to convict without state having to prove that he was not unconscious. (burden of proof on state)
<ul style="list-style-type: none"> • 4 Accidents/mistakes vs. physical misfiring (seizures etc) <ul style="list-style-type: none"> • i mitigating responsibility vs. no human action at all • ii Cogdon - mother acquitted after killing daughter with an ax while sleepwalking (act of killing was not her act at all) • iii Decina v. People (1956): defendant who knew he was subject to epileptic attacks and drove a vehicle anyway. Since defendant was aware of his condition and potential consequences and disregarded them, he was found "culpably negligent" for deaths. <ul style="list-style-type: none"> • a distinguished from Martin: he made a voluntary decision to do a prohibited act (driving with epilepsy). Martin did not do any prohibited acts
<ul style="list-style-type: none"> • 5 Omission and Legal Duty
<ul style="list-style-type: none"> • D THE REQUIREMENT OF CULPABILITY
<ul style="list-style-type: none"> • 1 Mental States <ul style="list-style-type: none"> • i (mens rea) Vicious will. Moral blameworthiness extends from choosing to commit a criminal wrong. When a mental state is identified for one material element of a crime, it is regarded as applying to all material elements. Assures that only the morally blameworthy are convicted and punished. Problems of self-knowledge and truthfulness • ii MPC Definitions and Requirements <ul style="list-style-type: none"> • a MPC§§1.13 Elements of an Offense:

<ul style="list-style-type: none"> • 1 "element of an offense" means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as
<ul style="list-style-type: none"> • a. is included in the description of the forbidden conduct in the definition of the offense; or
<ul style="list-style-type: none"> • b. establishes the required kind of culpability; or
<ul style="list-style-type: none"> • c. negatives an excuse under the statute of limitations; or
<ul style="list-style-type: none"> • d. negatives a defense under the statute of limitation
<ul style="list-style-type: none"> • e. establishes jurisdiction or venue. Fed has jurisdictional elements relating to method to commit the crime or victim. A federal officer element is jurisdictional despite arguments about whether or not the person knows.
<ul style="list-style-type: none"> • 2 "material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct;
<ul style="list-style-type: none"> • b MPC §2.02: General Requirements of Culpability
<ul style="list-style-type: none"> • 1 (1) Minimum Requirements of Culpability. Except as provided in §2.05 (SL), a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
<ul style="list-style-type: none"> • 2 (2) Kinds of Culpability Defined
<p><i>implicit premises that there are significant distinctions among the four and that four are enough</i></p> <ul style="list-style-type: none"> • a. Purposely. [Intentional crime - must intend actual result, in contrast with intentional tort.] A person acts purposely with respect to a material element of an offense when:
<ul style="list-style-type: none"> • i. if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result, and
<ul style="list-style-type: none"> • ii. if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist <p><i>for circumstance element, as long as there is knowledge, there is purpose OR at least recklessness (if purpose doesn't count) (from notes 9/16)</i></p>
<ul style="list-style-type: none"> • b. Knowingly. <p><i>result is practically certain to occur, even though/even if he does not seek to cause it</i></p>
<ul style="list-style-type: none"> • i. if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist, and
<ul style="list-style-type: none"> • ii. if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
<ul style="list-style-type: none"> • c. Recklessly. consciously disregards a substantial and unjustifiable risk (jury decides by how much) <p><i>-foresees the harm may occur and disregards</i> <i>commentaries say you must be aware of the substantiality of the risk, but hard to tell from the text</i> <i>-must you be aware of the unjustifiability of the risk?--more of a normative conclusion than substantiality, which is a factual matter</i></p>
<ul style="list-style-type: none"> • The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
<ul style="list-style-type: none"> • subjective choice to disregard risk
<ul style="list-style-type: none"> • d. Negligently. he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. <p><i>-a lot easier to prove than recklessness</i> <i>-if not stated, not enough for criminal culpability</i></p>
<ul style="list-style-type: none"> • The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

<ul style="list-style-type: none"> • c MPC§2.02(3) Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto. <i>at least reckless if not otherwise stated</i>
<ul style="list-style-type: none"> • iii Motive, Intent, Subjectivity <ul style="list-style-type: none"> • a Motive becomes purpose when it is an element of the crime (as in specific intent crime). Motive normally does not relate to an element of the offense. Motive can be used to infer culpability level. "motive can be purpose when motive and intent are the same" • b Specific v. General Intent - Although the distinction has been abandoned by the MPC, at common law specific intent referred to a special mental element above and beyond that required with respect to the actus reus of the crime. <ul style="list-style-type: none"> • 1 Subjectivity v. Objectivity Clearly purpose and knowledge are subjective standards, while negligence is an objective one [reasonable person]. Recklessness is a hybrid. [Recklessness and negligence begin with the same objective components, but recklessness goes one step further by requiring that the person be aware of the risk and consciously disregard it.] • 2 The Hierarchy of Model Penal Code Definitions §2.02: Effort to deal with difficulty of defining culpability. Not adopted in every jurisdiction. Unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction can be obtained. Material elements when combined with the appropriate level of culpability, will constitute an offense. Material elements includes facts that negate an excuse or justification plus the facts of the definition of the crime.
<ul style="list-style-type: none"> • iv Regina v. Cunningham (1957): Not liable for attempted killing of neighbor due to theft of gas meter <ul style="list-style-type: none"> • a Statutory language "knowingly and maliciously" requires culpability as to act of taking neighbor's life. • b "Maliciously" does not mean wickedness (which would apply generally to all the acts), but requires that the defendant act recklessly with foresight of the actual consequence, or have actual intent to do the particular harm done. Negligence not sufficiently blameworthy to convict under this particular law.
<ul style="list-style-type: none"> • c elements of offense <ul style="list-style-type: none"> • 1 administer poison (unlawful and malicious) <ul style="list-style-type: none"> • question of whether malice correlated to intention (foresight of consequence) or recklessness • 2 endanger life/cause grievous harm
<ul style="list-style-type: none"> • v Negligent Homicide Cases <ul style="list-style-type: none"> • a Santillanes v. New Mexico (1993): <ul style="list-style-type: none"> • 1 The term "negligently" in a criminal statute cannot be construed to mean normal civil negligence. Criminal negligence is worse. Statute states "negligently causing a child to be place in a situation of harm." When moral condemnation and social opprobrium attach to the conviction of a crime, the crime should typically reflect a mental state warranting such contempt. • 2 RULE: Gross negligence required for condemnation (criminal punishment) • b State v. Hazelwood (1997): Exxon Valdez spill, question of if it was negligent <ul style="list-style-type: none"> • 1 Captain charged with the Alaska offense forbidding anyone to "discharge, cause to be discharged, or permit the discharge of petroleum...upon the waters or land of the state except...as the department may by regulation permit." When the offense is committed negligently it is a misdemeanor. • 2 Court of appeals used civil and criminal negligence as interchangeable, said they were the same

- 3 Court held that criminal negligence requires a greater risk, "of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation." Does not spill over into recklessness; no requirement that the defendant be actually aware of the risk of harm.

- vi **US v. Jewell (1976)**: D guilty of drugs in hidden compartment through willful blindness to their presence

- a D knew of secret compartment but not of its contents. A court can properly find **willful blindness** only where it can almost be said that the D actually knew -

- 1 awareness of high probability of element; and
- 2 conscious purpose to avoid learning the truth

- b Judge gave jury conscious avoidance instruction: changes what govt had to prove (conscious purpose of avoiding knowledge). Expansion? **high probability vs. conscious avoidance**

- c MPC §2.02(7) Requirement of knowledge satisfied by knowledge of high probability unless the D actually believes that it does not exist. (fed gvt is not mpc)

- d elements of the crime

- 1 transporting (knowingly)
- 2 marijuana (knowingly)
- 3 United States (knowingly)

- 2 Strict Liability

- i Imposition of criminal liability **without proof of culpability** for an element of offense. Usually we read in an intent element if it's a crime that's traditionally been interpreted to have an intent element and congress is silent. harder when not a common law crime

- ii MPC, 2.02 §1, except as in 2.05

- a only for violations, where violations are not a crime
- b seriousness of crime is important to determining applicability of strict liability

- iii Characteristics of Strict Liability Crimes:

- a "New" statutory offense - not traditional common law crime (malum in se) [Note that there are some traditional common law crimes (moral crimes) that are generally strict liability offenses - bigamy and statutory rape.];

- b Does not involve direct infringement on rights of others;

- c Part of regulatory scheme - a "public welfare" offense (malum prohibitum);

- d Relatively light penalty;

- e Requiring proof of culpability would impede implementation of legislative purpose

- iv Arguments for Strict Liability:

- a Administrative efficiency - If prosecution had to prove mens rea, convictions would be difficult to obtain, no deterrent.

- b Protection of social interest, social regulation.;

- c Prosecutors have discretion and can weed out cases.

- d A responsible person has the opportunity to find out v. the helpless public. (Dotterweich

- v **Arguments against Strict Liability:**

- a Violates fundamental principles of penal liability.;

- b Innocent people can get caught up in law.;

- c Requisite mens rea would be easy to prove in most cases;

- d It deters only the most careful people.;

- e Criminal law is only one way to promote social welfare.

- vi **United States v. Balint (1922)**: Strict liability in public welfare regulatory offense of selling opiates

- a SCOTUS held that state did not have to prove that defendant knew the drug was opium. While general rule in the common law was that knowledge was a necessary element, there

has been a modification of this view with respect to public welfare/regulatory statutes, the purpose of which would be obstructed by a mens rea requirement.

- b The state may impose strict liability for crimes that are part of regulatory schemes (particularly when regulated items are potentially harmful.) Social betterment in such cases is more important than punishing crime (punishing innocent sellers v. harming innocent buyers). Note court's emphasis on legislative intent. ****public welfare case****
- c Justice Jackson's writing shows he thinks strict liability is dumb, tries to limit its scope
- vii **US v. Dotterweich (1943)**: Pharmaceutical company repackaged and resold drugs with erroneous labels. Statute does not require mens rea. Penalties are a means for regulation. In interest of the common good, the burden of acting at hazard upon person otherwise innocent but standing in responsible relation to public danger. A responsible person has the opportunity to find out v. the helpless public.
- viii **Morissette v. U.S. (1952)**: Where statute prohibits "knowingly converting federal property" and defendant believed property had been abandoned, he cannot be convicted. This is a common law crime and not a regulatory one and **strict liability should not be extended to common law crimes**. Where a statute is a codification of a common law crime, mens rea usually remains an element whether it is mentioned in the statute or not. Although statute did not specify culpability, court rejects strict liability given tradition of requiring culpability for stealing (malum in se crime). Trying to distinguish from Balint but not totally successful. ****not a public welfare case****
- a elements
 - 1 take property (conduct) (know)
 - 2 property belongs to US (circumstance) (not necessarily know?)
- ix **United States v. Staples (1994)**: Possession of an automatic firearm without a license, must be shown that legislature intended strict liability, esp. in the case of a felony
 - a Court found that strict liability is disfavored; one arguing for strict liability has burden of showing that legislature intended strict liability (particularly in a case such as this where potentially harsh penalty and risk of convicting innocent persons).
 - b Making this a regulatory crime would **criminalize a broad range of innocent activity**. Defendant charged with violating act requiring registration of all automatic weapons. Defendant claimed he did not know it had been converted into an automatic weapon. Act construed as not imposing strict liability with regard to nature of weapon.
 - c **Distinguish U.S. v. Freed**- same case but with grenades - distinguished b/c grenades are particularly dangerous and possessing them cannot be entirely innocent unlike possessing a gun - not a long tradition of lawful ownership, owner is on notice. Mala en se v. mala en prohibatum. Grenades and drugs require more carefulness as they require specific, and not general knowledge like guns.
- d Elements of crime
 - 1 possess a firearm (something that fires automatically)
 - 2 that isn't registered
- x Status of Strict Liability in Federal Criminal Law
 - a common law offense: read in culpability requirement
 - 1 Morissette
 - b not common law
 - 1 Balint: yes, regulatory, for common good
 - 2 Dotterweich + Freed: yes, regulatory, for common good
 - 3 Staples: no, reluctant to ensnare innocents
- 3 Mistake

- i MPC §2.04: Ignorance or mistake as to a matter of fact or law is a defense if mistake shows that defendant lacked required mental state/culpability:
 - draws no distinction between mistake of fact and mistake of law, providing that ignorance or mistake which negates the required mens rea requires acquittal.*
- a the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
- b the law provides that the state of mind established by such ignorance or mistake constitutes a defense.
- ii MISTAKE OF FACT:
 - a No liability if the accused made a mistake of fact negating the requisite mental state. The mistake usually must relate to a material element.
 - b **Requirement of Reasonableness:** Under MPC (in contrast to common law), mistake of fact does NOT need to be reasonable as long as it negates the state of mind required for liability. Many CL courts have not required a showing of reasonableness if the mistake negates the existence of a specific intent required for guilt. But some follow the idea that if the mistake is reasonable it will excuse but if not reasonable it will not excuse.
 - c A few situations where **even reasonable mistakes don't excuse**, where strict liability exists
 - 1 Morals cases like statutory rape
 - 2 Public welfare offenses
 - 3 Lesser crime situations impose strict liability to the more serious crime as long as culpability proven to more serious crime.
 - d Requirement that conduct have been morally and legally permissible had facts been as defendant believed.
 - e **Strict Liability Offenses:** General Rule: Mistake is no defense to complete strict liability crimes and may or may not be a defense to limited strict liability crimes. Mistake of fact, no matter how reasonable, cannot disprove a required intent if there is none. "May be so unfair as to deny due process"
 - 1 **People v. Olsen (California 1984):** Upholds conviction in 'lewd and lascivious acts with child under 14' case with mistake as to age
 - Elements:
 - Conduct: lewd and lascivious act
 - Culpability: (ulterior intent: don't modify intent but adds additional)
 - ulterior intent: sexual arousal
 - circumstances: child under 14
 - Even a reasonable mistake of age is not a defense in (statutory rape case) because of strong public policy to protect children of tender years. Statute clearly contemplates possibility of someone who makes a reasonable mistake of age and imposes punishment on a strict liability basis. Defendant was charged with lewd or lascivious act with an individual under 14. Could argue that the harsh punishment should make it require culpability. MPC imposes strict liability if under 10 years old.
 - Dissent: strict liability is usu. confined to regulatory offenses where the punishment is relatively small. S.L. for an offense that, but for the mistaken fact, is legal seems like cruel and unusual punishment. Even if it's the legislature's intent, dissenter thinks that it's unconstitutional
 - couldn't prove forcible rape, so went for this, which is rarely prosecuted
 - 2 **Garnett** - Retarded 20y.o. had (consensual) sex with a 13y.o; charged with 2nd degree rape; ct. upholds conviction b/c statute makes no allowance of mistake of age defense, if the legisl. wants that changed for this kind of case, they can do it. D will rely on discretion of sentencing judge

<ul style="list-style-type: none"> • Lesser legal wrong / moral wrong - D acting without mens rea deserves punishment for committing the lesser crime of fornication but that cannot apply here since fornication is not a crime and the ct. does not enforce shifting societal norms
<ul style="list-style-type: none"> • 3 Some courts have been willing to recognize a "defense" of reasonable mistake in strict liability situations. People v. Hernandez (California 1964): Good faith, reasonable belief that victim of statutory rape was over 18 is a defense. [Note that this is the view of a substantial minority of states, but in most jurisdictions a mistake of age, even if reasonable, is not a defense to statutory rape.] Olsen distinguished because of policy interest in tender years under 14.
<ul style="list-style-type: none"> • f People v. Lopez A mistake of fact relating only to the gravity of an offense with not shield a deliberate offender from the full consequences of the wrong [distributing marijuana to children] actually committed. The court refused to recognize a reasonable mistake of age defense. The act of furnishing marijuana is criminal regardless of the age of the recipient and furnishing marijuana to a minor simply yields a greater punishment. Different from Cunningham because that case involved two quite different crimes and two different states of mind. Could extend argument to Olsen because he still would have known she was under 18.
<ul style="list-style-type: none"> • iii b. MISTAKE OF LAW (two kinds):
<ul style="list-style-type: none"> • a Mistake of legal circumstance/ Mistake concerning a matter of law (legal rule that characterizes attendant circumstances that are material to the offense, not the law defining the offense) may negate the required mental state of the crime. (MPC§2.04 (1))
<ul style="list-style-type: none"> • 1 State v. Woods Defendant who married a man with an invalid divorce is not criminally liable for bigamy if she honestly believed the divorce was valid. [Note that the court fails to distinguish between mistake of legal circumstance and mistake of governing law in this case.]
<ul style="list-style-type: none"> • 2 Regina v. Smith (Q.B. 1974): If defendant held an honest, though mistaken belief that the property was his, then he cannot be convicted. The reasonableness of this belief is irrelevant. Defendant damaged a wall panel and floorboard he had constructed in his apartment was charged with violating criminal damage act which prohibits damaging another's property.
<ul style="list-style-type: none"> • 3 State v. Fox (AM36): Had knowledge of possession, statute doesn't require culpability for knowing it was a controlled substance. Purchased ephedrine through a mail order from a different state (ordered a lot so probably wanted to sell). he didn't have knowledge that the substance was illegal in the state MPC 2.02(9) General Rule.
<ul style="list-style-type: none"> • elements
<ul style="list-style-type: none"> • conduct: possess ephedrine (he had purpose)
<ul style="list-style-type: none"> • circumstances: no prescription (he had knowledge)
<ul style="list-style-type: none"> • b RELIANCE ON OFFICIAL ADVICE /Mistake of governing law - Ignorance of the law is no excuse. Generally no defense.
<ul style="list-style-type: none"> • 1 MPC §2.02(9) - Culpability as to Illegality of Conduct. Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.
<ul style="list-style-type: none"> • Exceptions:
<ul style="list-style-type: none"> • When the statute says it is an excuse.
<ul style="list-style-type: none"> • Official Pronouncement/Reliance on Statute Later Held Unconstitutional: Good faith reliance on the advice of a private attorney is no defense - not official pronouncement.
<ul style="list-style-type: none"> • 2 Policy Considerations: Encourage people to know the law. Would encourage ignorance if mistake of governing law were a defense; Infinite number of mistake of governing law

defenses that could be devised in good faith; Opportunities for wrong-minded individuals to contrive.

- 3 **MPC §2.04(3)** - A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

- (a) the statute or other enactment defining the offense is not known to the actor **and** has not been published or otherwise reasonable made available prior to the conduct alleged; or

- (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous.

- 4 In **California** Section 500, Ignorance or Mistake... (2)(b) if the persons mistaken belief is due to his misconception of the meaning or application of the law defining the crime to his conduct, (i) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in a statute, judicial decision, administrative order or grant of permission, or an official interpretation of the public officer or body charged by law with the responsibility for interpreting, administering or enforcing the law defining the crime.

- 5 **New Jersey** has a mistake of governing law defense, but there is a high standard of diligent ascertainment. Honest and good faith required.

- 6 **Raley v. Ohio (Supreme Court 1959)**: SCOTUS has held it a violation of due process to convict a defendant for conduct that governmental representatives in their official capacity, had earlier stated was lawful. Commission investigating un-American activities instructed defendants that they were protected by fifth amendment and therefore did not have to testify. An Ohio statute gave them automatic immunity for testifying. They were then prosecuted for contempt by commission. Supreme Court found to violate due process stating that to affirm convictions "would be to sanction the most indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the state clearly had told him was available to him."

- 7 **US v. Albertini** (281). First amendment right to protest. had been convicted of trespassing in protest. Conviction reversed by ct. of appeals and pending appeal to SCOTUS when committed the same act again. SCOTUS reversed court of appeals and affirmed first conviction, reversed second conviction.

- The second conviction is reversed since defendant was relying on the official statement of the law from the appeals court when he committed the second act. The fact that the official statement was pending appeal and later overruled is irrelevant. latest controlling court opinion at least until Supreme court certiorari (but don't know about between C and judgment). Right to fair warning of criminality of actions.

- MPC 2.04(3)(b) (ii): official decision

- 8 **Rev Hopkins**, p. 280, notary public relying on advice of counsel. the vs. a public official. possible but not certain that he's protected.

- 9 Compare these cases to Keeler. We're all on notice of the law. Keeler gets off even though he did something wrong. "I didn't know it was the law" vs. "it wasn't the law." Create strongest possible incentive to learn the law, and then rely on prosecutorial discretion to make up the difference

- **III HOMICIDE - A STUDY IN GRADING AND CULPABILITY**

- **A INTRODUCTION**

- 1 **THE THEORY OF GRADING** (theories of punishment). More wickedness (retribution) and more future potential danger (incapacitation).

- i Principles of Grading:

- relative judgments about seriousness of crimes

- absolute judgments of seriousness

- a 1. Culpability

- b 2. Amount of harm

<ul style="list-style-type: none"> • c 3. Other circumstances (provocation, extreme emotional distress, etc.)
<ul style="list-style-type: none"> • ii Proportionality MPC 1.02 Punishment proportional to the seriousness of the offense is a traditionally salient principle of punishment. MPC 1.05 states that this enables one to differentiate between serious and minor offenses and safeguard against excessive disproportionate or arbitrary punishment. Is the point that certain crimes cannot be punished with more than a certain amount or that minor offenses are punished less than major. Aim justice and fairness or utilitarian goals
<ul style="list-style-type: none"> • iii Kant - there is a precise kind and degree of punishment for every wrong
<ul style="list-style-type: none"> • iv Bentham Punishments may be too small or too great. <ul style="list-style-type: none"> • a The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offense. • b When two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less. • c The punishment should be adjusted in such manner to each particular offense that for every part of the mischief there may be a motive to restrain the offender from giving birth to it. • d The punishment ought in no case to be more than what is necessary to bring it into conformity with the rules here given • e That the value of the punishment may outweigh the profit of the offense it must be increased in point of magnitude, in proportion as it falls short in point of certainty. (Uncertainty weakens punishment) • f Punishment must be further increased in point of magnitude, in proportion as it falls short in points of proximity. (Distance weakens punishment)
<ul style="list-style-type: none"> • v Gross Proportionality is as strong a principle in criminal law as is the idea that an innocent should not be punished.
<ul style="list-style-type: none"> • vi Hart Differential severity of punishment is complex. <ul style="list-style-type: none"> • a Some crimes may cause great harm • b Temptation to commit one sort of crime may be greater • c Commission of one crime may be a sign of a more dangerous character
<ul style="list-style-type: none"> • vii Ewing To punish disproportionately will change one's perception as to the level of wrongfulness or discredit the system. Punishment is a language of moral disapproval
<ul style="list-style-type: none"> • viii Stephen Different reasons for severity. Not in character, morally extreme. Likely to do again, need deterrence. if vengeance affects punishment, all mitigating and aggravating factors must be considered in punishment. Must judges would punish the ignorant criminal less than an educated accomplice although the former, being subject to greater temptation, is more likely to offend again (that is, judges ignore prevention rational) therefore we see that punishment is a manifestation of vengeance
<ul style="list-style-type: none"> • 2 PATTERNS OF GRADING IN HOMICIDE
<ul style="list-style-type: none"> • i Swedish Penal Code (n.b. judges, not juries are the fact finders) <ul style="list-style-type: none"> • a A person who takes the life of another shall be sentenced for murder to imprisonment for ten years or for life. • b If, in view of the circumstances that led to the act or for other reasons, the crime mentioned in § 1 is considered to be less grave, imprisonment for manslaughter shall be imposed for at least six and at most ten years • c A person who through carelessness causes the death of another shall be sentenced for causing another's death to imprisonment for at most two years, or if the crime is less grave, to pay a fine; if grave 6 mos.; if drunk driving related is it grave and the fine option is not available.
<ul style="list-style-type: none"> • ii MPC: <ul style="list-style-type: none"> • a MPC §210.0 Definitions Unless a different meaning plainly is required:

