

Why Punish? Purposes of Punishment-Crim Law 2008

Steiker

- MPC 1.02(1)
 - A. Forbid and prevent inexcusably inflicting or threatening harmful conduct to an individual or the public.
 - B. Control those whose conduct shows they have a disposition to do A.
 - E. Differentiate between the seriousness of offenses.
 - 1, 2, & 4: Safeguard offender against excessive or arbitrary punishment.

Consequentialism

- Results based. Nothing intrinsic except for the good of the results, for individuals or all.
 - Forward looking, purpose of punishment: 1. deterrence, 2. rehab, and 3. incapacitation.
 - Jeremy Bentham: Punishment is itself evil and only allowed to prevent greater evil.
 - Fair play teaches that competition is governed by the rules (football foul).
 - unfair advantage to lawbreakers leads to an overall diminishing compliance.
 - Advantage must be erased by punishing the individuals and restore balance
 - Criticisms
 - If erasing the advantage, the punishment must vary by gain
 - Unsuccessful attempts are not punishable.
 - Punishment should address the wrongness of the harm done or attempted.
- Consequentialist Prosecution
 - Deter Criminal (specific deterrence) and others (general deterrence)
 - Punishment cost is greater than the benefit derived from the crime, discount punishment by the likelihood of getting caught. (Posner)
 - Criticism
 - Assumes criminal weighs the punishment when deciding the crime.
 - Does not take into account moral accountability.
 - Punishment varies by the individual. Benefit may be uncertain.
 - Flipside, Durkheim, targeted not to bad man, but to the good man.
 - Rehabilitation
 - Indeterminate sentence, 15 to life. Determined by parole board.
 - Abandoned because right and left don't like it
 - Right- There are more deserving people to receive benefits

- Left- patronizing, poor and minorities will probably be viewed as needing more rehabilitation, tends to impinge liberty.
 - Incapacitation- prevent people from reoffending. In prison can't shoot your sister.
 - How much of violent crime decline resulted from more incarceration.?

Retribution- Retributionism- wrongdoing requires punishment.

- People should be punished because they deserve to be punished. (Kant).
 - Deontological- rules for themselves. Looks to intrinsic theory, not forward looking.
 - Kantian Retribution: Poena forensis (judicial punishment) and Poena Naturalis
 - Forensis: only to respond to the commission of a crime because people end in se.
 - Naturalis: Crime as a vice is a punishment in itself.
 - Util. exceptions bad because without justice and righteousness there is no value to life.
 - Example: remit death sentence for medical experimentation. No justice.
 - Realize the desert of his deeds, remove bloodguiltiness from the people.
 - Michael S. More: Moral culpability is both sufficient and necessary. ability and duty to punish.
 - HLA Hart
 - Punish if only if committed a voluntary moral wrong.
 - Punishment must match or be equivalent to the wickedness of the wrong.
 - Justified punishment: the return of moral suffering for voluntary moral evil is good
 - Wicked conduct itself calls for punishment even if no deterrent effect
 - repetition of the act by the guilty or by others.
1. Autonomy and Dignity of rational acting people, the two grounds of Kantian Retribution
 - a. It respects our autonomy to punish us; violating Cat. Imp. Wills own punishment
 - i. Protects dignity and autonomy by restricting punishment to every time deserved
 - ii. So that individuals realize the desert of his deeds
 - b. Equality.
 - i. Preserve equality by making sure people are ends in themselves.
 1. Actions have same results regardless of who people are.
 2. Punish proportional and as nearly identical to the harm caused.
 3. The only just punishment for murder is death
 - ii. Punishing restores the unfair balance for the victim and society
 - iii. Remove the bloodguiltiness; otherwise society assent to murder
 2. Kant: Not just right to punish, but a duty. Execute the last murderer.
 3. Criticisms of Consequentialist Utilitarian
 - a. If utilitarian punishment, why not punish people who haven't committed crimes for the greatest good (punish the wrong person to avert a mob)
 - b. Otherwise justice would be uncertain depending on the consequences
 - c. People wouldn't know how to act; too difficult to calculate

- d. Avoids utilitarian exceptions, preserves intrinsic values like justice
- Kantian retributivism vs. vengeance
 - Revenge is an emotional need, hot blooded, viewed frequently as negative,
 - James Fitzjames pro revenge, hating criminals is good because the crime itself is bad and hating criminals is a sign of healthy morality.
 - Punishment converts the transient sentiment into a definite expressions and solemn ratification to the hatred against the offense, like a signet into hot wax. Otherwise there would be vigilante justice.
 - Revenge is a natural, deep-seated human passion. Criminal punishment channels and makes this passion useful, like marriage does for sex
 - Retributivism is a moral duty
 - Robinson and Darling: Most people obey the law not for fear of prison, but from peer pressure and intrinsic personal constraint because views law as fair.
 - We must therefore protect the legitimacy of the legal system.
 - Most people are retributivists, so system must be for us to follow it.
- Criticism of Retribution
 - Jeffrie Murphy: Marxism and Retribution: False equality
 - Assumes rules benefit all concerned and people all recognize the benefit.
 - In fact there is a lesser benefit to the poor.
 - If we want a retribution punishment we must make all in society equal
 - John Mackie: We're not really getting paid back, we are repaying harm with harm.
 - Repayment should be reparations.
 - Retribution seeks to wipe out the crime, but it can't.
 - Poverty and discrimination also cause a problem of autonomy. People are conditioned to act a certain way, may not be as morally culpable.
- Incapacitation: Punishment depends on likelihood of recurrence of crime, not on terribleness of crime (I only have one mother). (3 strikes you're out, most severe).
 - Evidence suggests most crime committed by the same people, mostly age (18-21).
 - Criticisms
 - Punishing for crimes that haven't yet