<ul style="list-style-type: none"> • 1 "human being" means a person who has been born and is alive;
<ul style="list-style-type: none"> • 2 "bodily injury" means physical pain, illness or any impairment of physical condition;
<ul style="list-style-type: none"> • 3 "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;
<ul style="list-style-type: none"> • 4 "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which is in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.
<ul style="list-style-type: none"> • b MPC §210.1 Criminal Homicide
<ul style="list-style-type: none"> • 1 A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.
<ul style="list-style-type: none"> • 2 Criminal homicide is murder, manslaughter or negligent homicide
<ul style="list-style-type: none"> • c MPC §210.2 Murder
<ul style="list-style-type: none"> • 1 Except as provided in §210.3(1)(b), criminal homicide constitutes murder when: <ul style="list-style-type: none"> • a. it is committed purposely or knowingly; or • b. it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission or, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.
<ul style="list-style-type: none"> • 2 Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in §210.6].
<ul style="list-style-type: none"> • d MPC §210.3 Manslaughter
<ul style="list-style-type: none"> • 1 Criminal homicide constitutes manslaughter when: <ul style="list-style-type: none"> • it is committed recklessly; or, (involuntary) • a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. (voluntary)
<ul style="list-style-type: none"> • 2 Manslaughter is a felony of the second degree
<ul style="list-style-type: none"> • e MPC §210.4 Negligent Homicide
<ul style="list-style-type: none"> • 1 Criminal homicide constitutes a negligent homicide when it is committed negligently. <i>situational, with situation left to trier of fact</i>
<ul style="list-style-type: none"> • 2 Negligent homicide is a felony of the third degree
<ul style="list-style-type: none"> • iii The Practice of Grading The traditionally broad discretion of sentencing judges means that the grading differences expressed in the code and determined by juries have only a marginal effect in determining an offender's sentence. There is little reason to codify detailed rules that do not correspond to shared community intuitions. There is danger of unfairness in rules that deviate too far from the intuitions of average people. There is much that can be done to enhance the effectiveness of today's criminal codes in their primary functions (retribution, deterrence, reform, incapacitation): make laws understandable, give jury instructions which are clear and intuitive and set sentencing standards so there is less judge discrepancy.
<ul style="list-style-type: none"> • B INTENTIONAL HOMICIDE
<ul style="list-style-type: none"> • 1 Murder vs. Voluntary Manslaughter
<ul style="list-style-type: none"> • i THE COMMON LAW STANDARD: PROVOCATION: <ul style="list-style-type: none"> • a Voluntary manslaughter is killing that would otherwise be murder but that was committed in response to certain provocation; intentional homicide committed under extenuating circumstances which mitigate but do not justify or excuse the killing.
<ul style="list-style-type: none"> • b To reduce intentional homicide from murder to manslaughter the facts must satisfy all of the following four elements:

<ul style="list-style-type: none"> • 1 There must have been provocation of the kind that would cause a reasonable person to lose control;
<ul style="list-style-type: none"> • 2 defendant must have in fact been provoked, and the provocation must have caused defendant to kill the victim;
<ul style="list-style-type: none"> • 3 A reasonable person would not have cooled off in the interval between provocation and the crime; and
<ul style="list-style-type: none"> • 4 Defendant must not have actually cooled off.
<ul style="list-style-type: none"> • c Legally sufficient provocation How do we determine if provocation is reasonable?
<ul style="list-style-type: none"> • 1 Traditionally judged by objective "reasonable person" standard.
<ul style="list-style-type: none"> • 2 Courts struggle with extent to which the reasonable person should be regarded as having characteristics that may have made (unusually susceptible to provocation.
<ul style="list-style-type: none"> • 3 MPC §210.3(1)(b) - Provides that reasonableness is to be determined from the viewpoint of a person in defendant's position under the circumstances as (believed them to be.
<ul style="list-style-type: none"> • d Categories of legally sufficient provocation:
<ul style="list-style-type: none"> • 1 Battery - must be violent and painful blow
<ul style="list-style-type: none"> • 2 Mutual combat - usually okay
<ul style="list-style-type: none"> • 3 Assault - courts are split, only in extreme cases
<ul style="list-style-type: none"> • 4 Illegal arrest - courts are split, but legal arrest is never provocation
<ul style="list-style-type: none"> • 5 Adultery - discovery of spouse in the act of adultery is clearly sufficient, modern trend is to extend the rule
<ul style="list-style-type: none"> • 6 Words - traditionally words do not suffice, now may suffice if containing provocative information, insults are not sufficient provocation
<ul style="list-style-type: none"> • 7 Injuries to 3rd person - only if close relatives
<ul style="list-style-type: none"> • e Girouard v. State (Maryland 1991): man stabbed wife 19 times after she berated him, he was tearful when the police arrived, convicted of second degree murder, NOT voluntary manslaughter, NOT legally adequate provocation
<ul style="list-style-type: none"> • 1 "Mere words do not suffice." Comments disparaging sexual abilities are not sufficient to mitigate to voluntary manslaughter. Adequate provocation must be such that a reasonable person would be provoked to kill. Very few jurisdictions have words are enough laws and usually the jury does not mitigate. Do words about one of the legally sufficient circumstances count as adequate?
<ul style="list-style-type: none"> • 2 Test: Provocation is adequate if calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason
<ul style="list-style-type: none"> • 3 Reasonableness Standard: the standard of reasonableness does not focus on the particular frailties of the petitioner's mind.
<ul style="list-style-type: none"> • 4 Judge determines whether provocation exists as a matter of law (common law and traditional approach)
<ul style="list-style-type: none"> • 5 [rule now softened if words reveal happenings which taunt victim p. 395]
<ul style="list-style-type: none"> • 6 like dissent in Maher
<ul style="list-style-type: none"> • f Maher v. People (Michigan 1862): (MINORITY VIEW) Man attempts to kill wife's lover after seeing him leave the woods an hour earlier. S.Ct. of Mich holds that evidence of provocation should have gone to jury.
<ul style="list-style-type: none"> • 1 Trial court ruled evidence of provocation inadmissible.
<ul style="list-style-type: none"> • 2 Had death ensued, provocation would reduce charge from homicide to manslaughter. Therefore if admitted could reduce charge from assault with intent to murder to simple assault and battery.
<ul style="list-style-type: none"> • 3 Supreme Court of Michigan held that despite time lapse between provoking event and assault, there was sufficient evidence to go to jury based on following principle:
<ul style="list-style-type: none"> • 4 Test: anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it. [Physical

effects not necessary]. In determining whether the provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard. [exception for those of peculiar weakness or infirmity]. Would an ordinary person be caused to act from passion rather than from judgment?

• 5 Two kinds of questions

• institutional:

- who gets to decide if second hand provocation is good enough? judge? law? jury?
- rephrased: What should be the role of law in setting moral standards? Should we try to track standards, be descriptive, try to make moral standards better?
 - leaving open to jury= descriptive
 - having law decide=prescriptive

• substantive: should the law permit second-hand provocation?

• 6 Reasonableness Standard: ordinary human nature, men of average mind and disposition unless the D as a particular weakness of mind not resulting from wickedness.

• 7 **jurors better situated to decide** unless the alleged provocation admits no reasonable doubt (Minority view, MPC?)

• 8 *Cooling time*: how long is all over the map; Some cts have jury evaluate cooling time (here); consider gender divide - women more likely to brood (esp battered women)

• 9 Dissent: evidence of provocation should be excluded since it was not given in the presence of the D (D didn't see the implied sex). risk of mistake, stronger visceral reaction by witnesses

• g **Dennis v. State (Maryland 1995)**: held that adultery could be a legally adequate provocation only if the defendant had suddenly discovered sexual intercourse taking place, not other sorts of sexual intimacy or contact.

• h **State v. Turner (Alabama 1997)**: adultery as provocation could not be used since defendant was not married to victim.

• i **US v. Roston** A reasonable person doesn't even kill when provoked. Ninth Circuit MPC Jury Instructions has better definition: "in order to be adequate, must be such as might naturally cause a reasonable person in the passion of the moment to lose self-control and act on impulse without reflection"

• j Other Requirements Common Law Places on Provocation -

• 1 Cooling period

• How long? General rule is a reasonable person test.

• **US v. Bordeaux (8th Cir. 1992)**: evidence of a prior dispute was insufficient to warrant a voluntary manslaughter instruction in the absence of "some sort of instant incitement."

• Many courts have rejected the concept of "**rekindling**" an event immediately following incident had rekindled the earlier provocation:

• **State v. Gounagias (1915)**: Defendant argued that taunts regarding sodomy two weeks earlier led to sudden heat of passion. Court held that provoking event was the sodomy two weeks earlier, not the taunts and that therefore there had been adequate cooling time.

• **Commonwealth v. LeClair (Mass 1999)**: court held that prior suspicions of adultery provided adequate cooling time and that therefore no provocation defense for man who murdered wife after he confirmed suspicions.

• Some courts permit the jury to make the decision regarding cooling time:

• **People v Berry (Cal. 1976)**: ruled that more time led to more agitation.

• 2 Victim has to be provoker.

<ul style="list-style-type: none"> • State v. Maurico allowed defense when accidentally killed someone else who defendant thought was the provoker. Several states have reached the same result by statute. However, Texas requires the provocation be given by the individual killed or another acting with the person killed.
<ul style="list-style-type: none"> • In Rex v Scriva and People v. Spurlin courts held that no provocation defense was available with respect to the murder of nonprovoking parties, even when murder was result of complete loss of self-control in response to provoking act.
<ul style="list-style-type: none"> • 3 iv. Defendant did not incite provocation <ul style="list-style-type: none"> • Homicide will not be reduced to voluntary manslaughter if the defendant was at fault in stimulating the provocation. • Although there has been some contention. See Regina v. Johnson: trial court would not allow provocation defense for original provoker. Court of appeals reversed, saying it was for a jury to decide.
<ul style="list-style-type: none"> • k Criticism <ul style="list-style-type: none"> • 1 Morse: (p 307) reasonable ppl to not kill others even when provoked - disrespectful to victims • 2 Miller: juries will not enforce reasonableness standards that will protect women's lives (c.l. and MPC discriminate against women therefore the defense of voluntary manslaughter no longer has a place in criminal law)
<ul style="list-style-type: none"> • l Limitations on Provocation <ul style="list-style-type: none"> • 1 only applies to homicide (not arson etc.) • 2 Victim must be the provoker (most states) - intention to kill maintains murder charge • 3 D cannot have instigated the provocation (<i>lesser crime theory</i>)
<ul style="list-style-type: none"> • ii THE MPC STANDARD: EXTREME EMOTIONAL DISTRESS <ul style="list-style-type: none"> • a Compared to C.L. <ul style="list-style-type: none"> • 1 CL approach focuses on the act of the provoker, MPC focuses more on the subjective culpability of the killer, although there is still an objective reasonableness requirement • 2 The MPC formulation is broader than provocation because it does not require a provoking or triggering event and allows for circumstances such as brooding (which would be prevented under common law by cooling time rule) • 3 Contrasting standards of individualization • 4 That the EED formula is broader means that more cases will get to the jury than under the provocation formula; but where there is adequate provocation, mitigation isn't necessarily more likely to ensue from the jury under the EED formula than under the provocation formula. • 5 perceived to be more lenient • b While the CL approach is focused on the act of the provoker, the MPC focuses more on the subjective culpability of the killer, although there is still an objective reasonableness requirement. Of two-thirds of states that have adopted MPC, only about 10 states have adopted this provision. Unpopular because it is considered too expansive. Less than insanity. • c MPC §210.2(1): Except as provided in Section 210.3(1)(b) criminal homicide constitutes murder when... • d MPC §210.3(1)(b): Killing which would otherwise be murder is reduced to manslaughter when committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. • e Two components of extreme emotional disturbance:

<ul style="list-style-type: none"> • 1 i. Actual - extreme emotional disturbance (subjective)
<ul style="list-style-type: none"> • 2 ii. Normative/evaluative - reasonable explanation or excuse (objective) ‡ the ultimate test is objective
<ul style="list-style-type: none"> • f People v. Casassa: killed girl he was dating after she refused him. Q of whether it was reasonable to kill in his mind
<ul style="list-style-type: none"> • 1 Although defendant must have actually, subjectively been under extreme emotional distress, the reasonableness requirement is objective. MPC formulation is broader than provocation because it does not require a provoking or triggering event and allows for circumstances such as brooding (which would be prevented under common law by cooling time rule). NY separated from MPC by requiring burden of proof on defendant to show provocation as affirmative defense. Other besides provocation, shed light on mental state of the defendant, longer timing.
<ul style="list-style-type: none"> • 2 Test: Under NY Penal Statute, it an affirmative defense to murder if “1) the defendant acted under the influence of extreme emotional distress (subjective component) for which there was reasonable explanation or excuse (normative/ evaluative component).”
<ul style="list-style-type: none"> • 3 Reasonableness Standard: Objective per MPC commentary - reasonableness determined by viewing the subjective internal situation of the D and the external circumstances as the D perceived them, however mistaken that may be. (Opens door to psychological testimony)
<ul style="list-style-type: none"> • 4 Operation: Trier of fact must first find whether there was EED, then asses reasonableness
<ul style="list-style-type: none"> • 5 Extreme Emotional Distress vs. Provocation <ul style="list-style-type: none"> • provocation could be a type of EED, but broader • example of mercy killing • EED harder to administer b.c harder to figure out • concern about lenience • within context of provocation, more standards are needed: gives enormous latitude to jury
<ul style="list-style-type: none"> • g Why waive jury trial: judge better understands complex legal arguments; jury may include women; jury need not follow instructions; judges are more responsive to psychological testimony.
<ul style="list-style-type: none"> • h In State v. Elliot (Conn. 1979): Court held that under Conn Penal Code (modeled on MPC) instructions on extreme emotional disturbance were required for defendant who killed his brother out of overwhelming fear (no direct provocation): <ul style="list-style-type: none"> • 1 "The defense does not require a provoking or triggering event. To establish the heat of passion defense a defendant had to prove that the "hot blood" had not had time to "cool off" at the time of killing. A homicide influenced by an extreme emotional disturbance, in contrast, is not one which is necessarily committed in the "hot blood" stage, but rather one that was brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation. [Is this a preferable outcome?]
<ul style="list-style-type: none"> • i In Boyle v. State (Ark, 2005) defendant shot and killed partner who lived in extreme pain. [defense under MPC?]
<ul style="list-style-type: none"> • j People v, Walker (NY 1984): judge refused to instruct jury regarding provocation for a drug dealer who killed his supplier in a fit of anger. Dissenting judge asserted that even though defendant is not sympathetic character, jury should still decide whether ther was adequate provocation.
<ul style="list-style-type: none"> • iii SUBJECTIVE, OBJECTIVE AND INDIVIDUALIZED STANDARDS
<ul style="list-style-type: none"> • a Debate on whether reasonableness standard for provocation should account for factors such as age, mental capacity, cultural background, being a battered woman, emotional depression etc. Three possibilities: <ul style="list-style-type: none"> • 1 No individualization – pure reasonable person standard

<ul style="list-style-type: none"> • 2 Individualization based on gravity of provocation only
<ul style="list-style-type: none"> • 3 Individualization more generally based on situation/circumstances
<ul style="list-style-type: none"> • b Generally under common law more allowance is made for physical characteristics and less for personality and mental defects
<ul style="list-style-type: none"> • 1 Characteristics such as age (unique physical characteristics of the accused) may be taken into consideration by the jury in determining the reasonableness of the provocation. However, the test is still an objective one (a reasonable 15 yr. old boy) see Camplin p. 408 - English courts began increasing individualization but changed course when the situation became extreme, now juries can broadly consider whether manslaughter is more appropriate
<ul style="list-style-type: none"> • but see Roe [russian roulette case] age of the D not considered in determining recklessness
<ul style="list-style-type: none"> • c MPC Formulation:
<ul style="list-style-type: none"> • 1 Test is whether the defendant acted "under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse"
<ul style="list-style-type: none"> • MPC § 210.3(1)(b) - Reasonableness of [EED] shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be - This leaves it to the jury to determine what to take into account. "In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."
<ul style="list-style-type: none"> • MPC Commentaries, Comment to §210.3:
<ul style="list-style-type: none"> • Situation is designedly ambiguous:
<ul style="list-style-type: none"> • To be taken into account: <ul style="list-style-type: none"> • personal handicaps: blindness, shock, extreme grief • some external circumstances
<ul style="list-style-type: none"> • Not to be taken into account <ul style="list-style-type: none"> • moral values
<ul style="list-style-type: none"> • 2 There is large debate about whether the reasonableness standard should account for factors such as age, mental capacity, cultural background, being a battered woman, emotional depression etc. Generally more allowance is made for physical characteristics and less for personality and mental defects. The MPC retains objective test, but specifies that reasonableness is to be assessed from viewpoint of person in actor's situation (but idiosyncratic moral values are not considered part of actor's situation.) MPC fudges with the word "situation" to give some individual leeway. This leaves it to the jury to determine what to take into account. "In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."
<ul style="list-style-type: none"> • d Culture:
<ul style="list-style-type: none"> • 1 Should nationality and cultural background be taken into account in a multiethnic society. An Australian Judges view in Masciantonio v. R., (High Court Australia, 1995): "If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would answer that that must be the natural consequence of true equality before the law."
<ul style="list-style-type: none"> • e Battered Women:
<ul style="list-style-type: none"> • 1 State v. McClain (NJ 1991): Woman killed abusive husband. had not been beaten for several years, but psychologist testified that battered womans syndrome had triggered mental "breakdown". The court held that evidence relating to the defendant's status as a battered woman was "irrelevant on the question of whether the victim's conduct was adequately provocative because that inquiry requires application of the 'reasonable person' test."
<ul style="list-style-type: none"> • 2 State v. Felton (Wis. 1983): "It is proper in applying the objective test... to consider how other persons similarly situated with respect to that type, or that history, of provocation

would react. The objective test may be satisfied by considering the situation of the ordinary person who is a battered spouse."

- 3 Does a person suffering from a personality disorder and battered woman's syndrome still qualify as an "ordinary person"? Raises difficulties with reasonable person standard. See JCS Comment on R. V. Thornton page 408.

- f Mental Disorder

- 1 **State v. Klimas** (Wis 1979): Defendant tried to use mental distress regarding disintegration of marriage as adequate provocation for killing wife. Trial judge ruled psychiatric evidence irrelevant and therefore inadmissible

- 2 **People v. Steele** (Cal. 2002): Inadmissible in case where Vietnam vet snapped when he heard the sound of an approaching helicopter.

- g Arguments for Subjective Standard. Utilitarian.

- 1 Purpose of punishment is to punish people based on mens reas. Only way to understand within levels of blameworthiness.

- 2 Don't want to be even handed in order to be fair.

- 3 Distinguish by whether the characteristic is a choice.

- h Arguments for Objective Standard. Retributive.

- 1 Far too many characteristics to weigh and they aren't tangible

- 2 Law should make some normative statements that gives barriers and limits about what is acceptable

- 3 May already be dangerous if easily provoked.

- 2 VARIETIES OF MURDER: FIRST VS. SECOND DEGREE AND THE PREMEDITATION FORMULA

- i **Common law:** No degrees of murder.

- ii **MPC approach:** No degree formula in §210.2. Statutes often divide murder into first and second degree.

- iii **Origins of degrees of murder:** Murder was first differentiated into degrees in Pennsylvania. As response to capital punishment.

- iv **First Degree Murder:** First-degree murder usually includes "premeditated, deliberate" and felony murder. Note that since capital punishment has its own jurisprudence, a 1st degree murder conviction does not automatically mean the death penalty. Not clear because some people who don't premeditate and deliberate may be just as evil.

- a **Deliberate Notion of mature reflection.** Formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. What kinds of evidence prove actual reflection? No one factor is controlling. Planning activity (behavior prior to killing). Prior relationship with victim. Nature and manner of killing. **Commonwealth v. O'Searo** When there is conscious purpose no reason to differentiate culpability based on elaborateness of design to kill

- b **Premeditated Intent to kill** is formed with some reflection, deliberation, reasoning or weighing, rather than simply on sudden impulse. Considered beforehand.

- 1 No appreciable time needed **The true test is not the duration of time, but rather the extent of the reflection.** A cold, calculated judgment and decision may be arrived at in a short period of time. **Young v. State** Can premeditate while pulling the trigger. Argument and scuffle over cards led to firing several shots.

- 2 A number of jurisdictions permit evidence of mental impairment to rebut an inference of premeditation. Some allow evidence of intoxication to negate premeditation and deliberation.

- 3 **California Penal Code Section 189:** "To prove the killing was deliberate and premeditated it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act."

<ul style="list-style-type: none"> • v Second Degree Murder: Residual category which includes all killings committed with malice aforethought that are not specifically made first degree murder.
<ul style="list-style-type: none"> • vi Lesser Included Offense: <ul style="list-style-type: none"> • a If you commit armed robbery (taking anything of value; by force or intimidation; while carrying a weapon), robbery is lesser included offense. <ul style="list-style-type: none"> • 1 Often there is a jury compromise to convict for the lesser charge. Trend toward allowing either or to request a lesser included offense instruction. Sometimes defendant will make tactical decision to not ask for a lesser included offense. • b Murder in the 2nd degree is a lesser included offense of murder in the 1st degree. Voluntary manslaughter is a lesser included offense of murder in the 1st and 2nd degrees.
<ul style="list-style-type: none"> • C UNINTENTIONAL HOMICIDE <ul style="list-style-type: none"> • 1 Lack of purpose or knowledge on part of defendant that death will result. Most courts and the MPC require a higher degree of negligence than in torts--usually a conscious realization that the defendant's conduct involves an unreasonable and high degree of risk of death--yet sometimes courts allow an involuntary manslaughter charge without conscious realization of risk ((civil negligence standard).
<ul style="list-style-type: none"> • 2 INVOLUNTARY MANSLAUGHTER AND SIMILAR OFFENSES <ul style="list-style-type: none"> • i Involuntary Manslaughter: Unintended killing is involuntary manslaughter if it is the result of criminal negligence or if it is caused during the commission of an unlawful act that is not a felony or that for some other reason is insufficient to trigger the felony murder rule. • ii MPC :defendant liable for murder if homicide is committed super-recklessly (extreme indifference to value of human life) <ul style="list-style-type: none"> • a §210.2(b); manslaughter if his criminal homicide is "committed recklessly" • b §210.3(1)(a); and negligent homicide if "committed negligently" • c §210.4(1). Negligent homicide adds another category for a Defendant whose mental state is negligence (compare to involuntary manslaughter which is unclear as to whether a negligence standard or recklessness standard is being applied) • iii Commonwealth v. Welansky (Mass 1944): Nightclub fire with blocked emergency exits: guilty of manslaughter (criminal negligence less than negligence, doesn't have to be aware of risk) <ul style="list-style-type: none"> • a <i>An unintentional killing caused by the commission of any act (even a lawful one) in a criminally negligent manner is involuntary manslaughter.</i> • b In this case, the reckless conduct involved is the failure (omission) to observe duty of care in disregard of the probable harmful consequences. • c Standard for involuntary manslaughter was "wanton or reckless conduct" defined as "distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct to avoid the act or omission which caused the harm." • d High degree of likelihood that substantial harm would result. If an ordinary person would have recognized the danger, defendant is guilty. Had regularly inspected nightclub until he became ill. • e MPC different because have to be aware and there isn't the ordinary person standard. Wouldn't be manslaughter under MPC because not reckless. • f State v. Barnett (1951): Originally held ordinary negligence could make culpable but now require something extra that goes beyond what an ordinary man would do. Involuntary now defined by statutes which mostly say requiring gross negligence or recklessness. • g Dickerson v. State (Miss. 1983): Deceased's contributory negligence is not a defense. Convicted of manslaughter for driving slightly over the speed limit and hitting a car parked in the middle of the road.

<ul style="list-style-type: none"> • iv People v. Hall (Col. 2000): skier killed someone in collision. determines that level of risk of death to count as reckless needn't be 50%, just "substantial risk depending on the circumstances of the case."
<ul style="list-style-type: none"> • a "that a reasonably prudent and cautious person could have entertained the belief that Hall consciously disregarded a substantial and unjustifiable risk that by skiing exceptionally fast and out of control he might collide with and kill another person on the slope."
<ul style="list-style-type: none"> • b lower court held that skier who killed another by skiing too fast and out of control could not be tried for felony reckless manslaughter because skier's conduct did not rise to the level of dangerousness required. [Colorado follows MPC definitions of manslaughter and negligent homicide.] District Court determined that in order for Hall's conduct to be reckless it must have been at least more likely than not that death would result.
<ul style="list-style-type: none"> • c Colorado Supreme Court held that "A risk of death that has less than a fifty percent chance of occurring may nonetheless be a substantial risk depending on the circumstances of the case." Based on eyewitness accounts of skier, determined that this case was substantial. Court also held that "Hall was serving no direct interest other than his own enjoyment." (i.e. unjustified). Because of Hall's background as a ski instructor, court found that he also consciously disregarded the risk.
<ul style="list-style-type: none"> • v State v. Williams (418) child with toothache that doesn't get taken to doctor dies, ordinary negligence plus causation. If the duty to furnish medical care did not arise until after it was too late to save the child, the defendants would not be guilty. Parents were found guilty.
<ul style="list-style-type: none"> • a Under WA statute, manslaughter must be the proximate result of ordinary negligence (not heightened negligence) - "If the conduct of defendant ... fails to measure up to the conduct required of a man of reasonable prudence [and if the conduct is the proximate cause], he is guilty of ordinary negligence."
<ul style="list-style-type: none"> • b WA statute was later repealed. Another element of homicide is causation; usually not complicated if affirmative action
<ul style="list-style-type: none"> • c problem of causation in failure to act (counterfactual)
<ul style="list-style-type: none"> • vi Individualization Debate: Tension between wish to individualize and achieve greater parity between moral and legal culpability vs. wish that law apply uniformly and practical difficulties of jury placing selves in place of others - Retribution theory requires greater individualization.
<ul style="list-style-type: none"> • a Objective Standard: <ul style="list-style-type: none"> • 1 Justice Holmes in Commonwealth v. Pierce applied and defended an objective standard. "In the absence of a clear reason to the contrary, there would seem to be at least equal reason for adopting it in the criminal law, which has for its immediate object and task to establish a general standard, or at least general negative limits, of conduct for the community, in the interest and safety of all."
<ul style="list-style-type: none"> • 2 Criticisms: <ul style="list-style-type: none"> • Glanville Williams (1961): Does not make sense to punish negligence under retributive theory or deterrent theory of punishment. Why punish one with a good will who simply makes a mistake. How can punishment deter those who do not realize through negligence that the threat of punishment applies to them • Hart (1968): argued that the problem with the objective approach is not that it sets an objective standard but that the standard applied without regard to the ability of the defendant to comply with it. <ul style="list-style-type: none"> • Adopted by Germans: Negligence for criminal law purposes is as follows: "A harm caused by defendants can be said to be caused by negligence only when it is established that they disregarded the care which they were obliged to exercise and of which they were capable under the circumstances and according to their personal knowledge and abilities....": Raises many questions: How do we know defendant's capacity?
<ul style="list-style-type: none"> • b The MPC on Individualization:

<ul style="list-style-type: none"> • 1 rejects a fully individualized standard, however allows some individualization by reference to "the care that would be exercised by a reasonable person in [the actor's] situation." MPC Comment to 2.02. Compare to Provocation.
<ul style="list-style-type: none"> • c Case Law: <ul style="list-style-type: none"> • 1 Courts remain ambivalent or in conflict regarding the degree of individualization • 2 State v. Everhart (NC 1977): Young girl with IQ of 72 who accidentally smothered baby to death because she thought it was born dead not guilty. Held that because of low IQ and accidental nature of the death, the state had not proved culpable negligence • 3 Edgmon v. State (Alaska 1985): Individual capabilities can be considered, but peculiarities of a given individual - intelligence, experience, etc. are irrelevant.
<ul style="list-style-type: none"> • 3 UNINTENTIONAL MURDER <ul style="list-style-type: none"> • i When the risk of death created by negligent behavior is very high, (i.e., greater than that in involuntary manslaughter) - "evincing a depraved heart, devoid of social duty, and fatally bent on mischief" then such negligence may constitute murder. • ii MPC Approach §210.2(1)(b) - ...[criminal homicide constitutes murder when:] ... it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape. • iii "DEPRAVED HEART MURDER" <ul style="list-style-type: none"> • a Under MPC Recklessness (consciousness) + extreme indifference to the value of human life. 210.2(1)(b). Under CL Depraved malignant or abandoned heart (i.e., risks directed at more than one person such as bomb, shooting into crowd etc.) intent to kill, intent to inflict great bodily harm, intent to commit a felony, awareness of a high risk of death • b Commonwealth v. Malone "russian poker," pulled trigger three times. murder. treats q: when can unintentional homicide be murder? <ul style="list-style-type: none"> • 1 Extreme indifference/depraved heart to human life is murder. Killing resulted from an intentional act by defendant in reckless and wanton disregard of the consequences which, the court says, were at least 60% certain on his third shot. defendant's conviction for murder is affirmed.[Malone would be controversial under the MPC standard and under CL] • 2 Defendant testified that the gun went off to his surprise and that he had no intention of harming his friend. • 3 Justice Maxey: "At CL, the 'grand criterion' which 'distinguished murder from other killing' was malice on the part of the killer and this malice was not necessarily 'malevolent to the deceased particularly' but 'any evil design in general; the dictate of a wicked, depraved and malignant heart'"
<ul style="list-style-type: none"> • 4 Possible Defenses: <ul style="list-style-type: none"> • Consent. In some crimes, lack of consent is an element of the crime (larceny, rape). With homicide, consent is not an element. Law does not allow consent to be used as a defense for homicide or serious bodily injury. There are limits to the level of bodily injury one can consent to. You cannot consent to aggravated assault or homicide to preclude liability. • Assumption of Risk/Contributory Negligence. Criminal liability may actually be broader than tort liability in some cases. The role of criminal law is to distribute community scorn, not to redistribute loss so AR and CN have no place here. Fault of victim can enter at the margins in criminal cases (provocation, enters judgment in rape cases).
<ul style="list-style-type: none"> • 5 Elements of depraved heart murder in PA <ul style="list-style-type: none"> • reasonably anticipate • cruelty/hardness of heart

<ul style="list-style-type: none"> consciousness of risk?? hard to say
<ul style="list-style-type: none"> c New York has roughly adopted MPC language but substituted "depraved indifference" for "extreme indifference". Boy found guilty in similar case to Malone in People v. Roe (1989), majority held that evidence of the actors subjective mental state was not relevant, only the known degree of risk to life that the defendant's action created that distinguished manslaughter from murder.
<ul style="list-style-type: none"> d Intoxication <ul style="list-style-type: none"> 1 MPC§2.08(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial. <ul style="list-style-type: none"> recklessness=negligence+consciousness of risk. here, no consciousness of risk, so MPC singles out one aspect of recklessness to acknowledge and discount by intoxication 2 US v. Fleming Second degree murder for killing while driving drunk and out of control. <ul style="list-style-type: none"> Malice Afterthought does not mean proving any hatred towards the victim and can be proved by reckless, wanton and gross deviation from a standard of care that the defendant was aware of a serious risk of death or bodily harm" To support conviction, government only needed to show that he operated his care in the manner he did with a heart that was without regard for the life and safety of others. A drunk driver may not meet because not necessarily intending to put others at risk, but he went beyond. Consciousness of risk (required in MPC, often in CL) Under MPC w/o 2.08, would be negligent homicide in MA, would be involuntary manslaughter
<ul style="list-style-type: none"> iv b. INTENT TO CAUSE SERIOUS BODILY HARM, WITH DEATH RESULTING <ul style="list-style-type: none"> a Intent to Cause Serious Bodily Harm + Death = Murder - Under the MPC, reckless indifference to human life standard includes this. At CL, this is a type of malice aforethought. b Policy Considerations: <ul style="list-style-type: none"> 1 (a) Difficult to determine intent (defendant will always claim that he just intended serious bodily injury). 2 (b) defendant should not have been involved in lesser crime in the first place. c Common Law Definition of Malice Aforethought and corresponding MPC: <ul style="list-style-type: none"> 1 Knowingly or intentionally causing death without provocation §210.2(1)(a) 2 Depraved heart 3 Intent to cause serious bodily injury and death results [Note: not in MPC] 4 Felony Murder §210.2(1)(b) (sort of same as PA depraved heart murder: value defect with regard to importance of human life) 5 Intent to oppose force of an officer of justice
<ul style="list-style-type: none"> 4 FELONY-MURDER <ul style="list-style-type: none"> i a. THE RULE AND ITS RATIONALE <ul style="list-style-type: none"> a Felony Murder Rule: A killing - even if it was accidental - will be murder if it was caused with the intent to commit a felony. Death caused in the commission of a felony is considered murder. Not based on notions of dangerousness or culpability, felony murder is essentially a strict liability rule. The felony on which a FM prosecution is based is called the predicate felony. Rule has been limited in modern times, and some courts have expressed dissatisfaction with it because its imposition of strict liability for serious crime seems to violate basic principles of criminal liability. [Note that England, where the felony murder rule had its inception, abolished the rule in 1957.]Prevailing rule is the more specific one as in Stewart. b People v. Stamp : death from heart attack after robbery. unreformed felony-murder= a type of strict liability <ul style="list-style-type: none"> 1 RULE: Robber takes his victim as he finds him.

<ul style="list-style-type: none"> • 2 Defendant was found guilty of felony murder even though victim was in poor health. As long as the homicide is the direct causal result of the robbery the felony-murder rule applies whether or not the death was a natural or probable consequence of the robbery.
<ul style="list-style-type: none"> • c No Foreseeability Requirement. [Some courts disagree and require foreseeability as a condition for applying felony murder.]
<ul style="list-style-type: none"> • d No mens rea Requirement.
<ul style="list-style-type: none"> • e Strict liability Doctrine: A felon is held strictly liable for all killings committed by him or his accomplices in the course of a felony.
<ul style="list-style-type: none"> • f Proximity/Causation Requirement: As long as the homicide is the direct causal result of the robbery the rule applies, whether or not the death was a natural or probable consequence of the robbery.
<ul style="list-style-type: none"> • 1 King v. Commonwealth defendant not responsible for accomplice's death in plane crash while smuggling marijuana because the illegal activity did not make death more probable. limitation on causal element
<ul style="list-style-type: none"> • g MPC§210.2(1)(b) The fact that the actor was involved in felony creates a rebuttable presumption that his conduct was with extreme indifference to human life (super-recklessness) and throws it to the jury. This provision was a compromise among the drafters of the MPC - many people felt felony murder should have been abolished altogether. Only NH follows the MPC provision. <i>MPC absorbs felony-murder into extreme indifference to the value of human life</i>
<ul style="list-style-type: none"> • h Policy Considerations:
<ul style="list-style-type: none"> • 1 Arguments for FM Rule: <ul style="list-style-type: none"> • Rule is extremely popular with public and law enforcement. [Only 3 states have abolished.] • Encourages people who commit crimes to do so in a way that is less likely to cause death (i.e. not carrying a gun). Discourages use of violence during commission of felonies. • Deters felonies by adding to the threat of conviction and punishment for the felony the additional threat of conviction and punishment for murder if death results. • Wrongdoer must run risk that things will turn out worse than expected. • Rule reflects societal judgment that a felony that causes the death of a human being is qualitatively more serious than an identical felony that does not.
<ul style="list-style-type: none"> • 2 Arguments against FM rule: <ul style="list-style-type: none"> • More effective to increase penalties for predicate felonies rather than severely punishing someone in the minute chance that death results. • FM distinction is unnecessary because most people convicted of FM could also be convicted of depraved heart murder. • Converting accidental death into first-degree murder renders punishment that is disproportionate to the wrong for which the offender is personally responsible. Rule erodes relationship between criminal liability and moral culpability. • at odds with retributive theory
<ul style="list-style-type: none"> • 3 3 general points <ul style="list-style-type: none"> • harm matters in the way the criminal law assigns punishment • hard to divorce criminal law from social attitudes and reactions • law cannot always be rational and cohesive
<ul style="list-style-type: none"> • ii b. THE "INHERENTLY DANGEROUS FELONY" REQUIREMENT
<ul style="list-style-type: none"> • a Many states have limited the scope of the felony murder rule by requiring that the felony be dangerous to life. Most courts examine the facts of the particular case and focus on whether under the circumstances there was a foreseeable danger/risk to human life. A few states demand that the felony be inherently dangerous to life to trigger felony murder.

<ul style="list-style-type: none"> • b People v. Phillips (S.Ct. of Cal. 1966): <i>Only such felonies as are inherently dangerous to human life can support the application of the felony murder rule.</i> Grand theft is not normally thought of as "inherently dangerous." Court said it will look to the elements of the felony in the abstract, not the particular facts of a case. Doctor who represented that he could cure a girl with eye cancer without surgery to remove the eye was convicted of felony murder in connection with grand theft for the misrepresentation. Conviction was reversed
<ul style="list-style-type: none"> • 1 People v. Henderson Unlawful restraint of another does not necessarily involve the requisite danger to human life for a felony-murder conviction and the statutory factors elevating the offense to a felony. not all unlawful restraint crimes involve conduct that is life-endangering. Legislature did not distinguish false imprisonment by violence or menace from by fraud or deciet. <ul style="list-style-type: none"> • since court can think of an instance of the crime that is not dangerous, the crime isn't inherently dangerous, so felony-murder doesn't apply
<ul style="list-style-type: none"> • c People v. Stewart (S.Ct. of RI 1995): Should determine if a felony is inherently dangerous to human life by weighing the facts and circumstances of the particular case. Mother went on crack binge and left baby to die. Rejects California test in Phillips and creates new test. <ul style="list-style-type: none"> • 1 court doesn't like felony-murder rule and trying to limit it • 2 "as committed" approach: used here, more aligned with retributive theory, more specific
<ul style="list-style-type: none"> • d Hines v. State (S.Ct. of GA 2003): Drunk hunter mistook his friend for a Turkey and shot him dead. Felony murder based on underlying crime of possession of a firearm by a convicted felon. Court convicted by applying dangerous as committed rather than inherently dangerous test. He was drunk, took an unsafe shot, it was dusk, etc.
<ul style="list-style-type: none"> • iii c. THE MERGER RULE: FELONY MUST BE INDEPENDENT
<ul style="list-style-type: none"> • a Felony Must be "Independent" Most courts hold that felony murder rule can be applied only where the predicate felony is somewhat independent of the killing. If the predicate felony is assault or battery by which the victim's death is caused, the felony "merges" into the killing and thus does not retain sufficient independence to be a predicate felony. If we did not have this rule, it would in effect wipe out our homicide grading system.
<ul style="list-style-type: none"> • b Tests: <ul style="list-style-type: none"> • 1 Independent Purpose - requires a fully independent purpose (is a drive-by that kills a third party an assault that merges or an independent crime) <ul style="list-style-type: none"> • Robertson dissent - what would have been accidental or involuntary manslaughter becomes murder when the D denies any intent to kill. • 2 "Included in Fact" - disallows only those offenses that would elevate all assaults to murder and subvert legislative intent <ul style="list-style-type: none"> • Hansen - drive by kills 3rd party;. court says independent felonious purpose test is misguided. convicts of felony-murder, declines to merge. Possible issue of unforeseen enlargement of criminal liability. (depraved heart murder probably would have applied.)
<ul style="list-style-type: none"> • c People v. Burton: armed robbery sufficiently independent to support a felony-murder conviction. <ul style="list-style-type: none"> • 1 Even if the felony was included within the facts of the homicide and was integral thereto, a further inquiry is required to determine if the homicide resulted from conduct for an independent felonious purpose as opposed to a single course of conduct with a single purpose. Case draws line betwee deaths resulting from assault (subject to merger rule) and deaths resulting from robbery or rape accomplished with a deadly weapon. Asks what he was trying to do • 2 Ireland - assault with a deadly weapon in included within murder therefore felony murder rule does not apply.

<ul style="list-style-type: none"> • 3 Wilson - burglary where the intended felony is assault with a deadly weapon cannot trigger the felony-murder rule
<ul style="list-style-type: none"> • 4 People v Mattison (Cal. 1971): defendant had supplied methyl alcohol to a fellow prison inmate who died from ingesting it. Act of furnishing a drug is sufficiently independent to uphold a felony murder conviction because purpose was independent of any intent to kill.
<ul style="list-style-type: none"> • 5 People v. Hansen (Cal 1995): Rejected the "integral part of the homicide test" because it would preclude the felony-murder rule for those felonies most likely to result in death. Rejected "independent purpose" of Burton because if have intent for another crime and injure someone have greater liability than someone who intended to hurt. Cut back on the scope of the merger rule. "Court chose instead to disallow as predicate felonies only those that would 'elevate all felonious assaults to murder or otherwise subvert the legislative intent.'"
<ul style="list-style-type: none"> • 6 People v. Ropertson (Cal 2004): Court reversed again and returned to the independent purpose test. Defendant fired at man stealing his hubcaps in an effort to scare him away. Convicted of second-degree felony murder on the basis of the predicate felony of discharging a firearm on a grossly negligent manner. Purpose was "independent" because he wasn't trying to kill, just trying to scare.
<ul style="list-style-type: none"> • iv d. THE "IN FURTHERANCE OF THE FELONY" RULE
<ul style="list-style-type: none"> • a All courts agree that the killing must be caused in the perpetration (or attempted perpetration) of the predicate felony. This does not require that the death occur before the felony is technically completed, only that actions taken before the felony is completed be shown to have caused the death.
<ul style="list-style-type: none"> • b Agency Theory/Rule In most states, the doctrine of felony murder only extends to those killings which are attributable to an act of the felon, co-felon, or accomplice, and not to those committed by other actors. "The doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise." Thus when the act of killing is committed by a police officer or bystander, the felony murder rule does not apply. The felony murder rule is applicable when a felon commits the act of killing even if a co-felon is a victim.
<ul style="list-style-type: none"> • 1 State v. Canola (NJ 1977): cuts back on cofelon rule to exclude any killings not committed by one of the agents
<ul style="list-style-type: none"> • Applies agency theory that one may not be criminally liable for acts not actually or constructively his own. NJ more stringent.
<ul style="list-style-type: none"> • Defendant and three others were robbing a store when shooting started. Store owner shot and killed one of the robbers and was, in turn, killed by another one of the robbers.
<ul style="list-style-type: none"> • c Proximate Cause Theory Some courts have found felony murder liability exists on basis of proximate cause theory. Felony murder applies to any death that is the proximate result of the felony - show that "but for" the commission of the felony, the victim would not have died.
<ul style="list-style-type: none"> • d Agency Theory and Proximate Cause Theory Compared: Under agency theory, the identity of the actual killer becomes a central issue; only if the act of killing is done by a co-felon will the felony murder rule be applicable. Under the proximate cause theory, the central issue is whether the killing, no matter by whose hand, is within the foreseeable risk of the commission of the felony.
<ul style="list-style-type: none"> • e Killings after the felony has ended
<ul style="list-style-type: none"> • 1 People v. Gillis (Mich 2006): Killing by hitting with car while escaping felony even after 10 miles from felony is sufficient to support felony-murder conviction. a felony continues to be "perpetrated" during defendants efforts to escape
<ul style="list-style-type: none"> • 2 State v. Amaro (Fla 1983): Man in police custody (handcuffs) still guilty of felony murder because his co-felon (drug dealer) shot and killed a police officer during arrest.

<ul style="list-style-type: none"> f Other Killings by Felons but not in furtherance <ul style="list-style-type: none"> 1 States v. Heinlein (DC 1973): Woman being raped by three men slapped one and then was killed by him. Other two not guilty of murder because Heinlein's unanticipated actions, not in furtherance of the common plan could not be attributed to them. 2 People v. Cabalero (Cal 1939): Lookout during robbery panicked and fired shots at passing car. Leader of the group shot lookout because of his stupidity. Court found all members involved in robbery guilty of murder under a statute declaring all murder committed in the perpetration of a robbery as murder in the first. Court thought that the shooting was connected to the ongoing felony and therefore not the shooters 'frolic of his own'
<ul style="list-style-type: none"> 5 MISDEMEANOR-MANSLAUGHTER <ul style="list-style-type: none"> i Junior version of felony manslaughter rule. In some states, a misdemeanor resulting in death can provide basis for a manslaughter. Rule has proved less durable than felony murder. <ul style="list-style-type: none"> a MPC has totally abolished this approach because it ignores culpability. b Limitations in most states that still apply <ul style="list-style-type: none"> 1 proximate cause 2 regulatory offenses excluded by some states - restricted to malum in se rather than malum prohibitum misdemeanors 3 misdemeanor must be dangerous or involve disregard for safety of others
<ul style="list-style-type: none"> D CAPITAL MURDER <ul style="list-style-type: none"> 1 How/Why <ul style="list-style-type: none"> i Deterrence Not very good evidence one way or the other of its effectiveness as compared to life with no parole. There is no way to do a controlled study. <ul style="list-style-type: none"> a Can act as a good deterrent to life prisoners who kill repeatedly in prison. b May lead to more crime - increase of brutalization. c Arguments about the way it is administered and that no evidence of deterrence doesn't mean it isn't ii Costly and Complicated Capital trials are wildly expensive so savings from no capital trials compared to savings from incarceration. iii one of SCOTUS's few interventions into substantive criminal law iv Evolution <ul style="list-style-type: none"> a Mandatory Phase For all murder (Pennsylvania formulation of 1st and 2nd degree murder, death was mandatory for 1st degree.) b Discretionary Phase For murder the jury would decide, no guidelines, enormous discretion. This system (small % of imposition) was tested in: 2 Furman v. Georgia. '72. Cruel and unusual as then administered (de facto moratorium) <ul style="list-style-type: none"> i Based on community sense, but actually most people are in favor. ii Brennan and Marshall concluded that all capital punishment was unconstitutional. iii The other three concurring justices put their objections to capital punishment on narrower grounds. iv Burger, Blackmun, Powell and Rehnquist dissented, stressing the long tradition and continued acceptance of capital punishment and argued that the majority's position involved an unwarranted intrusion into the legislative process. v This decision invalidated all Death Penalty statutes so states had to re-write statutes to conform. vi Excessive discretion inherent in administration of capital punishment creates substantial risk that it would be inflicted in an arbitrary and capricious manner, which violates eighth amd. prohibition of cruel and unusual punishment. Furman v. Georgia (1972) <ul style="list-style-type: none"> a Invalidated all death penalty statutes b In response, states re-wrote statutes to achieve compliance, many of whom mandated death sentence to avoid discretion problem but were subsequently found unconstitutional

<ul style="list-style-type: none"> • 3 Woodson v. North Carolina. '76 Mandatory death sentence violates 8th amendment, must have individualized consideration
<ul style="list-style-type: none"> • i inconsistent with contemporary standards of decency and fails to provide standards that will effectively guide the jury and respect dignity.
<ul style="list-style-type: none"> • ii State has to avoid extremes of Furman no standards and Woodson too standard
<ul style="list-style-type: none"> • 4 Gregg v. Georgia '76. Capital punishment is not cruel and unusual, per se. Reaffirmed after Furman
<ul style="list-style-type: none"> • i Furman: no sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.
<ul style="list-style-type: none"> • ii The concerns expressed in Furman may be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.
<ul style="list-style-type: none"> • iii The Eighth Amendment draws meaning from the changing standards of society and we cannot act as the legislature.
<ul style="list-style-type: none"> • iv The Georgia statute which lists 10 aggravating factors, at least one of which must be found by the jurors before a death sentence may be imposed, meets the requirement. state may not limit mitigating factors
<ul style="list-style-type: none"> • v appellate review of sentencing
<ul style="list-style-type: none"> • 5 McCleskey v. Kemp (S.Ct. 1987): Statistical study showing racial differences in who receives the death penalty is not a major systemic defect (as in Furman) and does not make capital punishment unconstitutional.
<ul style="list-style-type: none"> • i Baldus study:disproportion based on race of victim
<ul style="list-style-type: none"> • ii would open courts to similar racial claims for all crimes and other reasons.
<ul style="list-style-type: none"> • iii Fourteenth amendment requires showing of purposeful discrimination in this particular case.
<ul style="list-style-type: none"> • iv Powell says a partic decision-maker must show prejudice (a kind of proof you'll never get) so no challenge on this ground has ever survived since
<ul style="list-style-type: none"> • 6 Common Statutes Today -
<ul style="list-style-type: none"> • i Bifurcated trial Guilt is established separately from sentencing. Evidence of mitigating factors is presented at sentencing to (usually) the same jury, or a judge.
<ul style="list-style-type: none"> • ii Narrow Categories of murder considered eligible for capital punishment narrowed by aggravating factors.
<ul style="list-style-type: none"> • iii Appellate review State supreme court has appellate review over capital punishment to ensure that sentences are not arbitrary.
<ul style="list-style-type: none"> • iv Mitigating Factors: Lockett v. Ohio Court found that "the sentencer, in all but the rarest kind of capital case, [must] not be precluded from considering as a mitigating factor, any aspect of a D's character or record and any of the circumstances of the offense that the (proffers as a basis for a sentence less than death." (i.e., neglect, abuse, mental illness, intoxication etc.) Eddings v. Ok Evidence of background could not be ruled irrelevant and the sentencer must give some consideration to it. Skipper v SC Impermissible to exclude good behavior while awaiting trial.
<ul style="list-style-type: none"> • a most important mitigating factors
<ul style="list-style-type: none"> • 1 bad life
<ul style="list-style-type: none"> • 2 mental infirmity, psychological impairment
<ul style="list-style-type: none"> • 3 heavily under the influence
<ul style="list-style-type: none"> • b other important factors in punishment
<ul style="list-style-type: none"> • 1 victim was vulnerable
<ul style="list-style-type: none"> • 2 punishment seems cruel
<ul style="list-style-type: none"> • 3 killer had no purpose (more likely to get capital sentence, more frightening to people)
<ul style="list-style-type: none"> • 4 is there an alternative of life without parole>
<ul style="list-style-type: none"> • v Aggravating Factors Jurek v. Texas Court upheld jury questions that if found would require the death penalty because they were equivalent to aggravating factors: Whether acted deliberately with a reasonable expectation of causing death, Whether they defendant would be

a threat to society, and if raised by the evidence whether acted unreasonably in responding to victim's provocation

- 7 Constitutional Limitations

- **i Not for Rape:**

- a Coker v. Georgia Death penalty "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment."

- b Not for rape of a child: Kennedy vs. LA

- ii Espionage/ Aircraft Hijacking Court has not yet considered.

- iii **Co-Felon:** Enmund v. Florida Eighth Amendment prohibits death penalty on a ("who does not himself kill, attempt to kill, or intend killing take place or lethal force.

- iv **Co-Felon Major Participation:** Tison v. Arizona "major participation in the felony and reckless indifference to life satisfies the Enmund culpability requirement."

- v Limits on offenders

- a At least 16 years of age

- b not for the mentally retarded

- 8 Current Status

- i still arbitrariness

- ii prosecutory discretion on seeking it, standards for prosecutors aren't regulated

- iii concerns about mitigating factors and aggravating factors

- a aggravating factors list not narrow enough. in some jurisdictions 80% of murders eligible: don't help determine which murders are particularly heinous

- b how can jury know how to weigh mitigating against aggravating factors?

- iv individualization vs. even-handedness (esp. difficult due to breadth of trial and decentralization of system)

- v bad lawyers for capital defendants

- vi jury misinformation (if we don't give death, they will get out)

- vii Furman concerns

- viii new concerns about racial issues

- ix slow process, few actually carried out

- x many capital convictions have been overturned, raising innocence concerns

- xi last year, 42 out of 20,000 homicides, "like being struck by lightning

- xii politicization in state with elected judiciaries

- xiii some possible improvements

- a reduce number of aggravating factors

- b centralize review

- c more direct jury instructions

- d more even-handed and stronger provision of counsel

- IV JUSTIFICATION AND EXCUSE

- A **Justification:** The act is "right." We would want someone to behave the same way if the same situation were presented again. **Excuse:** The act is wrong, but the actor is excused from responsibility. We would not want someone to behave the same.

- B Justification: Defense of Self and Others. Issue of self defense raises questions about the morality of criminal punishment and provides a window on social issues (particularly race and gender.)

- 1 Self-Defense

- **i General Requirements for Self Defense**

- a Reasonable belief (must reasonably believe it was necessary to defend herself. Defense available even if it turns out that the belief was wrong, and there was no actual need for force in self-defense.

- b Threat of death, serious bodily injury, certain felonies

- c Immediacy of threatened harm: must have reasonably believed harm was imminent.

<ul style="list-style-type: none"> • d Unlawfulness of threatened harm
<ul style="list-style-type: none"> • e Force was necessary to prevent harm [No defense available to the use of force beyond that which reasonably appeared necessary to prevent the threatened harm.]
<ul style="list-style-type: none"> • ii Additional Requirements for Use of Deadly Force: Deadly force is force used with intent to cause death or serious bodily injury or which is known by its user to create a substantial risk of death or serious bodily injury. Perceived threat of death, serious bodily injury, kidnapping, or rape
<ul style="list-style-type: none"> • a MPC §3.04(2)(b) The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or rape. [Does common law include kidnapping and rape or only MPC?]
<ul style="list-style-type: none"> • b Deadly force necessary to prevent death or serious bodily injury - must have reasonably believed that deadly force was necessary.
<ul style="list-style-type: none"> • c Duty to retreat [See infra]
<ul style="list-style-type: none"> • iii United States v. Peterson: Self Defense predicated on law of necessity. "The right of self defense arises only when the necessity begins... There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save him there from. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances."
<ul style="list-style-type: none"> • iv People v. Goetz. NY imposes objective standard for self-defense.
<ul style="list-style-type: none"> • a The use of force may be justified in certain circumstances, such as the defense of a person, but only to the extent the person "reasonably believes" the use of force to be necessary to defend himself from what "he reasonably believes" to be the use or imminent use of unlawful force by the aggressor.
<ul style="list-style-type: none"> • b somewhat individualized standard: jury can consider circumstances (i.e. prior experiences being mugged.)
<ul style="list-style-type: none"> • c NY didn't adopt the MPC model - either complete defense or not (not by element of the crime) and allows deadly force against robbery.
<ul style="list-style-type: none"> • d jury nullification: ignored legal standard for reasonableness, said nobody could have been reasonable in the situation
<ul style="list-style-type: none"> • v Imperfect Self Defense: honest but unreasonable belief in need for lethal force
<ul style="list-style-type: none"> • a Where reasonableness is required for total exculpation, how should the law deal with a person who holds an honest but unreasonable belief in the need to use lethal force? Some jurisdictions and MPC provide "imperfect" defense to those unable to establish complete self-defense in a murder prosecution. (who killed under unreasonable belief that it was necessary to defend against imminent attack or by unreasonable amount of force cannot claim self defense is convicted of voluntary manslaughter on the view that "malice" is not present.
<ul style="list-style-type: none"> • vi Mistake of Use of Force (generally if reasonable, no liability, if unreasonable, some liability)
<ul style="list-style-type: none"> • a Reasonable: <ul style="list-style-type: none"> • 1 CL (Recognizes Imperfect) - No Liability • 2 CL (Does Not Recognize Imperfect) - No Liability • 3 MPC - No Liability
<ul style="list-style-type: none"> • b Unreasonable: <ul style="list-style-type: none"> • 1 CL (Recognizes Imperfect) - Manslaughter • 2 CL (Does Not Recognize Imperfect) - Murder • 3 MPC - No Liability
<ul style="list-style-type: none"> • c Negligence: <ul style="list-style-type: none"> • 1 CL (Recognizes Imperfect) - Manslaughter • 2 CL (Does Not Recognize Imperfect) - Murder

<ul style="list-style-type: none"> • 3 MPC - Negligent Homicide?
<ul style="list-style-type: none"> • d Reckless: <ul style="list-style-type: none"> • 1 CL (Recognizes Imperfect) - Manslaughter • 2 CL (Does Not Recognize Imperfect) - Murder • 3 MPC - Manslaughter
<ul style="list-style-type: none"> • e Superrecklessness <ul style="list-style-type: none"> • 1 MPC - Murder
<ul style="list-style-type: none"> • vii Resisting Unlawful Arrest as Self-Defense: Old Rule: Force permitted to resist unlawful arrest. Modern Rule: No right to resist arrest by officer (with exception for unlawful arrest made with excessive force.)
<ul style="list-style-type: none"> • viii Defense of Third Party (p. 771): <ul style="list-style-type: none"> • a Should D be regarded as "standing in his own shoes" or "in the shoes" of the person in whose defense he acted? Is the D exculpated if he reasonably believed he had to attack in order to save the person he reasonably took to be the victim? Or is D exculpated only if that other person in fact had a right to use defensive force? [MPC §3.05]. Old Rule: Defender put in shoes of third party. Modern Rule: Reasonableness. Note: There is a split between jurisdictions on how to deal with this issue. Most states and MPC use the modern rule.
<ul style="list-style-type: none"> • ix MPC §210.0: (2) "bodily injury" means physical pain, illness or any impairment of physical condition; (3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.
<ul style="list-style-type: none"> • x MPC §3.11(2): "deadly force" means force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force. Does this preclude men from using?
<ul style="list-style-type: none"> • xi Most jurisdictions put burden on prosecution to disprove self-defense by a reasonable doubt once the issue is raised by the evidence. (burden of production on D, burden of proof on P)
<ul style="list-style-type: none"> • xii Self-Defense and Battered Women's Syndrome (
<ul style="list-style-type: none"> • a Problems with Battered Victim Claiming Self Defense for Killing Batterer: <ul style="list-style-type: none"> • 1 Imminence of Threatened Harm How do we deal with the issue of imminence when the threat to (is a history of physical abuse rather than a single threatening episode? In many cases, (attacks batterer after a particular episode of abuse has ended. What does imminence add to necessity? Agressor's imminent threat vs. defendant's necessary use of force.
<ul style="list-style-type: none"> • 2 Escape Option (necessity) In many cases, the absence of any physical barrier to (leaving relationship suggests that she could have escaped and deadly force was unreasonable.
<ul style="list-style-type: none"> • 3 Courts have typically rejected individualized objective standard
<ul style="list-style-type: none"> • 4 law of self-defense pre-supposes a one-time encounter. works less well with endemic violence that authorities haven't been able to prevent.
<ul style="list-style-type: none"> • b Responses to Problems with Battered Women's Defense: <ul style="list-style-type: none"> • 1 Expert Testimony on Battered Women's Syndrome: Some jurisdictions allow expert testimony to establish Battered Women's Syndrome as grounds of self-defense (goes to reasonableness of her belief). Questions as to whether BWS is scientifically reliable.
<ul style="list-style-type: none"> • Why do we need expert testimony in addition to defendant's testimony? Helps the woman establish that she had an honest and reasonable belief in the imminent threat of death or serious bodily injury. Adds credibility if it can be established that her fear is "reasonable under the circumstances" (people in similar circumstance of cycle of abuse

behave in similar ways). Some feminists don't like because implies the woman is mentally disturbed. People have stereotypes of battered women.

- **State v. Kelly** Psychological evidence of battered women's syndrome is admissible depending on the relevance for the purposes of determining whether defendant actually believed her life was in immediate danger. The testimony is also relevant in considering the reasonableness of that fear, helping the jury determine whether a reasonable person would have believed that action to be immediately necessary to protect from death or serious bodily harm. **The standard for reasonableness is still that of a reasonable person, not a reasonable battered woman.** A public attack and she went to find her daughter; husband came at her again and so she thought he might have a weapon. He had tried to choke her in the public attack (these facts are disputed)

- Why Bring Evidence of Battery into Court?

- (Make battered woman appear more sympathetic to jury - maybe she should not be held liable at all because he was a bad guy.
- Make batterer look like he deserved it.
- Given history, she had more reason to fear serious bodily injury or death.
- Given history, she would know that this incident was going to be more serious, justifying deadly force.

- **2 Individualized Standard:** Should there be a different standard of reasonableness for a battered woman which accounts for physical and psychological characteristics, specific experiences as a victim of battering, and the disadvantaged position of women in society?

- **3 Different notion of imminence:** Some have argued for the elimination of requirement that D must have reasonably perceived the threatened deadly harm as imminent. Relevant policy concerns would be satisfied if the law required only that D reasonably perceive the use of deadly force in self-defense to be necessary.

- **State v. Norman** A battered wife killed her husband while he slept. No defense of self-defense exists even if she believed the danger to her to be imminent. Imminence is defined as an immediate threat which must be instantly met. D was not faced with an instantaneous choice. In this case, the D was not guarding against immediate danger, but only against the future possibility of such. [Note that dissent argues for changing the imminence standard.]

- convicted of voluntary manslaughter because of provocation? but too much cooling time?

- **c MPC§3.04(1) - Use of Force Justifiable for Protection of the Person.** Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. [Note that this is a relaxed requirement for imminence.]

- **d Should Battered Women's Homicide Cases Be Treated As:** Self Defense, Imperfect Self-Defense Mistake, Temporary Insanity (Lorena Bobbit), Provocation

- **2 Self-Defense 2 - Retreat**

- **i** There is no duty to retreat before using non-deadly force. The issue is more complicated as regards the use of deadly force.

- **a Majority Rule:** D (if not the original aggressor) need not retreat, even if he could do so safely, if he reasonably believes the aggressor will kill him or do him serious bodily harm.

- **b Minority Rule:** D must retreat if he can do so safely before using deadly force.

- **c** D need not retreat (in any jurisdiction) unless he knows he can do so in complete safety, and he need not retreat from his own home or place of business (unless the original aggressor). MPC has retreat rule but a majority of precedents oppose it.

<ul style="list-style-type: none"> • 1 State v. Abbot Actor must retreat if (1) deadly force and (2) he/she can retreat with complete safety. Actor does not have to endure any risk of harm by retreating. Self defense is measured by necessity, and there is not necessity if you can safely retreat.
<ul style="list-style-type: none"> • ii MPC §3.04(2)(b)(ii) is similar to minority rule, requiring retreat, surrender possession of a thing demanded by another asserting a claim of right to it, or comply with a demand that she abstain from any action she has no duty to take, if D knows this can be done with complete safety. Under MPC, there is no duty to retreat from your own home.
<ul style="list-style-type: none"> • iii No force for self-defense if D is the Original Aggressor. Forfeit self-defense right by starting it. Rationale is that victim, in defending against the aggressor, is ordinarily using lawful force, and (can only use self-defense in response to threats of unlawful harm. 2 times initial aggressor may regain right to self defense:
<ul style="list-style-type: none"> • a Non-deadly aggressor met with deadly force: If the victim responds to the aggressor's use of non-deadly force with deadly force, the aggressor can use whatever force appears reasonably necessary (including deadly force) to repel the attack. The rationale is that because non-deadly force cannot be met with deadly force, the victim by responding with deadly force has threatened unlawful harm. Not in all jurisdictions.
<ul style="list-style-type: none"> • b Aggressor withdraws: An aggressor may regain her right to act in self-defense by withdrawing from the affray. Ordinarily D must actually notify her adversary of the desire to desist, but some jurisdictions hold that even unsuccessful efforts to do so, if reasonable, will suffice.
<ul style="list-style-type: none"> • c United States v. Peterson No self-defense when D provoked.
<ul style="list-style-type: none"> • 1 "An affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the act of homicide... only in the even that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self defense."
<ul style="list-style-type: none"> • 2 In the case, decedent was original aggressor, but he withdrew. Defendant returned with his gun making him the new aggressor.
<ul style="list-style-type: none"> • d MPC §3.04: Traditional common law approach reflected in Peterson differs from the approach of the MPC. From comments: "So long as the assailant's victim employs moderate force in self-protection, it is not unlawful... When the victim goes beyond the necessity by answering moderate force with deadly force..., the fact of the original minor aggression does not warrant the denial of a privilege to defend against deadly force; the initial aggressor can and ought to be convicted of assault.
<ul style="list-style-type: none"> • 3 Necessity (Choice of Evils)
<ul style="list-style-type: none"> • i Accept responsibility, but deny that it was bad. D acted in the reasonable belief that perpetuation of the offense would prevent the occurrence of a greater harm or evil. Often hedged by limitations beyond what the MPC lays out because uncomfortable with it. Only half of the states recognize by statute and the federal by common law.
<ul style="list-style-type: none"> • ii MPC§3.02 Justification Generally: Choice of Evils (MPC calls necessity justification
<ul style="list-style-type: none"> • a Conduct which the actor believes [subjective] to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
<ul style="list-style-type: none"> • 1 the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented [objective] by the law defining the offense charged; and
<ul style="list-style-type: none"> • 2 neither the Code nor other law defining the offense provides exception or defenses dealing with the specific situation involved; and
<ul style="list-style-type: none"> • 3 a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
<ul style="list-style-type: none"> • b When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

<ul style="list-style-type: none"> c [Note that MPC seems to allow for net saving of lives, lesser evil principle. Comment to §3.02 states that "it would be particularly unfortunate to exclude homicidal conduct from the scope of the defense... conduct that results in taking life may promote the very value sought to be protected by the law of homicide." And that the MPC has express provision: "legislature foreclosure" which clearly indicates laws.]
<ul style="list-style-type: none"> iii Requirements of Necessity Defense: <ul style="list-style-type: none"> a Defendant must have committed crime for the purpose of avoiding a greater harm or evil. [Note: authorities are often not clear about whether this element must be objective or subjective.] Benefits clearly outweigh harms. Must be causal relationship btw action and thing sought to be avoided (Schoon) b Harm sought to be avoided was imminent. (Until threatened harm becomes imminent, there are ordinarily options other than breaking the law.) [NY law differs from MPC in requiring that situation be an emergency.] c Defendant believes that action was not only reasonable but right. d Harm to be avoided is grave. e No less harmful alternatives available. f Situation must not arise out of fault of actor. (Under MPC, D must not have been reckless or negligent in bringing about the situation if recklessness or negligence is sufficient for the crime charged.) g Not a defense to a homicide h Not a defense when you gain from the act
<ul style="list-style-type: none"> iv Borough of Southwark v. Williams: The doctrine of necessity is limited to cases of great and imminent danger. Homeless "squatters" not allowed to raise.
<ul style="list-style-type: none"> v People v. Unger: Necessity is an appropriate defense in this case even though the jury may find it faulty and the judge should have given instructions. D subject to rape and received a death threat in prison. United States v. Bailey Held contrary to Unger that necessity defense requires that D make a bona fide effort to surrender as soon as the duress or necessity has lost its coercive force. <ul style="list-style-type: none"> a paradox of Lovercamp criterion: if you escape you have to put yourself back in
<ul style="list-style-type: none"> vi Commonwealth v. Leno: Danger seeking to avoid must be clear and imminent. D distributed needles over state's prohibition and argued that the danger of HIV infection created a necessity defense. The Ds did not show that the danger they sought to avoid was clear and imminent, rather than debatable or speculative.
<ul style="list-style-type: none"> vii Regina v. Dudley & Stephens: Rejects necessity defense where an innocent was killed to save lives of others. Defendants who were on a lifeboat at sea killed and ate their sicklier companion to survive. Hunger is not an excuse of taking the life of another person. The argument is only successful when protecting oneself against an offending party. It was held that self-sacrifice should be required first, and that there should never be murder of innocents for personal gain, no matter what the exigencies. Also there were possibilities of imminent rescue or no rescue.
<ul style="list-style-type: none"> viii United States v. Holmes: "If two persons face a situation in which only one can survive 'neither is bound to save the other's life by sacrificing his own, nor would he commit a crime in saving his own life.'" However, a sailor owes a special duty.
<ul style="list-style-type: none"> ix United States v. Schoon: Indirect civil disobedience can never have a necessity defense. No direct causal relationship between conduct and the harm sought to be averted. The mere existence of a law or policy does not represent a legally cognizable harm and there are legal alternatives. Protested IRS conviction by holding protest in the IRS offices. No imminent harm. 4-part elaboration of judge-made federal necessity rule <ul style="list-style-type: none"> a no legal alternative to avoid harm b lesser evil c imminent harm

<ul style="list-style-type: none"> • d causal relationship
<ul style="list-style-type: none"> • C Excuse
<ul style="list-style-type: none"> • 1 Admit conduct was bad, deny responsibility. Justice precludes blame where none is deserved. Analysis depends on the act. Insanity: Excuse Based on Mental Irresponsibility. Need both the mental defect and an effect on the crime. We don't think the person did the right thing, but we don't think the mentally ill person should be a responsible agent.
<ul style="list-style-type: none"> • 2 Duress (being forced): <ul style="list-style-type: none"> -involuntariness doctrine -impaired volition -most states have it, but strongly hedged: want to induce people to resist pressures and temptations to break the law
<ul style="list-style-type: none"> • i Common Law: The defense of duress is recognized only when the alleged coercion involved a use or threat of harm which is present, imminent and pending and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. <ul style="list-style-type: none"> <i>imminence is most litigated issue</i>
<ul style="list-style-type: none"> • a Exception: Does not excuse the killing of an innocent person
<ul style="list-style-type: none"> • b Threatened injury must induce such a fear as a man of ordinary fortitude and courage might justly yield to
<ul style="list-style-type: none"> • c Courts have assumed as a matter of law that neither threats of slight injury nor threats of destruction to property are coercive enough to overcome the will of a person of ordinary courage. <ul style="list-style-type: none"> • 1 Ex: loss of job, denial of food rations, economic need, prospect of financial ruin
<ul style="list-style-type: none"> • d When the alleged source of coercion is a threat of future harm, courts have found that the defendant has a duty to escape from the control of the threatening person or to seek assistance from law enforcement authorities.
<ul style="list-style-type: none"> • e Assuming the above conditions are met, there is no requirement that the threatened person be the accused. Concern for the well-being of another, especially a near relative can support a defense of duress
<ul style="list-style-type: none"> • ii State v. Toscano (S. Ct. NJ 1977): <ul style="list-style-type: none"> • a Court Rejects Common Law Standard and adopts NJ Code (modelled on MPC): Duress shall be a defense to a crime other than murder if the defendant engaged in conduct because 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 be unable to resist.
<ul style="list-style-type: none"> • 3 Excuse Based on Mental Irresponsibility: The Insanity Defense
<ul style="list-style-type: none"> • i M'Naghten Rule
<ul style="list-style-type: none"> • a M'Naghten's Case To establish a defense on the grounds of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong." Burden of proof on D.
<ul style="list-style-type: none"> • 1 Focus is on "cognitive" impairment and in MPC 1st prong. Does not allow cases where (knows right from wrong, but cannot control the behavior - "volitional" impairment.
<ul style="list-style-type: none"> • 2 Two important changes: <ul style="list-style-type: none"> • No longer classes of people who are insane/sane. • Insanity is no longer observable to a lay person. May require expert testimony. • Becomes dominant standard in Anglo-American world. 1/3 states imposed an additional and alternative way to find insanity based on irresistible impulse test which is volitional and in MPC 2nd prong. Criticism of Irresistible Impulse - The rule as originally conceived has been criticized on the grounds that (1) usually insanity involves a long brooding rather than an impulsive explosion, and (2) How can jury distinguish between an irresistible impulse and an impulse not resisted? Considered psychologically unrealistic.

<ul style="list-style-type: none"> • 3 Affective sense of knowledge: to know something is wrong and to have that knowledge that affects your behavior. capacity to function with respect to knowledge.
<ul style="list-style-type: none"> • 4 The King v. Porter Explanation of M'Naghten rule: 1) state of mind must be one of disease, disorder or disturbance arising from some infirmity, temporary or of long standing, and 2) must have been of such character as to prevent him from knowing the physical nature of the act he was doing or of knowing that what he was doing was wrong. Some people are mentally abnormal but know right and wrong.
<ul style="list-style-type: none"> • ii MPC Approach - The history of dissatisfaction with the M'Naghten, irresistible impulse, and Durham test led the American Law Institute to formulate a new approach in the MPC §4.01 Mental Disease or Defect Excluding Responsibility. This approach became very popular. Trend in favor of MPC approach was abruptly reversed following the 1982 acquittal of Hinckley, who shot and wounded Reagan.)
<ul style="list-style-type: none"> • a A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. <ul style="list-style-type: none"> -@time of conduct -disease or defect: brain irregularity -lacks substantial capacity: permits doctors to testify truthfully. doctors talk about tendencies, not absolutes -appreciate criminality or conform conduct (one or the other, volitional or cognitive)
<ul style="list-style-type: none"> • 1 Note that MPC uses both cognitive and volitional tests, similar to expanded M'Naghten rule. Uses "appreciate" rather than "know" to specify affective aspect of cognitive test.
<ul style="list-style-type: none"> • 2 "Appreciate" = affective sense of knowledge.
<ul style="list-style-type: none"> • 3 Substantial capacity is designed to reflect fact that psychiatry operates in degree and not all or nothing - meant to accommodate psychiatric testimony.
<ul style="list-style-type: none"> • 6 ways Law is different from psychiatry. <ul style="list-style-type: none"> • Law asks legal/normative question, Psych asks factual/medical condition. • nature of personality vs. human agency (behavior as marker) • conduct is characterized yes/no for law, tendency for psych • purpose of legal institution is to blame, of medicine is to treat. judgmental vs. non-judgmental • law makes pre-suppositions about free will and moral agency; psych is more deterministic • mind/body problem: law- mind, psych-brain
<ul style="list-style-type: none"> • Has become the battle of the experts. (Ake vs. OK, indigent defendants get experts appointed)
<ul style="list-style-type: none"> • b United States v. Lyons: rejected volitional prong of insanity defense. Only if D, because of mental disease or defect, cannot appreciate the wrongfulness of his conduct. Volition is confusing and speculative with more opportunities for mistakes. Most who fail volition test would also fail cognitive.
<ul style="list-style-type: none"> • c Blake v. United States: Using the "Substantial" definition of insanity is more up-to-date and allows jury to determine under evidence. Once raised, burden of proving not insane beyond a reasonable doubt by the prosecution. Had history of psych and shot wife.
<ul style="list-style-type: none"> • d State v. Green: made competent to stand trial by drug treatment. State has the burden of proving D's sanity beyond a reasonable doubt by showing that (1) he did not suffer from mental disease or defect or (2) if he was, it did not prevent him from knowing the wrongfulness of his conduct.
<ul style="list-style-type: none"> • e Juries don't usually relate to definition in the law; usually judge if the defendant is insane or not. Less likely to find guilty when know that defendant will be kept off the streets via civil commitment. Current shift to move burden to defendant

- iii **Federal Law:** In response to the Hinckley verdict, in 1984, Congress enacted a provision that supercedes the Lyons decision and narrows the insanity test even further.
 - a **§17 Insanity Defense:** It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
 - 1 Volitional prong eliminated. May make a difference in the case of impulse disorders.
 - 2 very difficult to show difference between people who are unable to conform and people who didn't, so can't use that as a standard
 - b Very few insanity defenses in federal law - more important as an example that has had influence on the states.
- iv Procedural issues:
 - a Burden of proof
 - 1 All jurisdictions create a presumption of sanity if the defense is not raised.
 - 2 The burden of production lies with the Ds. Jurisdictions differ on how much evidence must be brought before presumption disappears. Some require only some, others require that evidence raise a reasonable doubt as to D's sanity.
 - 3 At this point, once presumption disappears, different jurisdictions may assign different burdens of proof and burden may be on either D or on the prosecution. As part of the reform of insanity defense following Hinckley acquittal, trend has developed placing the burden of proof on D. In federal courts D must prove by clear and convincing evidence.
 - 4 **Jones** case on 869-70. burden of proof shifts to D in release hearing
 - 5 civil commitment offers confinement on a much lower standard of proof than in crim court
 - b **Ake v. Oklahoma** Where the defense is raised, government must pay for a psychiatric expert witness for indigent defendants. Does not determine quality.
- v "Reform": Abolition, or Guilty but Mentally Ill
 - a **Return to M'Naghten Test:** Following the Hinckley acquittal, many states adopted modernized versions of the M'Naghten test.
 - b Abolition of Insanity Defense:
 - 1 Policy Considerations:
 - Arguments for abolition:
 - Insanity meaningless.
 - People are dangerous, lock them up.
 - People are likely to be locked up anyway, and often spend more time in mental hospitals than they would in prison if convicted. Defense does not really benefit impaired offenders.
 - Efforts to apply insanity tests are time consuming and often so confuse juries that improper acquittals result.
 - Arguments against abolition:
 - Insanity imprecise, but not meaningless.
 - Some version of defense has been present across time and cultures.
 - Most cases involving insanity defense are not contested.
 - Not giving up much deterrence.
 - Upholding principle that we only punish people who are morally culpable. Impaired persons can avoid stigma and harsh punishment imposed for criminal responsibility.
 - Effective way of diverting proper persons into mental health system.
 - c Guilty But Mentally Ill (GBMI):
 - 1 (1) The verdict is appropriate when the judge or jury determines that the D (1) is guilty of the offense; (2) was mentally ill at the time of the offense; and (3) was not legally insane at the time of the offense. A D found GBMI will be sentenced as normal but will be

examined before his prison term and if he is found in need of treatment he will be transferred to a mental institution.

- 2 Is this less stigmatizing or doubly stigmatizing?
- 3 Has not in practice improved treatment, because jury cannot control what happens in the corrections system. Seems to function as a jury compromise.
- 4 14 States have followed Michigan's lead with "guilty but mentally ill".
- 5 Possible Verdicts in Insanity Defense Cases:
 - Guilty
 - Not Guilty
 - Not Guilty by Reason of Insanity.
 - Guilty But Mentally Ill (New verdict)

• d **Competency to Stand Trial:** Insanity is at the time of the criminal act, competence is the mental state at the time of trial.

- 1 Can D understand charges?
- 2 Can D understand proceedings?
- 3 and cooperate with lawyers to prepare a defense?
- 4 Limits are now set on the length of time one can be incapacitated to determine competence to stand trial. (Jackson v. Indiana, on handout).
- 5 If D is found to be incompetent, cannot be prosecuted criminally, but can be civilly committed. For commitment one must be mentally ill and dangerous to self or others (government has to prove elements by clear and convincing evidence Addington v. Texas SC 1976) or simply cannot care for oneself. Can still be competent if suffering from amnesia. Sometimes force medication.
- 6 All states bar execution of a condemned prisoner who becomes insane (humanitarian concerns and concerns about allowing him to appeal and defend himself and retribution concerns that D understands)

• V RAPE

• A THE OFFENSE OF RAPE

• 1 THE ACT REQUIREMENT

- i force or forcible compulsion (traditional)
- ii threat of force can be substitute for actual force most jurisdictions
- iii can have force with consent
- iv focus on victim's resistance to evaluate use of force (actus reus)
- v **State v. Rusk:** Rape after ride home from a bar on fear of force

• a Trial: Found guilty by jury of second degree rape, question of sufficiency of evidence of force.

• b Overturned by Appellate Court on **insufficient evidence**: look at facts in light most favorable to the prosecution (whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.) Reasonableness of victim's fear of force is a jury issue.

• c Court concluded that the jury could rationally find that the essential elements of second-degree rape had been established and that Rusk was guilty of that offense beyond a reasonable doubt.

• d Pat agreed to give Rusk a ride home and cautioned him that she was just being friendly and not looking for anything more. He repeatedly asked her up which she refused and then he took her car keys so she followed him up. He pulled her to the bed and undressed her. She asked if he would not kill her if she did what he asked; he lightly choked her and said yes.

• e elements of 2nd degree rape in MD

- 1 intercourse
- 2 force or threat of force**this is the issue on appeal (see Hazel for elements)

<ul style="list-style-type: none"> resisted and overcome by force <i>does verbal resistance count?</i>
<ul style="list-style-type: none"> didn't resist bc prevented by threats ** P's arg <i>fear must be extreme and genuine and also probably reasonable</i>
<ul style="list-style-type: none"> 3 against her will (subjective) 4 without consent (objective)
<ul style="list-style-type: none"> vi Requirements
<ul style="list-style-type: none"> a Force: Typical statutes specify that conviction of rape requires proof of intercourse committed by force or forcible compulsion and the victim's nonconsent. Force = victim resistance is overcome or did not resist because of threats to her safety, including but not limited to death or serious bodily injury. Hazel made it clear that a victim's fear had to be genuine (fear or resistance as lack of consent) but didn't define if it could be unreasonable; most jurisdictions require reasonableness.
<ul style="list-style-type: none"> 1 Non-consensual intercourse without force can be criminal in special circumstance (i.e., statutory rape, sex with mentally incompetent or unconscious person, certain forms of deception).
<ul style="list-style-type: none"> 2 State in the Interest of M.T.S. Application of the force requirement. No extra force required. Any sexual touching without freely given permission. <ul style="list-style-type: none"> Under NJ statute, force is satisfied by the normal amount of physical force required to accomplish penetration if there is no freely given consent. Any sexual penetration without affirmative permission is sexual assault (similar to battery where any contact unauthorized and offensive is a crime). Permission may be given in either words or actions that, when viewed in light of all of the surrounding circumstances, would demonstrate to a reasonable person affirmative and freely-given authorization to the specific act of sexual penetration. NJ law did away with resistance standard; to require physical force would go against this move
<ul style="list-style-type: none"> b Resistance: Traditionally rape did not exist unless there was resistance, in some states "to the utmost." All states have abandoned "to the utmost" requirement, but most courts still require "reasonable" resistance. Puts the man on notice that this is unwanted sex. Proud instinct of an innocent honorable woman to resist; male view of how women ought to behave in a difficult situation. Hard to differentiate until she resists to something
<ul style="list-style-type: none"> c Reasonable Apprehension Most courts agree with principle that victim's fear (and therefore failure to act) must be reasonably grounded. <ul style="list-style-type: none"> 1 People v. Warren: Complainant's failure to resist when it was within her power to do so [her apprehension was not reasonable] conveys the impression of consent regardless of her mental state, amounts to consent and removes from the act performed an essential element of the crime" circumstances must show that resistance would be futile or life endangering or that victim is overcome by superior strength or paralyzed by fear. 2 Purpose is to put perpetrator on Notice. Is this right? Shouldn't a conviction be proper regardless of reasonableness. Conversely shouldn't a conviction be improper if the fear is reasonable but the defendant is totally unaware of them.
<ul style="list-style-type: none"> vii MPC Approach (Graded) §213.1 Rape and Related Offenses [MPC seeks to shift focus of attention from victim's behavior to that of defendant and seeks to differentiate between different degrees of force. <ul style="list-style-type: none"> a Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: <ul style="list-style-type: none"> 1 he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or 2 he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or 3 the female is unconscious; or 4 the female is less than 10 years old.

<ul style="list-style-type: none"> • b Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony in the first degree. Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required.
<ul style="list-style-type: none"> • c Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: <ul style="list-style-type: none"> • 1 he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or [Who is this woman?] • 2 he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or • 3 he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.
<ul style="list-style-type: none"> • 2 NONPHYSICAL THREATS (acts/promises don't necessarily transform sex to rape) <ul style="list-style-type: none"> • i State v. Thomson. Defendant, a high school principal, allegedly forced a student to submit to sexual intercourse by threatening to prevent her from graduating high school. Court affirmed dismissal of sexual assault charges. In Montana force defined as threat of imminent death bodily injury or kidnapping. Court said acts were disgusting but hands were tied due to language of the statute. • ii Commonwealth v. Mlinarich. Defendant assumed custody of 14-year old girl. Forced her to engage in sexual acts or be sent back to detention center if she refused. Pennsylvania court overruled rape conviction holding that rape as defined by the legislature "requires actual physical compulsion or violence or a threat of physical compulsion or violence sufficient to prevent resistance by a person of reasonable resolution" To define otherwise would put in the hands of the jurors unlimited discretion in deciding which acts threats or promises will transform sexual intercourse into rape. • iii Solutions: Rape law is meant to protect sexual choice rather than physical protection. This freedom can be as effectively negated by nonphysical as by physical coercion
<ul style="list-style-type: none"> • a Gross Sexual Imposition. MPC 213.1 above A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: <ul style="list-style-type: none"> • 1 he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or [Who is this woman?] • 2 he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or • 3 he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.
<ul style="list-style-type: none"> • b Under (a) how does one distinguish a threat from an offer. MPC commentary: submission must result from coercion rather than a bargain
<ul style="list-style-type: none"> • c Other States achieve a similar result to MPC by extending rape to situations in which consent is obtained by duress, coercion, extortion, or by using a position of authority. Pennsylvania adopted a statute defining the forcible compulsion required for a rape conviction as "compulsion by use of physical intellectual, moral, emotional or psychological force, either express or implied." NH statute makes it a felony to threaten to "retaliate against the victim"
<ul style="list-style-type: none"> • 3 MENS REA: rare that culpability is the key issue in a rape case bc it's usually a subjective standard and because it's rare that the facts are agreed upon <ul style="list-style-type: none"> • i Consent Lack of consent is generally found when a reasonable person would have known from the victim's words or actions that she was not consenting. <ul style="list-style-type: none"> • a Commonwealth v. Sherry. Mistake of fact defense as to victim's consent must be objective (mistake must be reasonable). Although the court did not reach the issue of whether a reasonable, good-faith mistake of fact is a valid defense, it ruled that "when a woman says

'no' to someone, any implication other than a manifestation of non-consent that may arise in that person's psyche is legally irrelevant, and thus no defense. Any further action is unwarranted and the person proceeds at his peril. Physical resistance not necessary; any resistance is enough when it demonstrates lack of consent is honest and real Victim with co-workers at a Halloween party. She thought they were horsing around until Three men started disrobing and attempted intercourse and she told them to stop. Victim felt too humiliated to physically fight.

- b **Commonwealth v. Ascolillo** Honest and reasonable mistake as to consent is not a defense to rape in Massachusetts.

- c **Betts** (AM 74): Initial resistance isn't dispositive. Focusing on mens rea wouldn't solve the problem here.

- ii **Recklessness v. Negligence.** Most jurisdictions recognize mistake of fact as to consent as a defense but only where mistake was honest and objectively reasonable. However some jurisdictions will hold a person guilty if he was reckless or negligent with respect to consent, and some states have nearly a strict liability standard (MA). Mistake of fact in that honestly/ reasonably believed there was consent can negate mens rea, but not if negligence or recklessness.

- 4 COMMENTARY

- i Legislative Reform

- a Area of great divide between law on the books and how it is applied by judges and juries

- b Common belief that reforms have done little

- c Some evidence that things are better

- 1 Evidence that justice system officials now treat victims better

- 2 More offenders being sent to prison in acquaintance rape cases

- 3 Reporting rate, probability of conviction and imprisonment for acquaintance rape increased between 1973 and 1990 (small increases)

- ii Four possible legislative definitions

- a force or reasonable fear of harm (crime of violence approach)

- b no means no (non-consent as critical element). "opt out" approach

- 1 words that agree-more protective

- 2 words alone--less protective

- c affirmative consent (similar to MTS): "opt in" approach

- d Affirmative verbal consent

- iii Impact of Rape Reform Legislation (limited capacity to reform)

- a Predominant conclusion is that reform litigation has had little effect on either victims' reporting behavior or on criminal justice system practices.

- b Consistent evidence that justice system officials now treat victims better

- c More offenders being sent to prison in acquaintance rape cases.

- d Reporting rate, probability of conviction and imprisonment for acquaintance rape increased between 1973 and 1990 (small increases).

- iv Feminist Perspectives

- a Power (McKinnon, Stanko) - to be a woman is to experience sexual terrorism at men's hands; typical and aberrant male behaviour is not a useful rubric since women often feel threatened and are confused by both

- b Empathy/Relational (Gilligan) -

- c Equality (Vivian Berger) - women should not be overprotected (jury must believe that the victim at least said no), portraying women as incapable of standing up to pressure cheapens the right to self determination

<ul style="list-style-type: none"> • d Counter: Bryden - doing away with the force requirement causes rape to be entirely consistent with consensual sex and will make claims of mistake more plausible.
<ul style="list-style-type: none"> • B SOME PROBLEMS OF PROOF
<ul style="list-style-type: none"> • 1 MPC Provisions Although these rules rarely exist in current law, they are still effectively embedded in social mores.
<ul style="list-style-type: none"> • i Corroboration Requirement Very difficult to demonstrate. Most states that initially had this requirement abolished it. Rationale for requirement was that a charge of rape is easy to make and difficult to disprove. Difficult to prove unless semen.
<ul style="list-style-type: none"> • a MPC§213.6(5) - Testimony of Complainant. no person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. corroboration may be circumstantial...
<ul style="list-style-type: none"> • ii Prompt Complaint Requirement Many jurisdictions require a complaint within a certain time to prosecute, but in practice in how police bring cases.
<ul style="list-style-type: none"> • a MPC §213.6(4) Prompt Complaint. NO prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within 3 months of its occurrence or, where the alleged victim was less than 16 years old or otherwise incompetent to make complaint, within 3 months after a parent, guardian or other competent person specially interested in the victim learns of the offense.
<ul style="list-style-type: none"> • iii Caution Requirement Cautionary instructions that should examine victim's testimony with care because so easy to make an accusation (not given in other crimes)
<ul style="list-style-type: none"> • 2 Rape Shield Laws Rape shield laws protect the admissibility of the victim's sexual history generally by banning all such evidence except as regards the perpetrator or to establish that a person other than the accused was responsible for the act. The purpose is to prevent D from putting the victim's moral character on trial.
<ul style="list-style-type: none"> • i Constitutional Issue The problem is that defendants have a constitutional right to cross-examination, but this can be overruled if the evidence is too prejudicial. Constitutional argument in rape cases cuts one way - in favor of men because they are the defendant. SCOTUS has taken broad view of 6th amendment rights in favor of D.
<ul style="list-style-type: none"> • ii Expansion of culpability requirements has done little because police and prosecutors still reflect the values that the laws were trying to combat.
<ul style="list-style-type: none"> • iii Types of evidence D might try to introduce
<ul style="list-style-type: none"> • a prior sexual history: hardest to introduce BUT idea of relevant evidence in law is low standard (Williams, AM 86: not evidence that makes something probable, but ANY tendency to make any fact more likely than it would be without the evidence)
<ul style="list-style-type: none"> • b prior sexual history known to D: general rule (w/ exceptions) is no prior bad acts bc too prejudicial. exception in sexual assault cases
<ul style="list-style-type: none"> • c prior sexual history with D (as in Betts): probably would violate 6th amendment to exclude
<ul style="list-style-type: none"> • VI OMISSIONS
<ul style="list-style-type: none"> • A (Failure to Act) There are a number of statutory crimes which are specifically defined by failure to act (such statutes create legal duties) and other crimes which may be committed either by acting or by failure to act under circumstances which give rise to a legal duty to act. The second type are those crimes that only define a result and do not specify how the crime is to be committed, such as homicide or arson.
<ul style="list-style-type: none"> • 1 action= willed, muscular contraction (what's ordinary)
<ul style="list-style-type: none"> • 2 failure to make you better vs. things that make you worse
<ul style="list-style-type: none"> • 3 no entirely accurate, rigorous distinction
<ul style="list-style-type: none"> • B For Omission to Constitute a Crime you need:
<ul style="list-style-type: none"> • 1 Omission Given Legal Duty (for a particular crime)
<ul style="list-style-type: none"> • 2 Requisite Culpability
<ul style="list-style-type: none"> • 3 Causal Element (sometimes)
<ul style="list-style-type: none"> • 4 ** Must Satisfy Other Elements of Crime Set Forth in Statute

<ul style="list-style-type: none"> • C Duty to Act Legal duties do not correlate with moral duties. There is no general duty to aid another in peril, even if there is no danger of inconvenience to the actor. However, there are situations which do give rise to duties. Common law singles out people who have a special interest, connection to person in peril.
<ul style="list-style-type: none"> • 1 Statute - hit and run statutes, tax statutes, registering for the draft
<ul style="list-style-type: none"> • 2 Relationship/Status - parental (williams) or spousal, ship captain to passenger, master to servant <ul style="list-style-type: none"> • i Duty of Landowner - Welansky, owner of nightclub
<ul style="list-style-type: none"> • 3 Contract - lifeguard, nurse,, railroad gate-person (when contractual duty to protect or care for others)
<ul style="list-style-type: none"> • 4 Voluntary Assumption of Care and Seclusion So That Others Cannot Provide Aid
<ul style="list-style-type: none"> • 5 Creation of the Peril Defendant at fault in creating danger may have a duty to save
<ul style="list-style-type: none"> • D MPC 2.01(3) (dominant)
<ul style="list-style-type: none"> • 1 Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: <ul style="list-style-type: none"> • i the omission is expressly made sufficient by the law defining the offense [specific duty in criminal statute for which you are charged (e.g. 18 year old men registering with Selective Service)]; or • ii a duty to perform the omitted act is otherwise imposed by law [General legal duty (B: 1-5 above)].
<ul style="list-style-type: none"> • E CASES:
<ul style="list-style-type: none"> • 1 Pope v. State Cannot convict defendant under child abuse statute even if she had moral obligation to help child, unless she is within the class of people on whom the statute imposes a legal obligation. Defendant took in Norris, who suffered from mental illness and her infant child. While in Pope's presence, Norris went into a fit of violent frenzy and injured her child. A person does not become responsible for a child because he knows that the parent is incapable of caring for the child.
<ul style="list-style-type: none"> • 2 Jones v. United States: conviction reversed bc no jury instructions to find legal duty to care <ul style="list-style-type: none"> • i Defendant would be guilty if either he undertook a contractual duty to care for the child, or the child was secluded from its mother. Moral duty, but no legal duty. Infant child of placed with (. Mother lived with (. Conflict in evidence as to whether he was paid to take care of the baby. (was charged with failing to provide for the child, resulting in his death. Both of these are questions of fact on which there is a conflict of evidence and are therefore jury questions. • ii Might be murder rather than involuntary manslaughter if the defendant refused aid with the intention of causing death, or with full knowledge of a great risk that the defendant would die. In Commonwealth v. Pestinikas defendant convicted of murder in the third degree for permitting a 92 year old man to die of starvation after agreeing to feed him and knowing that there was no other way for him to obtain food.
<ul style="list-style-type: none"> • F Good Samaritan Statutes - A handful of states, including Minnesota, Rhode Island, Vermont and Wisconsin, have enacted Good Samaritan statues which make it criminal to refuse to rescue a person in emergency situation. Differ from Anglo-American norm.
<ul style="list-style-type: none"> • 1 Vermont limits by: <ul style="list-style-type: none"> • i danger or peril to self • ii interfere with important duties to others • iii reasonable assistance • iv you KNOW someone else is giving care
<ul style="list-style-type: none"> • G Policy Consideration
<ul style="list-style-type: none"> • 1 Arguments for general duty to aid: <ul style="list-style-type: none"> • i Utilitarian: B>PL • ii Rights-based: enhances autonomy • iii Criminal law should reflect important moral norms
<ul style="list-style-type: none"> • 2 Arguments against: <ul style="list-style-type: none"> • i Utilitarian: bad incentives, makes people more careless?

<ul style="list-style-type: none"> • a People ought to act out of altruism rather than compulsion
<ul style="list-style-type: none"> • ii Rights-based: interferes with autonomy
<ul style="list-style-type: none"> • iii Slippery slope problem - can this problem be prevented by requiring emergency or limiting application to grossly unreasonable omissions?
<ul style="list-style-type: none"> • VII THE SIGNIFICANCE OF RESULTING HARM
<ul style="list-style-type: none"> • A CAUSATION (see checklist, MPC vvs. common law)
<ul style="list-style-type: none"> • 1 For crimes that include a result element the defendant's culpable conduct must also be the legal cause of the result. Many crimes do not have a result element and only criminalize conduct, so causation is often not an issue (the opposite is true in the law of torts). Need cause in fact and cause in law.
<ul style="list-style-type: none"> • 2 Cause-in-Fact: "But For" Causation - Prosecution must first establish that "but for" defendant's acts, the result would not have occurred as and when it did. Necessary but not sufficient
<ul style="list-style-type: none"> • i Concurrent Sufficient Causes - 2 simultaneous causes are both "but for" causes, even though the result would have occurred if either one of the factors had not come into operation.
<ul style="list-style-type: none"> • a If one person attempts to kill and another kills first, the person who kills first is liable for murder and the other of attempted murder.
<ul style="list-style-type: none"> • ii Substantial Factor Requirement - Strictly speaking, cause-in-fact does not require a "but-for" cause, but rather that D's conduct be a significant or substantial factor in bringing about the result.
<ul style="list-style-type: none"> • iii Speeding Up Result - Factual causation will be present even though defendant's acts simply speeded up the result.
<ul style="list-style-type: none"> • 3 Legal Cause/ Proximate Cause - As a policy consideration, should D be held responsible for a particular result. "notoriously bereft of rules," basically for jury to decide, so often gets equated to our feelings of moral blameworthiness.
<ul style="list-style-type: none"> • i In addition to but-for cause, there must be proof of proximate causation to support a finding of criminal liability. Proximate causation is a flexible analysis involving a variety of policy considerations which ultimately asks whether as a matter of policy D should be held responsible for a particular result. No general rule on proximate cause - just conclusions based on data points of cases.
<ul style="list-style-type: none"> • ii Natural and probable consequence: if the result occurred as a "natural and probable consequence" of the criminal act and no intervening factor broke the chain of causation, even if result occurred in a different manner than D expects. The variance can be as to: (1) the person or property harmed, (2) the manner in which the harm occurs or (3) the type or degree of harm.
<ul style="list-style-type: none"> • a Type or Degree of Harm
<ul style="list-style-type: none"> • 1 People v. Kibbe: guy freezes on road, plan to steal and forcing him out of car suffice to establish natural and probable consequence.
<ul style="list-style-type: none"> • Defendants and victim were drinking at a bar. D already decided to steal Stafford's money, agreed to drive him. During the drive D forced victim to exit the vehicle. Victim fell onto the shoulder of the rural two-lane highway. The temperature was near zero. A half-hour later victim was hit by a truck driving down the road. D's activities were a sufficiently direct cause of the death of victim so as to warrant the imposition of criminal sanctions.
<ul style="list-style-type: none"> • b Person or Property Harmed - Transferred Intent - A (is held liable if he intends to shoot X but misses and hits Y. This doctrine is clearly legal fiction ((had not real intent to kill Y) but satisfies a sense of fairness. For murder, intent can be transferred, but not premeditation. Must be a voluntary action to transfer intent.
<ul style="list-style-type: none"> • iii Breaking the Chain of Causation - Proximate causation does not exist if the causal chain between D's act and the result was affected by an intervening cause.
<ul style="list-style-type: none"> • a Cause must be intervening - Must be set in motion after D's act
<ul style="list-style-type: none"> • b Must be unforeseeable

<ul style="list-style-type: none"> • 1 Improper Medical Treatment - Generally not viewed as an intervening cause since risks are foreseeable, except if medical care is grossly negligent (as to constitute medical malpractice).
<ul style="list-style-type: none"> • 2 Intervening Disease - Would be unforeseeable to contract a rare disease. If there were an outbreak, it might be foreseeable
<ul style="list-style-type: none"> • 3 Acts of Victim: negligence of victim does not affect <ul style="list-style-type: none"> • United States v. Hamilton: If a person inflicts a blow that may not be mortal in and of itself, but thereby starts a chain of causation that leads to death, he is guilty of homicide. This is true even if the deceased "contributes to his own death or hastens it by failing to take proper treatment." Victim's failure to take care of himself does not relieve defendant of responsibility.
<ul style="list-style-type: none"> • 4 Take Your Victim As You Find Him (Stamp)
<ul style="list-style-type: none"> • c Must Be Sole Major Cause of Result - If it simply combines with effects of D's conduct, both are concurrent proximate causes and chain is not broken.
<ul style="list-style-type: none"> • d Independence of defendant's Action - More likely to break chain of causation the more independent an intervening act is of D's original action.
<ul style="list-style-type: none"> • e Cause More Likely to be Considered Intervening When (motivations for humans to find so, not logical): <ul style="list-style-type: none"> • 1 intervening cause was very sudden, breaks causal chain • 2 very unusual, rare, unexpected intervening cause • 3 human agents more likely than physical circumstance to be an intervening factor • 4 blameworthy conduct
<ul style="list-style-type: none"> • f Year and a Day Rule - Murder can only be charged if death occurs within a year and one day of the defendant's act or omission for defendant to be held liable. CL rule, some jurisdictions have abandoned this.
<ul style="list-style-type: none"> • g Cases <ul style="list-style-type: none"> • 1 <u>Shabazz</u> - stab wounds would have been fatal if there was no medical intervention; court excluded evidence of medical malpractice since at the most the negligence would have been a contributing factor. • 2 <u>Main</u> - [car accident following police chase; passenger injured; police decide no to get immediate help; passenger dies before help arrives] - jury must have the option of deciding whether or not D's actions were the cause of death • 3 <u>Cambell</u> - [Campbell gave B the gun with which he killed himself and suggested that he commit suicide] case dismissed: Hope alone is not a degree of intention requisite to a charge of murder • 4 <u>Kevoorkian</u> - [assisted suicide] few jurisdictions, if any, keep common law rule that assisting in suicide is murder; distinguishes situations where the victim commits the final act causing death and merely participating in the events leading up to death • 5 <u>Williams</u> - [native american couple fail to bring child to hospital on time]
<ul style="list-style-type: none"> • 4 MPC §2.03 MPC provides that D will be treated as causing the result unless the manner in which it occurred is too remote or accidental to have a just bearing on D's liability.
<ul style="list-style-type: none"> • B ATTEMPT <ul style="list-style-type: none"> • 1 Grading - Solely concerns punishment: grading system for criminal conduct that (1) consisted of the prerequisite intent to do a criminal act and (2) an act of furtherance of that intent which goes beyond mere preparation <ul style="list-style-type: none"> • i Reasons for grading <ul style="list-style-type: none"> • a The logic behind grading for attempt (as opposed to punishing in full) is that the retributive function of punishment is not served when no harm is done, and secondly that grading for intent gives incentives for potential criminals to desist at the last moment. • b Retributive: Appropriate that one who causes harm punished more

<ul style="list-style-type: none"> • c Lower punishment preserves incentive for potential criminals to desist at the last moment • d Possible that unsuccessful felons less dangerous
<ul style="list-style-type: none"> • ii Attempt not limited to crimes with result elements. At CL attempt was a misdemeanor always. Today the usual punishment grading system makes attempt punishable by a reduced factor of the punishment for the completed crime
<ul style="list-style-type: none"> • iii The MPC 5.05(1) moves towards the equalization of punishment for completed and attempted crimes.
<ul style="list-style-type: none"> • iv MPC - attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy (equalizes attempt and completed crime - in practice, attempt is treated as less severe) <ul style="list-style-type: none"> • a Capital crimes or first degree felonies – attempt is second degree felony • b Rationale – to extent punishment depends on antisocial nature of actor and need for corrective sanctions, that criminal plan failed is irrelevant
<ul style="list-style-type: none"> • v Cannot be prosecuted for both attempt and the completed crimes. Felony murder can be the predicate crime for attempt
<ul style="list-style-type: none"> • 2 Mens Rea Must have purpose to commit all the elements of the crime even if you do not necessarily need purpose to impose liability for a completed crime. Intent to commit the crime required for attempts, knowledge or less not sufficient (specific intent requirement). <ul style="list-style-type: none"> • i Attempt connotes purpose. Reckless creation of harm is covered by reckless endangerment statutes, found in MPC and some states. <ul style="list-style-type: none"> • a MPC §211.2 Reckless Endangering another Person - A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or s.b.i.... • ii People v. Kraft: (AM 103): shooting at car, then cop. Conviction on two counts of attempted murder reversed and remanded for new trial because instructions to jury had allowed knowledge as sufficient mens rea. Truck driver fired over a civilian car and over a police car to scare away someone who he thought was threatening him. Appellate court said that prosecution had to prove specific intent to kill in order to prove attempted murder • iii Thacker v. Commonwealth: Drunken defendant who shot tent would have been liable for murder if he had hit her, but missed and is not liable for attempted murder since he did not intend to kill her. Defendant would be liable for reckless endangerment under MPC §211.2. Assuming didn't have intent to kill, can charge him with depraved heart murder if she was hit and killed • iv Smallwood v. State: It can be reasonably concluded that death by AIDS is a probably result of Smallwood's actions to the same extent that death is the probably result of firing a deadly weapon at a vital part of someone's body, but need additional evidence of intent. • v b) MPC §5.01(1) [requires purpose/knowledge(b),] <ul style="list-style-type: none"> • a (1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: <ul style="list-style-type: none"> • 1 (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or • 2 (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or • 3 (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. • b MPC generally requires purpose, with two exceptions: <ul style="list-style-type: none"> • 1 One guilty of attempt if she <i>believes</i> that result will occur, even without knowledge. Terrorist attempts plane bomb to kill one person liable for attempted murder of everyone on plane. Common law outcome uncertain

<ul style="list-style-type: none"> • 2 Purpose requirement doesn't necessarily encompass attendant circumstances
<ul style="list-style-type: none"> • vi Transferred Intent - followed in virtually all jurisdictions - if you intend to harm and wind up harming B by mistake you are treated as if you had intended to harm B. You may also be liable for attempt on A. Must be voluntary action to transfer (have actus reus).
<ul style="list-style-type: none"> • vii Strict liability crimes – do not need to prove specific intent with respect to result <ul style="list-style-type: none"> • a statutory rape: must have intent as to the circumstantial element of the victim being under age?
<ul style="list-style-type: none"> • 3 The Act Requirement - There must be a line drawn between intention and the actual commission of the act. The MPC and the CL are different in this respect. The CL rule, know as the "proximity approach" focuses on what remains to be done to complete the crime, while the MPC focuses on what has already been done. Requires intent even if actual crime does not. Most litigated issue in attempt
<ul style="list-style-type: none"> • i a) Attempt v. Mere Preparation: The Varying Formulations <ul style="list-style-type: none"> • a Common Law: Dangerous Proximity Approach <ul style="list-style-type: none"> • 1 the conduct must come dangerously close to the commission of the crime, so that there was a reasonable likelihood of its accomplishment but for some cause. Dangerous proximity to success. "A dangerous proximity to success." – Holmes • 2 This rule has been rejected, but no definite substitute found. • 3 People v. Rizzo: Ds were not guilty of attempted robbery where they planned to commit the robbery but were not able to find him before arousing the suspicion of the police and being subsequently arrested. Not dangerously close and too remote. • b MPC Approach Substantial Step - Strongly Corroborative -NOTE: 1/2 of states and 2/3 of federal circuits currently use substantial step test. <ul style="list-style-type: none"> • 1 MPC§5.01(2) Conduct Which May be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law. NOTE: 1/2 of states and 2/3 of federal circuits currently use substantial step test. Studies show it reaches more broadly than people's ideas about what should count as attempt. • 2 elements/examples: <ul style="list-style-type: none"> • lying in wait, searching for or following the contemplated victim of the crime; • enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; • reconnoitering the place contemplated for the commission of the crime; • unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; • possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; • possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication of serves no lawful purpose of the actor under the circumstances; • soliciting an innocent agent to engage in conduct constituting an element of the crime. • 3 United States v. Jackson. Guilty of attempt in ATM case. <ul style="list-style-type: none"> • The group armed themselves and drove to the bank, but did not rob it because they had arrived late. They went and got another guy and all entered the bank to check for camera and (made a false license plate. Since customers were in the bank the group decided to wait. Hodges was arrested for something else and cooperating with the

government warning them of the bank robbery. The men returned to the bank and when they detected the government agents they sped off and were arrested. Holding: Reconnoitering a target or possessing materials for a bank robbery is a sufficient substantial step under the MPC comments (c) and (f). D must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting...Second, the D must have engaged in conduct which constitutes a substantial step toward the commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the D's criminal intent."

- defense of entrapment: difficult to prevail upon. D has to show he wasn't predisposed to commit a crime

- 4 **United States v. Church:** Tip given to Army Special Investigations about Church wanting to hire a hit man against his wife. Provided agent posing as a hitman with partial payment and expense money, photos of wife. Did fake murder and appellant expressed satisfaction. Constitutes a substantial step towards commission of a crime

- 5 Solicitation

- Can't serve as basis for attempt liability in many states because actor lacks purpose to personally commit offense; federal cases often find solicitation is sufficient for attempt

- **State v. Davis** - hired an undercover agent to kill husband of his mistress - since the agent did not commit attempt, D did not since merely hiring a hit man is not attempt.

- **United States v. Church** - [airman contracts to have his wife killed; feigns grief when shown fake pictures of slain wife] soliciting someone to commit murder is sufficient to convict for attempted murder

- ii **Abandonment** - Some state allow "voluntary abandonment" and "complete renunciation of the criminal process" to serve as a defense to an attempt charge. Doesn't count if you were foiled

- a **The Interaction Between Proximity and Abandonment** - The theory for abandonment doctrine under proximity test is to give the criminal an opportunity to repent (locus penitentiae). The CL traditionally denied any defense of abandonment, and many modern courts continue to adhere to this. To minimize the resulting potential for unfairness, courts may therefore insist that the threshold of criminality be placed very close to the last act (proximity). Some courts have adopted a complete defense of abandonment. i.e., NY statute requires that abandonment occur "under circumstances manifesting a voluntary and complete renunciation of the criminal purpose."

- 1 Very difficult defense to win

- 2 simply desisting is not abandonment

- b **MPC §5.01(4) - Renunciation of Criminal Purpose.** When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that the abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

- 1 Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, no present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

- c **People v. Johnson** defendant entered a gas station, pulled a gun and demanded money. When the attendant produced only \$50 he departed saying he was only kidding. The court denied an abandonment defense in this case.

<ul style="list-style-type: none"> • d People v. McNeil defendant intended to rape. She pleaded and he released her promising never to do such a thing again. He was convicted of attempted sexual assault. The court noted that her unexpected resistance made his renunciation non-voluntary. <i>Ross v. State</i> Same facts court found abandonment as a matter of law, stating "(did not fail in his attack. No one prevented him from completing it. The victim did not sound an alarm. She successfully persuaded Ross, of his own free will, to abandon his attempt."
<ul style="list-style-type: none"> • 4 Substantive Crimes of Preparation: Note that an approach to criminalizing attempt is to criminalize conduct which may consist of preparation for other crimes. Examples include loitering, burglary, possession of a concealed weapon, etc. State v. Young We see no reason to challenge the power of a legislature to make it an offense to take a step, otherwise lawful, in furtherance of a hostile end..." Statute made it a misdemeanor to enter a school with intent to disrupt classes.
<ul style="list-style-type: none"> • i Traditional Crimes - created to solve limitations of attempt <ul style="list-style-type: none"> • a Burglary - attempted robbery. commonly only the entering of any structure with intent to commit a crime <ul style="list-style-type: none"> • 1 People v. Salemme defendant guilty of burglary for entering a victim's home with intent to make a fraudulent sale of securities. • b Assault - commonly an attempt to commit battery <ul style="list-style-type: none"> • 1 Wilson v. State: Attempted assault is not a crime because it would be an attempt to make an attempt. <i>State v. Wilson</i> Attempted assault is a crime, where defendant came looking for his wife at her place of work carrying a shotgun and intending to shoot her, but her fellow workers hid her and he was unable to find her. • c Stalking
<ul style="list-style-type: none"> • ii New Statues - balance liberty and safety concerns <ul style="list-style-type: none"> • a Possession of burglar's tools • b Loitering (Morales) • c Policing Measures <ul style="list-style-type: none"> • 1 Avoids restrictions of attempt law by including measures for dealing with people who engage in various activities that don't constitute a crime • 2 Procedural Allowing the police to stop and detain a person in circumstances short of those justifying arrest • 3 Substantive making it a crime to loiter or prowl or gather in circumstances giving rise to danger to others or to apprehension that a crime will be committed
<ul style="list-style-type: none"> • 5 Impossibility: defendant thought she was doing something illegal but actually wasn't. modern view is that impossibility is not a defense when defendant's actual intent was to do an act proscribed by law. (shot at a person and miss=attempted murder; shot at empty bed=attempted murder; stick pins in a voodoo doll=legal impossibility)
<ul style="list-style-type: none"> • i Factual v. Legal Impossibility (fuzzy line) <ul style="list-style-type: none"> • a Modern View/Majority- No impossibility defense as long as substantial step & intent shown • b Not recognized by the MPC which focuses on mens rea • c Traditionally there was a distinction, following the mistake doctrine, between "impossibility-in-fact" (which was not a defense) and impossibility-in-law (which was)
<ul style="list-style-type: none"> • d Factual Impossibility When attempts misfire because of poor aim, or the use of a defective or inadequate weapon, such as an unloaded gun. Courts have traditionally denied a defense. (not a defense at CL) <ul style="list-style-type: none"> • 1 People v. Dlugash: Under MPC standard as a substantially adopted by NY Legislature, "it is no defense that, under the attendant circumstances, the crime was factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be. Thus, if D believed the victim to be alive at the time of the shooting, it is no defense to the charge of attempted murder that the victim may have been dead." MPC and Dlugash make no defense of impossibility

unless one of law [Note - 2/3 of state have adopted this standard and abolished legal impossibility as a defense.]

- e **Legal Impossibility** When, unknown to the actor, what the actor planned to do had not been made criminal. Not a crime to shoot at a stuffed deer out of season, since it is not a crime to "kill" a stuffed deer. Not a crime to attempt to bribe someone you believe to be a juror where person was not in fact a juror. Defense at CL.

- **VIII GROUP CRIMINALITY**

- **A LIABILITY FOR SUBSTANTIVE CRIMES AS AN ACCOMPLICE**

- **1 Introduction**

- i Historically there were 4 categories of accessory to a crime. Today all accomplices, save "accessory after the fact" bear the same criminal responsibility as the principal does. It may generally stated that an accomplice liability accrues when a defendant (1) gave assistance or encouragement or failed to perform a legal duty to prevent it (2) with the intent to promote or facilitate commission of the crime. Originally the MPC required substantial facilitation of the commission of the crime, plus "purpose" or "knowledge". Some individualistic grounds that the general duty to give aid has been rejected. The argument is that people (i.e., merchants of firearms) ought not be held liable simply because they are aware there is a crime they may be facilitating, and thereby be force to do something out of the ordinary to avoid criminal responsibility. criminally responsible for the criminal acts of fellow conspirators committed in the furtherance of the planned criminal enterprise, whether or not those particular criminal acts were planned, so long as they were foreseeable. Even though federal code says that an aider and abettor can be punished as much as principal, not clear if must; still done though because judges have sentencing discretion.

- **2 Mens Rea: intent to aid with same mens rea required for principal**

- **i The Basic Rules:** In general if D intentionally aids a principal and does so, with the required mental state as to the principal's crime he will be liable.

- a There is some confusion as to whether the defendant's mental state must be with respect to the crime itself, for his own acts of encouragement or facilitation, or as to his awareness of the principal's mental state.

- b Punishment is the same for all levels of accomplice liability.

- c It is no longer the case that accomplices cannot be convicted until the principal is convicted (although there must be a showing that some crime has been committed). If P has act but no purpose but A has purpose and responsibility for P's act, then liable.

- d It is no longer necessary to charge accomplices with a type of complicity, they are all charged with a substantive crime. (MPC is minority rule now). Must prove at least knew (in some states) and had purpose MPC §2.06(4). Same question as in attempt: Would he be disappointed if the result were different?

- **e MPC §2.06**

- 1 A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both

- 2 A person is **legally accountable for the conduct of another person when**

- (a) Acting with kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or
- (b) He is made accountable for the conduct of such other person by the Code or by the law defining the offense; or
- (c) He is an accomplice of such other person in the commission of the offense

- 3 A person is an accomplice of another person in the commission of an offense if

- (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (i) solicits such other person to commit it; or
 - (ii) aids or agrees or attempts to aid such other person in planning or committing it; or

<ul style="list-style-type: none"> • (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
<ul style="list-style-type: none"> • (b) his conduct is expressly declared by law to establish his complicity.
<ul style="list-style-type: none"> • ii Mens Rea as to P's Criminal Conduct: purpose of encouraging
<ul style="list-style-type: none"> • a "Plus" factors from which we can infer purpose
<ul style="list-style-type: none"> • 1 charging a higher price
<ul style="list-style-type: none"> • 2 taking a cut of sales
<ul style="list-style-type: none"> • 3 when there is no legitimate purpose
<ul style="list-style-type: none"> • 4 secretive business transactions
<ul style="list-style-type: none"> • b Hicks v. United States: Hicks was present while his friend killed a third party. When accomplice liability is based on encouragement of the principal, the acts or words of encouragement must be made by the accomplice with the intention of encouraging and abetting the principle. If the accomplice, with the purpose of aiding or encouraging the principle, is present at the commission or the crime but, because his aid or encouragement becomes unnecessary, does not aid or encourage the crime, he is nevertheless guilty on a theory of complicity.
<ul style="list-style-type: none"> • c More purpose if tell the gun clerk you are going to kill your wife and give twice the price than just telling (living off the illegality v. going about your business).
<ul style="list-style-type: none"> • d State v. Gladstone: D must be associated with venture, participates and wishes, seeks its success.
<ul style="list-style-type: none"> • 1 D was approached by undercover officer trying to buy drugs and told undercover officer that he could buy drugs from someone else. cannot be convicted as an accomplice to the sale by the other person. [Not charged with aiding an abetting the officer in purchase or drugs, but aiding and abetting dealer with sale.]
<ul style="list-style-type: none"> • 2 dangerous precedent that mere communications to the effect that another might or probably would commit a criminal offense amount to an aiding and abetting of the offense would it ultimately be committed.
<ul style="list-style-type: none"> • e Mens Reas as to Variation Between What A Intended and P Did (Similar to Felony Murder, Causation/Chain of events, Lesser Crime theory, Cunningham). If you intend to do something bad, we will hold you liable for more serious crime even if don't have same liability (goes against MPC which wants culpability to match crime).
<ul style="list-style-type: none"> • 1 People v. Luparello: Reasonable foreseeability rule differs from MPC rule in dismissing purpose requirement and is now the majority rule. The actor is guilty not only of the crime he intended to encourage or facilitate, but also of any reasonably foreseeable crimes committed by the person he is aiding or abetting. Friends ending up killing someone he only wanted beat up.
<ul style="list-style-type: none"> • iii Mens Reas As to Result: same as for principal crime
<ul style="list-style-type: none"> • a MPC 2.06(4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.
<ul style="list-style-type: none"> • b McVay [negligent homicide after steamship sinks] can one be an accessory before the fact in negligent homicide? yes
<ul style="list-style-type: none"> • c Volt and Suchgore, AM104
<ul style="list-style-type: none"> • d whether you'd be disappointed if it didn't happen
<ul style="list-style-type: none"> • iv Scope of Liability
<ul style="list-style-type: none"> • a Natural and probable consequence doctrine: (majority rule, rejected by MPC)
<ul style="list-style-type: none"> • 1 Like lesser crime theory, or felony-murder
<ul style="list-style-type: none"> • 2 Purpose for crime 1 = purpose for crime 2
<ul style="list-style-type: none"> • 3 purpose of aiding and abetting some crime is still required
<ul style="list-style-type: none"> • 4 Liable for any reasonably foreseeable crime (Luparello)

<ul style="list-style-type: none"> • b Minority/MPC- Purpose as to crime 2 required
<ul style="list-style-type: none"> • c NY Penal Code §115: Criminal Facilitation: Person is guilty of criminal facilitation when, believing it probable that he is rendering aid to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for commission thereof and which aids such person to commit a felony”
<ul style="list-style-type: none"> • 3 The Act Requirement: Encourage or Aid.
<ul style="list-style-type: none"> • i How much?
<ul style="list-style-type: none"> • a little conduct is required to be n accomplice, need not be "but for" cause.
<ul style="list-style-type: none"> • b there is no requirement for rendering physical aid - threats or promises or provision of a plan is enough.
<ul style="list-style-type: none"> • c mere presence does not suffice (unless one is aware of the principal's intentions and there is a prior agreement to give aid if necessary).
<ul style="list-style-type: none"> • ii Why so little?
<ul style="list-style-type: none"> • a liable not for causing harm but for aligning oneself with someone who causes harm. Encouragement is a form of aid. association not causation.
<ul style="list-style-type: none"> • b hard to talk about and think about cause and effect with people, bc each one is an individual moral agent
<ul style="list-style-type: none"> • iii Wilcox v. Jeffrey: Journalist went to hear professor play illegally, and then printed an article about the concert. Holding: Journalist was aiding, abetting, and encouraging an illegal act. Presence and payment are encouragement.
<ul style="list-style-type: none"> • iv State v. Judge Tally: Tally intervened telegram warning someone that people were coming to kill him. Tally is guilty on accomplice liability for murder. The assistance given, however, need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient it facilitated a result that would have transpired even without it.
<ul style="list-style-type: none"> • v Davis: hired an undercover agent to kill husband of his mistress - since the agent did not commit attempt, D did not since merely hiring a hit man is not attempt.
<ul style="list-style-type: none"> • vi Church [airman contracts to have his wife killed; feigns grief when shown fake pictures of slain wife] soliciting someone to commit murder is sufficient to convict for attempted murder
<ul style="list-style-type: none"> • a no requirement that but for the aid the principal would since P is an independent moral actor
<ul style="list-style-type: none"> • B CORPORATE CRIMINALITY
<ul style="list-style-type: none"> • 1 Against corporate liability:
<ul style="list-style-type: none"> • i harm falls on powerless shareholders
<ul style="list-style-type: none"> • ii jury bias against corporations
<ul style="list-style-type: none"> • 2 For corporate liability
<ul style="list-style-type: none"> • i collective acts of a collective agent - individual acts may be fine where the collective is bad
<ul style="list-style-type: none"> • ii access to \$ for damages
<ul style="list-style-type: none"> • iii encourage due diligence (there is a due diligence defense in charging and sentencing practices - frequent use of deferred prosecution agreements)
<ul style="list-style-type: none"> • 3 Due diligence defense: federal law and most states do not have the defense formally, but do through discretion in charging and sentencing if there were compliance/preventative program
<ul style="list-style-type: none"> • 4 New York Central - [common carrier convicted of paying rebates] Congress can punish corporations even though stockholders bear the brunt of the punishment.
<ul style="list-style-type: none"> • i respondeat superior - corp. is responsible for action of agent bc corporation can ONLY act through agents
<ul style="list-style-type: none"> • 5 Hilton - [employee conditioned purchases on payment to a local association, boycotting those who did not in violation of the Sherman Antitrust Act] Corporation still liable for employee's actions if it had a policy against them and had told this employee not to participate in the boycott; liability attaches even where agents acting beyond their authority. due diligence
<ul style="list-style-type: none"> • i acts of agents in scope of their employment
<ul style="list-style-type: none"> • ii benefit to company is irrelevant

<ul style="list-style-type: none"> • iii collective act and collective intent(one can act, the other have intent, etc), then corp is liable
<ul style="list-style-type: none"> • 6 Beneficial - p. 42 [bribery] I: How much authority does an agent need to have for the corporation to become liable? H: <i>agent must have enough authority and responsibility to act on the behalf of the corp. for the particular corporate business, operation or project in which he was engaged at the time he committed the criminal act.</i>
<ul style="list-style-type: none"> • 7 Christy Pontiac - [theft of rebates intended for purchasers and forgery] Unlike in civil liability, employee must 1) have authority to act on behalf of company; 2) be acting in furtherance of the corporation's business interests; and 3) management must tolerate or ratify act.
<ul style="list-style-type: none"> • 8 Park - [FDA and Cosmetic Act violations] CEO held strictly liable for violations; need not be conscious of wrongdoing; policy of Act is to prevent violations before they occur, that is, incentivize oversight; trial judge told jury to find Park guilty if he had a "responsible relation to the situation"
<ul style="list-style-type: none"> • i elements: affirmative duty and responsible relation to underlying problem (sort of punishes him for his status) unless he's objectively powerless to prevent
<ul style="list-style-type: none"> • ii affirmative defense: D was "powerless" to prevent or correct the situation (so as to avoid criminalizing what is objectively impossible)
<ul style="list-style-type: none"> • iii dissent: majority asked for prosecution to show a duty of care but then allowed instructions that did not conform
<ul style="list-style-type: none"> • 9 MPC2.07 1c: high managerial agent
<ul style="list-style-type: none"> • C LIABILITY FOR THE CRIME OF CONSPIRACY
<ul style="list-style-type: none"> • 1 Introduction
<ul style="list-style-type: none"> • i The crime of conspiracy is at minimum (1) an agreement between two or more persons and (2) an intent thereby to achieve a certain objective which is unlawful or achieved by unlawful means. associated with abuses
<ul style="list-style-type: none"> • ii Common Law: <ul style="list-style-type: none"> • a <i>stackable</i> you can be charged for both conspiracy and the completed crime; • b agreement with anyone is sufficient for a charge of conspiracy
<ul style="list-style-type: none"> • iii Federal Law and Most States <ul style="list-style-type: none"> • a Agreement + any overt act (calling to find someone's schedule is a suff. act for conspiracy of assassination) • b Can be very minimal and only one of actors has to commit an overt act in furtherance of conspiracy. Standard lower than substantial step standard of attempt, though OH, ME, bring it closer • c Exception: Overt act may not necessarily required in case of conspiracies to commit the most serious offenses (e.g., conspiracies to distribute illegal drugs - what is serious is controversial) • d Why have crime of conspiracy <ul style="list-style-type: none"> • 1 allow early intervention • 2 deal with psychological firmness of purpose • 3 law of attempt used to require too much • e Unlike attempt and accomplice liability, conspiracy does not merge. • f Duration of a Conspiracy <ul style="list-style-type: none"> • 1 Conspiracy continues until either its objectives are accomplished or abandoned. Statute of limitations does not begin to run until conspiracy is over. • 2 Conspiracy cannot be extended by treating it as including an on-going cover-up unless there is direct evidence of such an agreement to continue to act in concert to cover up the original crime • g Continuing Criminal Enterprise - more serious crime for group offenses outside of conspiracy
<ul style="list-style-type: none"> • 2 The Act Requirement Agreement is the actus reus of the offense, however, proof of an express agreement is not required. It can be inferred from circumstantial evidence.

<ul style="list-style-type: none"> • i lower standard of action than for complicity and attempt • ii often punished severely, esp. in federal courts.
<ul style="list-style-type: none"> • iii Agreement <ul style="list-style-type: none"> • a Agreement distinguished from common purpose by nexus (Judge Talley would not be guilty of conspiracy; gang members vs. looters) • b Express agreement unnecessary, can be inferred from circumstantial evidence that shows common unlawful design pursued by common means. • c Can be inferred from future action • d Knowledge of essential nature sufficient, knowledge of all details not required • e Participants in conspiracy need not know each other • f Concurrence of purpose insufficient, but subtle/implicit agreement sufficient
<ul style="list-style-type: none"> • g The Coleridge Instruction - the judge directed the jury as follows "...if you are of the opinion that the acts, though done, were done without common concert and design between these two parties, the present charge cannot be supported. On the other hand...although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means and so to carry into execution. This is not necessary because in many cases of the most clearly-established conspiracies there are no means of proving any such thing, and neither law nor common sense require that it should be proved. If you find that these two person pursued by their acts the same object, often by the same means, one performing one part of an act and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is "Had they this common design, and did they pursue it by these common means - the design being unlawful.""
<ul style="list-style-type: none"> • h Knowledge by a defendant of all details of a conspiracy is not required. It is enough that he know the essential nature of it. <i>United States v. James</i>. It is black-letter law that 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 his personal participation
<ul style="list-style-type: none"> • 1 United States v. Alvarez: only evidence was that D smiled and lifted a refrigerator and agreed to meet a plane at an odd time an place. held to be part of a drug-smuggling ring. Where there is sufficient evidence for the jury to infer that D must have known of the criminal purpose of a project and D helped even as an employee or "menial," he is liable for conspiracy. it is not necessary that he know the full extent of the conspiracy (although he must know its essence or that he be involved from the beginning).
<ul style="list-style-type: none"> • i <i>Moussau</i>, 692. Was there agreement? What was his purpose? We infer agreement from parallel action
<ul style="list-style-type: none"> • j <i>Crips and Bloods</i>, 691.
<ul style="list-style-type: none"> • k Overt Act Requirement Under CL: an overt act is not required, only an agreement. Most state statutes require an overt act in furtherance of the conspiracy, but it is not unusual for the state to dispense with it for serious crimes. <ul style="list-style-type: none"> • 1 Usually the overt act may be one that would not reach the threshold of a substantial step for attempts. • 2 Some (Ohio, Maine) standards closer to attempt standard - substantial.
<ul style="list-style-type: none"> • 3 Mens Rea: specific intent <ul style="list-style-type: none"> • i There is confusion over what the mens rea standard for conspiracy is - in part because it is difficult to distinguish the mens rea of the agreement from that of the criminal objective. generally that the mental state required is intent to achieve a particular result which is criminal. This has been referred to as specific intent. • ii Providing Goods or Services: In some supplier cases, intent can be inferred from knowledge if:

<ul style="list-style-type: none"> • a The purveyor of goods has been shown to have a stake in the crime; or
<ul style="list-style-type: none"> • b There is no other legitimate use of the goods or service; or
<ul style="list-style-type: none"> • c The volume of business is grossly disproportionate to legitimate demand (so that a big profit is being made); or
<ul style="list-style-type: none"> • d If the crime involved is a major crime (felony)
<ul style="list-style-type: none"> • e would be disappointed if the purpose wasn't accomplished
<ul style="list-style-type: none"> • iii People v. Lauria: answering service to call girl operation with knowledge that his customers were prostitutes. Not guilty. Conspiracy requires both knowledge of the illegal activity and intent to further it. Where there is no direct evidence of intent, it may be inferred from knowledge if: <ul style="list-style-type: none"> • a the purveyor of legal goods (or services) for illegal use has acquired a stake in the venture. Regina v. Thomas defendant who rented a room to a prostitute at a grossly inflated rent was held to have intent. • b no legitimate use of the goods or services exists. People v. McLaughlin (who provided horse racing info. by wire held to have intent for bookmaking conspiracy • c volume of business with buyer is grossly disproportionate to any legitimate demand. Direct Sales - providing narcotics to a rural physician in quantities 300 times what he could have a legitimate use for, shows intent for conspiracy. • d if the crime is of an "aggravated nature" i.e., serious - for serious crime you have a duty to positively disassociate yourself from the crime once you become aware of it. Misdemeanor in this case does not qualify. (MPC and most jurisdictions do not accept this view. They require purpose for conspiracy for all crimes.) • e Court found none of these and defendant was found not guilty.
<ul style="list-style-type: none"> • iv Zahm - [renting trailer for premium price for use as meth lab; cook never carried out] - no conspiracy liability (perhaps the high price was for danger, not illegality)
<ul style="list-style-type: none"> • v Morse - [selling aircraft to transport drugs] - conspiracy liability where plane sold a 2x market value; all payments made in case and D knew plane used for drug transport yet he did nothing.
<ul style="list-style-type: none"> • vi MPC 5.03(1) - Criminal Conspiracy: (i) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose to promoting or facilitating its commission he: <ul style="list-style-type: none"> • a agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime: or • b agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.
<ul style="list-style-type: none"> • 4 The Consequences of a Conspiracy Charge <ul style="list-style-type: none"> • i General Overview <ul style="list-style-type: none"> • a At CL the punishment for conspiracy is fixed and "stackable". This is still the majority approach. Under the MPC and a majority of jurisdictions, punishment for conspiracy are graded in the same way as attempt and solicitation. This punishment cannot be added to the punishment for the actual crime if committed. • b MPC§5.05(1) Grading. Except as otherwise provided in this Section, attempt, solicitation and conspiracy are crimes of the same grade and degree as the most serious offense which is attempted or solicited or is an object of the conspiracy. An attempt, solicitation or conspiracy to commit a [capital crime or a] felony of the first degree is a felony of the second degree. • c Procedural Aspects of Conspiracy Charge <ul style="list-style-type: none"> • 1 Conspiracy Exception to Hearsay Rule Hearsay rule is set aside for co-conspirators and people on their death-beds. The doctrine applies whether or not the parties have been formally indicted or convicted of conspiracy, provided that the statement is in furtherance of the conspiratorial agreement between them. Some states say it becomes admissible only if there is independent evidence of the conspiracy.

<ul style="list-style-type: none"> • Krulewitch v. United States: The contents of a conversation between two former co-conspirators admitted although hearsay. Court cannot invent implied conspiracies when the original has terminated for the purpose of evidence. Statements against a co-conspirator not made in furtherance of the crime may not be admitted into evidence. The conversation took place well after the criminal act was completed. It was too far removed from the conspiracy alleged to have been made in furtherance of that conspiracy.
<ul style="list-style-type: none"> • 2 Venue: Ds can be haled into court from very remote locations since there is jurisdiction anywhere part of the crime was committed.
<ul style="list-style-type: none"> • 3 Joinder: Joinder made easier, "bad-guy" association, juries may not distinguish individual Ds.
<ul style="list-style-type: none"> • 4 Duration of Conspiracy Conspiracy continues until either its objectives are accomplished or abandoned. Statute of limitations does not begin to run until conspiracy is over.
<ul style="list-style-type: none"> • Gruenwald v. United States A particular conspiracy cannot be extended by treating it as including an on-going cover-up unless there is direct evidence of such an agreement to continue to act in concert to cover up the original crime.
<ul style="list-style-type: none"> • Abandonment/Renunciation/ Withdrawal <ul style="list-style-type: none"> • Abandonment The conspiracy is considered to be abandoned when none of the conspirators is engaging in any action to further the conspiratorial objectives. • Renunciation - CL says no. MPC and most states say yes, only if the circumstances manifest renunciation of the actor's criminal purpose and the actor was successful in preventing commission of the criminal objectives.
<ul style="list-style-type: none"> • 5 The Scope of a Conspiracy <ul style="list-style-type: none"> • i Rimless wheel with spokes vs. Chain. Conspiracies tend to take the shapes of a "rimless wheel with spokes" or a "chain". The court may not treat the "spoke" situation as one big conspiracy as no evidence that they entered into any agreement with each other beyond their independent associations with one. In a chain, the success of one group was dependent on the success of all of the other groups. There is therefore only one conspiracy (drug chain cases have gone both ways). Whether the agreement be to commit one unlawful act, or many, there is only one conspiracy and conspirators may only be punished once. Makes a difference how many conspiracies there are for venue and joinder and hearsay evidence • ii Vicarious Liability for the Crimes Committed by Co-Conspirators: The Pinkerton Rule <ul style="list-style-type: none"> • a The Pinkerton Rule All members of a conspiracy are liable for crimes committed in furtherance of the conspiracy. This bears some similarity to <i>Luparello</i>, but is followed by federal courts. It has been rejected by the MPC and many states. 677 • b Relationship of Pinkerton to Accomplice Liability. Pinkerton is held liable for things that happened while he was in prison. Coconspirator is liable for crimes carried out in furtherance of conspiracy as long as reasonably foreseeable. Under accomplice liability, might be liable but would have to go to jury on whether reasonably foreseeable. • c Alvarez - [agent shot in botched drug sting] Dealers who did not shoot the federal agent were convicted; court agrees to extend Pinkerton liability • d Eases prosecutor's burden since they would rarely have enough to prove individual culpability • e Incentivized criminals to monitor their co-conspirators • f Most commonly used in drug cases • g MPC rejects vicarious liability (minority view - see also how it rejected <i>Luparello</i>) • h MPC §2.06(3) (also rejects Pinkerton rule) - A person is an accomplice of another person in the commission of an offense if: <ul style="list-style-type: none"> • 1 with the purpose of promoting or facilitation the commission of the offense, he <ul style="list-style-type: none"> • (a) solicits such other person to commit it; or

<ul style="list-style-type: none"> • (b) aids or agrees or attempts to aid such other person in planning or committing it; or • (c) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
<ul style="list-style-type: none"> • 2 his conduct is expressly declared by law to establish his complicity.
<ul style="list-style-type: none"> • iii Wharton's Rule - When a crime requires two people to commit anyhow, one cannot in addition add a conspiracy charge. i.e., adultery, bigamy (not followed by MPC)
<ul style="list-style-type: none"> • iv MPC Approach - MPC §5.03(2-3)
<ul style="list-style-type: none"> • a Scope of Conspiratorial Relationship. If a person guilty of conspiracy, as defined by Subsection (1) of this Section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
<ul style="list-style-type: none"> • b Conspiracy with Multiple Criminal Objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
<ul style="list-style-type: none"> • D Some Common Problems of Accomplice Liability and the Crime of Conspiracy
<ul style="list-style-type: none"> • 1 Relationship of Parties
<ul style="list-style-type: none"> • i Accomplice Liability In modern times, it is not necessary that a principal have already been found guilty in order to find an accomplice or co-conspirator guilty. However, the guilt of the principal must be established at the trial of the accomplice.
<ul style="list-style-type: none"> • a (1) MPC §2.06(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted for a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.
<ul style="list-style-type: none"> • ii Conspiracy - The traditional view of conspiracy is termed "bilateral" and requires that two or more persons conspire to commit a crime, each with the intent to do so. If all but one co-conspirator merely feign acquiescence, there is no conspiratorial agreement and no conviction for conspiracy is possible. The MPC adopts a "unilateral" approach by which a culpable party's guilt is unaffected by whether other co-conspirators are also guilty. The rationale is that the unequivocal evidence of a firm purpose to commit a crime, which is the basis for conspiratorial liability is the same regardless of the true intentions of co-conspirators.
<ul style="list-style-type: none"> • 2 Renunciation and Withdrawal
<ul style="list-style-type: none"> • i Accomplice Liability
<ul style="list-style-type: none"> • a MPC §2.06(6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if: <ul style="list-style-type: none"> • 1 he is a victim of that offense; or • 2 the offense is so defined that his conduct is inevitably incident to its commission; or • 3 he terminates his complicity prior to the commission of the offense and <ul style="list-style-type: none"> • wholly deprives it of effectiveness in the commission of the offense; or • gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.
<ul style="list-style-type: none"> • ii Conspiracy
<ul style="list-style-type: none"> • a MPC §5.03(6-7)
<ul style="list-style-type: none"> • b Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of this criminal purpose.
<ul style="list-style-type: none"> • c Duration of Conspiracy. For purposes of Section 1.06(4): <ul style="list-style-type: none"> • 1 A conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are committed or the agreement that they be committed is abandoned by the D and by those with whom he conspired; and

- 2 such abandonment is presumed if neither the D nor anyone with whom he conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation; and
- 3 if an individual abandons the agreement, the conspiracy is terminated as to him only if and when he advises those with whom he conspired of his abandonment or he informs the law enforcement authorities of the existence of the conspiracy of his participation therein.

- IX ALLOCATING PUNISHMENT

- A THE DECISION TO CRIMINALIZE

- 1 Debate on enforcing morals
- 2 Mill: only regulate when someone would be harmed
 - i questions of paternalism, protect someone from harm
 - ii questions of secondary effects (property values, harm to women, etc)
 - iii hard to find pure cases for application of this principle due to secondary effects
 - iv need a limiting principle to tell which harms count and which don't
- 3 Stephen: there are acts of wickedness so gross that self-protection apart they must be prevented and punished (to prevent offending the accepted std. of morals)
- 4 See decriminalization of homosexuality in UK (not proper for law to regulate what consenting adults do in private; individual freedom in actions of morality vs. equation of morality and sin; consent of victim is no defense)
- 5 Paternalism (no consenting to murder)
- 6 Collapse of harm principle as harm is understood to be abstract (subjective discomfort of others)
- 7 Risks of overcriminalization: what should the gvt try to regulate **through** crim law?
 - i if laws not enforced, spectacle of nullification of the legislature
 - ii mockery of system
 - iii waste of resources
 - iv hard to find witnesses for consensual crimes
 - v tendency to pass criminal laws to deal with social problems
- 8 Consider product liability - do criminal sanctions prevent human lives from becoming part of a cost-benefit analysis?

- B CONSTITUTIONAL LIMITS ON SENTENCE

- 1 little constitutional regulation of substantive criminal law; court very reluctant to find statutes unconstitutional (lots of things are "not unconstitutional"). Times when Constitutionality has limited substantive criminal law:
 - i 8th amendment-death penalty
 - ii due process-void for vagueness
 - iii ex post facto clause
 - iv due process (albertini)
 - v burden of proof
- 2 Hesitancy to use 14th amd. for progressive purposes since it was used to promote laissez-faire gov't in the early 20th cen. (relevant to proportionality considerations)
 - i Deference to federalism (relevant to proportionality)
 - ii balance of power between judiciary and political branches.
- 3 Proportionality
 - i no one has standing to object to too lenient a sentence
 - ii difficult to justify outside of the retribution theory (Scalia)
 - iii **Bajakigian** - 8th amd. may bar excessive fines
 - iv **Ewing** - [golf club theft] Court upholds life sentence under Cal 3 strikes law. - not an 8th amd violation; state has an interest in harsh penalties for repeat offenders
 - a works on retributive view of punishment (scalia)

<ul style="list-style-type: none"> • b Harmelin: majority: no inter and intra jur. comparison of how the crime is treated is needed, just extreme sentence that is grossly disproportionate; dissent:
<ul style="list-style-type: none"> • c Harmelin says gross disproportionality (gravity of offense and harshness of sentence) is a threshold issue, then courts should do an inter/intra jur. comparison
<ul style="list-style-type: none"> • d Question of whether if someone has committed a crime and served a sentence, it should bear on sentencing for future crimes.
<ul style="list-style-type: none"> • v Weems v. US - (Philippines 1910) sentence of 12 years hard labor in shackles - 8th amd. violation for nature of punishment, not duration
<ul style="list-style-type: none"> • vi Close to no 8th amd. protection on non-capital cases. for capital cases: <ul style="list-style-type: none"> • a look to inter and intra jur. comparisons before considering proportionality for • b must be individualized consideration of mitigating evidence • c detailed regulation of capital sentencing vs. almost none on non-capital
<ul style="list-style-type: none"> • vii Supreme Court has only upheld a proportionality challenge once <ul style="list-style-type: none"> • a Solem v. Helm (1983) (5-4): Life w/o parole for passing a bad check for \$100. Helm had 6 prior felony convictions (all non-violent): 3 for burglary, one for obtaining money by false pretenses, one for grand larceny, and one for DUI
<ul style="list-style-type: none"> • 4 3-Strikes law: <ul style="list-style-type: none"> • i policy arguments against <ul style="list-style-type: none"> • a disproportionate impact on poor • b don't really need them because we already look at criminal history when we sentence • c many criminals age out of crime, so preventative theory might change with age • d incapacitation as a method of punishment is future-oriented • e applied inconsistently • ii Meltzer says <ul style="list-style-type: none"> • a no long history of cases (started in 1980) • b a lot of popular support • c dealing with number of years is difficult, has arbitrary quality, methodological problem
<ul style="list-style-type: none"> • X BURDEN OF PROOF
<ul style="list-style-type: none"> • A Burden of Production: burden of coming forward with enough evidence to put a certain fact at issue <ul style="list-style-type: none"> • 1 Indicate whether an issue is really in play • 2 When defendant bears burden of production, it's called an affirmative defense. • 3 Park (Acme foods p. 653) had the burden of producing evidence to show that he was powerless, and since he didn't bring it in, can't appeal based on it • 4 Once Burden of Production has been satisfied, Burden of persuasion comes into play • 5 How much evidence counts for burden of production? <ul style="list-style-type: none"> • i when defense bears, sometimes "more than a scintilla of evidence" and sometimes enough to raise a reasonable doubt
<ul style="list-style-type: none"> • B Burden of Persuasion: convincing trier of fact <ul style="list-style-type: none"> • 1 For elements of the crime <ul style="list-style-type: none"> • i P has to prove overall sufficiency of the evidence on each element of the crime beyond a reasonable doubt. for inferences/credibility question, has to go to the jury. condemnation requires this degree of certainty, gives concrete substance to presumption of innocence <ul style="list-style-type: none"> • a In re Winship, US 1970 – [juvenile convicted by a preponderance of the evidence of larceny]: Due Process Clause protects against conviction unless there is proof beyond a reasonable doubt. Can't use preponderance of evidence standard because. Before this, up to states on how to allocate burden of persuasion <ul style="list-style-type: none"> • 1 concern for convicting the innocent • 2 condemnation requires a degree of certainty • 3 concrete substance to the presumption of innocence

- b **Mullaney v. Wilbur, US 1975** – SCOTUS said that the state could not allocate the burden of persuasion regarding D’s culpability to D. State has burden of proof for both the elements of the crime and the degree of D’s criminal culpability. Since malice aforethought was part of the offense, and part of malice aforethought is no provocation. No provocation was presumed at trial (b/c D didn't prove otherwise): this **violates due process**. Incompatible to have malice aforethought and provocation.

- ii sometimes D gets burden for subsidiary issues

- iii The prosecutor also can seek to invoke a presumption, which allows burden of establishing some essential fact to be met through proof of some other fact from which the existence of the essential fact can be presumed.

- iv **NO DIRECTED VERDICT** for prosecution in crim cases, ever. Asymmetrical concept.

- a judges ask: could a rational jury have found beyond a reasonable doubt that D was guilty? (for motion to direct verdict)

- b **Curley v. US, 1947** – when it could go either way, the jury must decide. It is only when reasonable minds must have reasonable doubt that the question is taken from the jury.

- c if the jury acquits, judge can't enter verdict notwithstanding jury verdict

- d can't appeal a judgment on the facts by jury or judge as trier of fact

- 2 For affirmative defenses:

- i if D must prove, typically lower standard (like preponderance of evidence. Shifting burden to D

- a **Martin v. Ohio, US 1987**, p 54 – upheld jury instruction that while P had to prove all elements of crime beyond a r.doubt, the Δ had to prove self-defense claim by a preponderance of the evidence. In this case, one of the elements of the defense effectively negates elements of the offense, but the Court said that the state may allocate to aΔ the burden of persuasion regarding the affirmative defense as long as the jury may also consider the evidence relating to the defense as a basis for negating an element of the crime. Supreme Court upheld statute that put burden of self-defense on Δ -- only two states do this. In common law, Δ had burden of proof for self-defense.

- b Only Ohio shifts burden of proving self-defense onto the defendant, but court upholds

- c Court usu. defers to legisl. where they shift burden to D

- ii if P must prove false, usually beyond a reasonable doubt

- iii **Patterson v. New York, US 1977** – Narrows Mullaney, allows allocation of burden of proof of affirmative defense to D.

- a Charged with 2nd degree murder in NY: act causing death with intent to kill.

- b affirmative defense of provocation (killing with extreme emotional disturbance, burden on D)

- c SCOTUS says OK, since NY was not obligated to provide the affirmative defense of EED at all (greater power includes the lesser). Does not violate due process. Not incompatible to have 2nd degree murder as defined and EED as defined.

- d There’s no reason to add a burden of proof to the state when they’ve already proven the elements of a punishable crime. At common law, D had burden of proving all affirmative defenses. This case cites Davis v. US, 1985, in which SCOTUS said prosecution must prove the sanity of D if he raised insanity question – shifted burden of proof for many affirmative defenses. Also cites Leland v. Oregon, 1952 in which SCOTUS refused to strike down an Oregon statute that required the D to prove insanity beyond a r.doubt.

- e **Holding. formal test:** as long as burden on D does not negate something the legislature has defined as the offense, you can put it there. **substantive:** if state could get rid of element/defense and still have the punishment be constitutional, then it can place burden on D. (greater includes lesser).

<ul style="list-style-type: none"> iv Procedural Theory: Greater & Lesser Theory: if the state has the greater power of eliminating a defense, has power to shift burden to D; this theory would make a mess of proving facts on both sides (P = prove every fact necessary for a conviction beyond a reasonable doubt; D = disprove all other facts).
<ul style="list-style-type: none"> a Limits: The greater power to remove an issue does not grant the power to remove a jury
<ul style="list-style-type: none"> v Government can get rid of gratuitous defense, but can't eliminate something like self-defense without violating prohibition on cruel & unusual punishment.
<ul style="list-style-type: none"> a TEST: as long as element that defendant is asked to prove does not negate something the prosecution has been asked to prove, legislature can shift the burden to the defendant
<ul style="list-style-type: none"> vi Strict Liability: if state could get rid of element all together, then defendant could be better off having to prove an element.
<ul style="list-style-type: none"> C Who has which?
<ul style="list-style-type: none"> 1 With respect to most elements of crimes prosecution bears both burdens.
<ul style="list-style-type: none"> 2 Sometimes, like in Patterson, defendant must bear both burdens.
<ul style="list-style-type: none"> 3 Doesn't have to be the same party for both
<ul style="list-style-type: none"> D When is it constitutional for a state not to require the prosecution to prove an element of an offense or defense beyond a reasonable doubt?
<ul style="list-style-type: none"> 1 key question: is the existence of the defense incompatible with the elements of the offense? (Patterson)
<ul style="list-style-type: none"> 2 MPC §1.12(1) gives prosecution the burden of production and persuasion regarding the elements of an offense. This includes conduct that negatives an excuse or for the action, see MPC §1.13(9) (c), which means prosecution has duty to disprove defenses if Δ met his burden of production. The prosecution doesn't have to prove beyond a r.doubt those defenses the MPC expressly requires the Δ to prove by a preponderance of the evidence.
<ul style="list-style-type: none"> 3 MPC §1.12(2)(a) prosecutor doesn't have to disprove an affirmative defense "unless there is evidence supporting such defense" – doesn't specify strength of evidence
<ul style="list-style-type: none"> 4 w/ indeterminate sentencing, factual findings not beyond reasonable doubt count at sentencing
<ul style="list-style-type: none"> XI THE RIGHT TO COUNSEL (6th amendment)
<ul style="list-style-type: none"> A recognized in the early 19th century as a negative liberty. Since 80-85% of or defendants are indigent, doesn't get them anything. Positive liberty granted, if you can't afford, state should provide. Positive liberty is extremely rare in the US constitutional system. the gov does not usu subsidize your ability to exercise your rights. "Why is this right different from all other rights?"
<ul style="list-style-type: none"> 1 fulcrum on which all of the D's other rights depend (all other procedural rights enforceable by lawyers, so fair outcomes)
<ul style="list-style-type: none"> 2 need to exercise right imposed on you by gov.
<ul style="list-style-type: none"> 3 government has lawyers
<ul style="list-style-type: none"> 4 seriousness of condemnation
<ul style="list-style-type: none"> 5 legitimacy in community condemnation
<ul style="list-style-type: none"> 6 risk of deprivation of liberty
<ul style="list-style-type: none"> 7 dignitary interest: assistance in understanding
<ul style="list-style-type: none"> B Johnson v. Zerbst - Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.
<ul style="list-style-type: none"> C Betts v. Brady, 316 U.S. 455 (1942), SCOTUS : case-by-case determination of right to counsel under due process for non-capital state cases
<ul style="list-style-type: none"> 1 whether or not a lawyer was required depended on the circumstances of each case. Specifically, the Court focused on a case-by-case determination if the lack of representation affected a denial of due process, thus rendering the trial unfair. Under Betts, courts could require counsel if there were special circumstances

<ul style="list-style-type: none"> • D Gideon v. Wainwright (1963): Overruled Betts v. Brady. Fundamental right, applies to states via 14th amendment (unanimous)
<ul style="list-style-type: none"> • 1 requires that indigent criminal defendants be provided counsel at trial. the court held that the right to the assistance of counsel was a fundamental right, essential for a fair trial, thereby emphasizing the procedural safeguards which were needed for due process of law.
<ul style="list-style-type: none"> • 2 Black (writing for majority) says his dissent in Betts was right, and overrules Betts, wants lawyers for ALL criminal prosecutions
<ul style="list-style-type: none"> • 3 Justice Clark's concurring opinion: the Constitution makes no distinction between capital and non capital cases, so a defender needs to be provided in all cases.
<ul style="list-style-type: none"> • 4 Justice Harlan's concurring opinion: the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.
<ul style="list-style-type: none"> • E Argersinger v. Hamlin (1972): No potential prison w/o counsel. NOT unanimous.
<ul style="list-style-type: none"> • 1 Indigent charged in Florida for carrying a concealed weapon (punishable by up to six months prison and \$1000 fine) and tried without lawyer. Convicted @ trial.
<ul style="list-style-type: none"> • 2 Appealed, Florida S. Ct. held that right to counsel applies only to non-petty offenses punishable by more than 6 months in prison (standard for jury trial: arbitrary).
<ul style="list-style-type: none"> • 3 SCOTUS held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
<ul style="list-style-type: none"> • 4 Powell Concurred but held that states have not complied with Gideon, that right to counsel in petty offense cases is not absolute but should be decided on a case by case basis based on three general factors: <ul style="list-style-type: none"> • i The complexity of the offense charged • ii the probable sentence if a conviction is obtained • iii Individual factors peculiar to each case e.g. competency, attitude of community
<ul style="list-style-type: none"> • F Scott v. Illinois (1979): No actual prison w/o counsel. Draws line from Argesinger
<ul style="list-style-type: none"> • 1 Holding: "no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of a appointed counsel in his defense." Extension beyond this would produce undue costs on the justice systems of the states.
<ul style="list-style-type: none"> • 2 Brennan dissent favors authorized test over actual test. Court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependant on the budgetary decisions of state governments. makes it expensive to consider sentencing prison time
<ul style="list-style-type: none"> • 3 Effects <ul style="list-style-type: none"> • i growth in PD orgs • ii a lot of non-compliance <ul style="list-style-type: none"> • a still not provided • b poor quality • iii worsening, persistent problem • iv courts can't allocate \$\$
<ul style="list-style-type: none"> • G Nichols v. United States (1994): In felony cases (in contrast to misdemeanor charges), the constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competantly waived.
<ul style="list-style-type: none"> • H SUMMARY: Defendants have a right to counsel for all felony cases. If the charge is not a felony then they have a right to counsel only if a conviction will be followed by actual imprisoment. Defendants have right for trial and for first appeal, no right to State S. Ct. or SCOTUS level
<ul style="list-style-type: none"> • 1 SCOTUS has made stronger right to ounsel • 2 Congress has narrowed scope of post-conviction review, but more robust application
<ul style="list-style-type: none"> • I Effectiveness of counsel
<ul style="list-style-type: none"> • 1 Strickland v. Washington (1984) - Petitioner wanted sentence set aside for lack of effective counsel (failure to investigate mitigating evidence); standard is legal competence traditionally exhibited in the jurisdiction (deficient performance), there must be a reasonable probability

that but for the atty's deficiency, the result would be different (**sufficient prejudice**). Showing of both req. for claim.

- i Deficient:
 - a Failure to investigate mitigating circumstances is not deficient performance if there is more than one possible defense.
 - b A conflict of interest would mean deficient counsel.
 - c Basic duties do not serve as a "checklist" for counsel, for "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant."
 - d Judges who evaluate ineffective assistance claims should, in turn, be highly deferential to counsel's decisions and avoid scrutinizing them in hindsight. Harsh scrutiny would encourage the proliferation of ineffective assistance claims and "dampen the ardor and impair the independence of defense counsel."

- ii Prejudice: In certain circumstances, such as when D has had no counsel at all or when counsel has labored under a conflict of interest, the Court will presume prejudice. But ordinarily, D must show that counsel's deficient performance had an adverse effect on the defense. The defendant must show that there is **a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different**.

- 2 why difficult to prove:

- i usu raised as a collateral attack (procedurally difficult to raise)
- ii usu focused on what the atty did not do, harder to show in record
- iii there is no right to an attorney in the post-conviction process

- 3 Pre- 1970's standard was a "farce and mockery" standard

- i why hesitation to investigate atty's
 - a discourage them from taking cases
 - b sympathy for resource issues
 - c every trial could be open for appeal
- ii most D's at trial are guilty - trial is really abt. sentencing
 - a little sympathy for D's
 - b fear that overturning cases would release the guilty

- 4 Questions about standard

- i to what extent does it accept background resource constraints
 - a courts have accepted resource constraints and only applied standard to individual lawyers and decisions
- ii to what extent might it invalidate the system

- XII DISCRETION AND THE CRIMINAL JUSTICE SYSTEM

- A THE DECISION TO CHARGE

- 1 The prosecutor is the most important actor in the judicial decision
 - i decided whether and what to charge (Goetz originally not charged)
 - ii huge diff in penalties available
 - iii decisions are unregulated (no review or burden of explanation, unlike other administrative bodies such as the FDA)
 - iv determines resource allocation in light of heavy case loads
 - v 85-90% of cases plead out
 - vi judges rarely exceed their sentencing recommendations
 - vii decision not to charge is often failure by the police to investigate
 - viii theoretically adversarial but actually more administrative

- 2 Limits on Prosecutorial Discretion

- i what is reviewable:

<ul style="list-style-type: none"> • a no bias/ otherwise prohibited criteria (must show discriminatory EFFECT and PURPOSE)
<ul style="list-style-type: none"> • 1 Armstrong - Plaintiffs allege that they were prosecuted for crack because they were black; P must show that policy 1) had a discriminatory effect and was 2) motivated by discriminatory purpose; ct. balances risk of discovery by requiring a credible showing of different treatment of similarly situated persons. Two reasons court says he falls short: <ul style="list-style-type: none"> • Statistics that show unequal commission of crimes • He didn't meet burden to show that others similarly situated were treated differently (Catch-22 bc it's a discovery motion) • Discrimination <ul style="list-style-type: none"> • most in arrests • less in charging • less in conviction • less in sentencing
<ul style="list-style-type: none"> • 2 since 80s San Fran laundry permit case, SCOTUS has not found equal protection violated by discriminatory prosecution
<ul style="list-style-type: none"> • 3 vagueness cases emphasis on discriminatory enforcement—a kind of prophylactic to bringing discriminatory enforcement on charge itself bc it's so hard to win <ul style="list-style-type: none"> • b review for probable cause/ grand jury • c review for sufficiency of evidence
<ul style="list-style-type: none"> • ii resource limits
<ul style="list-style-type: none"> • iii some mandatory minimum/ "no drop" statutes (but required does not mean required)
<ul style="list-style-type: none"> • 3 Federal prosecutors have broader discretion since they are an overlay to the state's sys. and therefore <ul style="list-style-type: none"> • i can leave smaller cases to states • ii more specialized and targeted resources • iii federal penalties are potentially much higher
<ul style="list-style-type: none"> • 4 citizens lack standing to sue law enforcement unless they are personally prosecuted or threatened with prosecution <ul style="list-style-type: none"> • i policy: prosecutors get to set their own priorities; there is no way to assume they would do a good job if forced to prosecute • ii Linda R.S. - [child support for illegitimate children] class action against county DA on E.P. grounds sought injunction forbidding prosecutor from declining to prosecute fathers of illegitimate children. Court denies because: <ul style="list-style-type: none"> • a lacks standing: no sufficient interest in outcome of the case (not defendant) • b harm she complains of isn't caused by their failure to prosecute, prosecuting wouldn't remedy harm <ul style="list-style-type: none"> • 1 (ignores that putting someone in jail for failure to pay might motivate them to pay) • iii Inmates of Attica - court will not intervene in a decision not to prosecute at the behest of a 3rd party. 3rd party can't compel prosecution <ul style="list-style-type: none"> • a P's accuse criminal violation of civil P's civil rights because AG had not investigated any alleged crimes committed by officers; sought to require investigation and arrests; • b Reasoning <ul style="list-style-type: none"> • 1 resource allocation decisions (we can't second guess DA's office, AGs office, don't know what else they have) • 2 concern that making govt do something it doesn't want to do will disturb how well it's done
<ul style="list-style-type: none"> • 5 Alternatives to discretionary system: <ul style="list-style-type: none"> • i internal self-regulation <ul style="list-style-type: none"> • a statistical review of charging decisions and greater supervisor oversight where there is now little

<ul style="list-style-type: none"> • b New Orleans req. prosecutors to explain why they do and do not charge and include racial data
<ul style="list-style-type: none"> • c have system of internal policies instead of complete discretion
<ul style="list-style-type: none"> • d DM: greatest locus of power in criminal justice system, therefore self-regulation is necessary and important, much better than judges doing it
<ul style="list-style-type: none"> • ii Opposition to oversight
<ul style="list-style-type: none"> • a resources
<ul style="list-style-type: none"> • b autonomy
<ul style="list-style-type: none"> • c concern that guidelines should not be released to public
<ul style="list-style-type: none"> • iii European professionalized decision makers with written explanation.]
<ul style="list-style-type: none"> • a diminishes significance of difference in quality of lawyers
<ul style="list-style-type: none"> • b diminishes procedural rights
<ul style="list-style-type: none"> • c worries about official power, American mistrust of government, premises of adversary system
<ul style="list-style-type: none"> • 6 Pretext prosecution
<ul style="list-style-type: none"> • i focus on the person then the crime (Al Capone was caught for tax evasion)
<ul style="list-style-type: none"> • ii Is this targeting an abuse of authority (consider vagrancy and Olsen)
<ul style="list-style-type: none"> • iii is a pretext prosecution more justified in terrorism cases where the stakes are higher
<ul style="list-style-type: none"> • iv what inference do you draw from the inability to prove the greater crime
<ul style="list-style-type: none"> • B PLEA BARGAINING
<ul style="list-style-type: none"> • 1 guilty plea vs. plea bargain
<ul style="list-style-type: none"> • i guilty plea: can happen any time, even before charge, even right before sentence. most common after charge, before trial (before P devotes resources).
<ul style="list-style-type: none"> • ii plea bargain: deal takes some time for D to accept that he will plead guilty. re-arraignment with conviction at end. gets something in return, like concession on charges (charge bargaining) or concession on sentencing (sentence bargaining)
<ul style="list-style-type: none"> • 2 theoretically adversarial system is actually administrative and risk-averse. bargain theory of justice (analogy to contract):
<ul style="list-style-type: none"> • i objections
<ul style="list-style-type: none"> • a too much power against person
<ul style="list-style-type: none"> • b agents are not equally sophisticated
<ul style="list-style-type: none"> • c economic incentive for defense agents to take plea
<ul style="list-style-type: none"> • d prosecutorial agent incentives
<ul style="list-style-type: none"> • 1 conviction rate (electability)
<ul style="list-style-type: none"> • 2 clearing their abundance of cases
<ul style="list-style-type: none"> • 3 garner leisure
<ul style="list-style-type: none"> • e discounting "guilt"
<ul style="list-style-type: none"> • f may not have confidence that process leads to reliable outcome
<ul style="list-style-type: none"> • g maybe people who would go to trial are more likely innocent, so "discount issue" is kind of perverse
<ul style="list-style-type: none"> • h maximum legally authorized penalties are substantially higher than normally used, contract theory of duress
<ul style="list-style-type: none"> • i possible problem of over-lenience: needs a norm to measure (from legislature?)
<ul style="list-style-type: none"> • ii counter:
<ul style="list-style-type: none"> • a most d's are guilty, system is under-resourced and this helps manage
<ul style="list-style-type: none"> • b not bazaar bargaining, regulated by complex social norms, not legal norms
<ul style="list-style-type: none"> • c when the system operates well, can approximate reasonable judgment
<ul style="list-style-type: none"> • d don't idealize alternative (trials). lay juries lead to weird rules of evidence

- 3 **Brady** - promised lesser maximum penalty if he did not go to trial; court finds Brady's plea to be **voluntary and knowing & intelligent** although the scheme under which it was obtained was struck down
 - i voluntariness is a normative judgment, not used in normal sense. here means:
 - a you kind of know what the consequences are
 - b you have counsel to advise you
 - ii White says if this were unconstitutional, almost all pleading would be
 - iii you can waive a group of rights without knowing exactly what you are waiving. you can waive right to appeal and collateral attack and counsel.
 - iv no collateral attacks on convictions after new decisions;
 - v **Bram**: direct or implied promises are coerced/involuntary **confessions**. Same question in context of guilty plea is NOT coerced. presence of counsel to protect and advise you makes this case (and pleas) different than **Bram** (and confessions).
- 4 Federal sentencing guidelines give significant reduction in range if you accept responsibility (plead): 35% less
- 5 **Bordenkirchner** - prosecutors can threaten to recharging the crime as something much greater
 - i encourages higher initial charging for leverage
- 6 Constitutional Bases for overturning a plea bargain (almost none)
 - i ineffectiveness of counsel
 - a below norm of lawyers in jurisdiction
 - ii prejudice, defined restrictively as "but for lawyers inadequate performance, you would not have plead guilty)
 - iii do not address the two main problems of plea bargaining, that:
 - a D might be coerced by uncertainties of trial
 - b community confidence in disposition
- 7 No Contest pleas (no lo contendere)
 - i prosecutors don't like them bc not "guilty," so people can argue their innocence publicly
 - ii no preclusive effect for civil case

• C SENTENCING

- 1 **Williams v. New York** - info for sentencing not restricted to info from trial
 - i jury recommended life in prison, judge gave death sentence in light of additional information obtained through probation department and other sources.
 - ii SCOTUS held that in determining sentence, the Federal Const. does not restrict the view of the sentencing judge to the information received in open court. Even though Defendant has not been able to confront witnesses, the due process clause does not prevent the trial judge from using other evidence in determining sentence.
- 2 Selection of a Sentence Length by Judge
 - i **United States v. Jackson** - "**selection of a sentence within the statutory range is essentially free of appellate review.**"
 - a Jackson had 7 armed robbery convictions. On day of release from prison for two robberies he robbed another bank.
 - b Sentenced to LWOP. Appellate court upheld. Court reasoned that specific deterrence had failed, therefore justified under incapacitation and general deterrence.
 - c Posner concurred but said sentence should be determined through theory of retribution (he would have given 20 yrs WOP). To incapacitate only need to imprison him until he is an old man. General deterrence will not work since incremental sentences will not deter others from a "rational crime"
 - ii **United States v. Thompson** - When can a judge make a **downward departure** from the offense level of the Federal Sentencing guidelines?
 - a Two part test:

<ul style="list-style-type: none"> • 1 Compare any given defendant to all defendants and not just those similarly situated with respect to the offense of conviction [Thompson II]
<ul style="list-style-type: none"> • 2 Impact that a given sentence will have on innocent third parties [Pereira] <ul style="list-style-type: none"> • once someone is in jail, harm has already been done to third parties, they have been replaced. Thompson can not receive downward departure on this ground
<ul style="list-style-type: none"> • b Second possible ground for departure: "Extraordinary circumstances reflecting rehabilitation after an earlier (now vacated) sentence for the same crime." Ground no longer available, but was available at time of Thompsons crime. He is eligible on this ground.
<ul style="list-style-type: none"> • iii Blakely v. Washington: When can a judge impose a sentence that exceeds the standard range? <ul style="list-style-type: none"> • a must be "substantial and compelling reasons justifying an exceptional sentence" • b A reviewing court will reverse if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.
<ul style="list-style-type: none"> • c Applied Apprendi standard: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." In Apprendi the court concluded that constitutional rights had been violated since the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding.
<ul style="list-style-type: none"> • d Defendants sentence invalid because it does not comply with the 6th ammendment <ul style="list-style-type: none"> • 1 rare, could have been avoided
<ul style="list-style-type: none"> • e dissent: too many facts relevant to sentencing to submit them all to a jury; hard to argue in alternative to jury
<ul style="list-style-type: none"> • f Max is not statutory max but the high end of the sentencing guideline: threat to guideline system because you can't prove sentencing facts by preponderance before judge, have to establish at trial if you want to increase sentencing max. So legislature could set high max and make factors advisory. To constrain judges more, you could have no additions, just subtractions (not affected by Blakely or Apprendi), so increase max with mandatory subtractions to get exact same result (odd formality). Or you could get D to plead relevant facts you want to sentence on
<ul style="list-style-type: none"> • XIII THE SENTENCING DECISION
<ul style="list-style-type: none"> • A Traditional sentencing system: "multiple discretion". four institutions that have the power to determine criminal sentences: the legislature, the prosecutor, the judge and the parole board or its equivalent. Abuse by one might be cancelled by another
<ul style="list-style-type: none"> • 1 Legislature - sets the range of sentences legally authorized after conviction for a particular criminal charge.
<ul style="list-style-type: none"> • 2 Prosecutor - is the most important institutional determinant of a criminal sentence...He has the legal authority in most systems to determine the specific offense for which a person is to be prosecuted, and this ability to select a charge can also broaden or narrow the range of sentences that can be impose upon conviction.
<ul style="list-style-type: none"> • 3 Judge - has the power to select a sentence from the wide range made available by the legislature for any charge that produces a conviction. Her powers are discretionary - within this range of legally authorized sanctions his selection cannot be appealed, and is not reviewed... <ul style="list-style-type: none"> • i Guided by: <ul style="list-style-type: none"> • a presentencing report <ul style="list-style-type: none"> • 1 prior record • 2 asseessment of person by probation officer • 3 evidence at hearing or trial • 4 mitigating evidence from D's lawyer, memo from him • b factors about the offense <ul style="list-style-type: none"> • 1 motive

• 2 was gun loaded
• 3 actual harm
• 4 who victim was
• 5 how much money
• c factors about the offender
• 1 likelihood of recidivism
• 2 record
• 3 was he a good guy
• 4 mastermind?
• ii Constraints
• a legal
• 1 not over maximum statutory
• 2 no burden of explanation (often do, but don't have to)
• 3 can't go under minimum mandatory if it exists
• 4 no bald discrimination
• 5 essentially no appellate review on the merits, minimal on due process
• b social/procedural (stronger than legal)
• 1 don't piss off constituency for elected judges
• 2 prison capacity
• 3 often not exceed prosecutorial recommendation
• 4 care about appropriate sentences
• 5 can't upset the apple cart too much (part of complex procedural system), don't want to disturb expectations too much
• 6 personal relationships with prosecutors, probation officers (repeat actors)
• 4 Parole or Correctional Authority - has the power to modify judicial sentences to a considerable degree.
• i Disaffection with the traditional approach - some object that the inconsistencies and uncertainties associated with discretion undermine deterrence and permit undue leniency. Others see discretion as permitting vindictively harsh punishments and invidious discrimination among offenders.
• ii political parole boards
• iii open-ended criteria
• iv almost everyone gets it, question is when
• v usually statutory when you're eligible
• B Statistics
• 1 2,299,000 prisoners in 2007, up from 347,000 in 1970
• 2 larger increase in probation and parole
• 3 varies enormously by state
• i differential crime rates
• ii differential attitudes
• 4 7% women in prison
• 5 6.5 times incarceration rate for black people, 2.5 for hispanic
• 6 increase in older inmates (bc sentences are getting longer)
• C The "Determinate Sentencing" Alternative - Many jurisdictions use, narrows release/parole possibilities, narrows range of authorized sentences. Concerned about discrepancies in sentencing.
• 1 Reasons for reform
• i growing recognition of problem of sentencing disparity
• ii sense that system was not transparent
• iii we like govt officials who exercise power to have rules to follow, constraint
• iv concern with rising crime rate in the 60s, soft on crime vs. law and order

<ul style="list-style-type: none"> • v declining faith in power of rehabilitation
<ul style="list-style-type: none"> • 2 Federal Sentencing Guidelines - Crime Control Act of 1984 abolished parole and created a Us Sentencing Commission charged with promulgating guidelines for judges to use in federal sentencing decisions. The Act required the commission to establish sentencing categories based on specific combinations of offense and offender characteristics and to identify a narrow range of authorized sentences (with no more than 25% spread between minimum and maximum terms of imprisonment) for each category. Judges normally must impose a sentence within the authorized range.
<ul style="list-style-type: none"> • i Factors to be considered in Imposing a Sentence. ...The court, in determining the particular sentence to be imposed, shall consider -
<ul style="list-style-type: none"> • a the nature and circumstances of the offense and the history and characteristics of the defendant; <ul style="list-style-type: none"> • 1 federal: only looks at incarceration and criminal history • 2 states look at other things: family stability, etc
<ul style="list-style-type: none"> • b the need for the sentence imposed - <ul style="list-style-type: none"> • 1 to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (retribution) • 2 to afford adequate deterrence to criminal conduct; (deterrence) • 3 to protect the public from further crimes of the D; (incapacitation) and • 4 to provide the D with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;... (rehabilitation)
<ul style="list-style-type: none"> • ii Concerns about new guidelines: <ul style="list-style-type: none"> • a hard question to formulate about whether they've reduced disparity <ul style="list-style-type: none"> • 1 more successful intra-district than inter- • 2 not clear on racial • 3 are people in boxes the same • b create new kinds of disparity in the process of eliminating the old ones, • c can be overly rigid and thus prevent appropriate individualization of sentences, and • d can overly restrict the use of probation and require sentences that many critics consider too severe • e combined with war on drugs have drastically increased prison population • f Plea bargaining is still a separate system.
<ul style="list-style-type: none"> • iii judges hated them because <ul style="list-style-type: none"> • a authority reduced • b forced to impose different sentences than they would have chosen • c substantively harsh • d "sounds like tax code": not pronouncing moral judgment • e limits to how much rules can capture complexity of human affairs <ul style="list-style-type: none"> • 1 factors not accounted for create false equality • 2 enormous concessions to those who plead guilty so increase plea rate
<ul style="list-style-type: none"> • iv problem of multiple purposes of punishment, often push in different directions. unclear how to turn any purpose or group of them into a number. importance of social conditions
<ul style="list-style-type: none"> • D Procedural Rights in Sentencing (only counsel) vs. at Trial (lots) <ul style="list-style-type: none"> • 1 professional, not jury • 2 rehabilitation as purpose of punishment, so individualized (kind of dated) • 3 mercy • 4 confidentiality of presentencing report • 5 defects in process • 6 don't really want a full trial on all evidence relevant to sentencing, problem of prejudice to trial jury, so second trial phase?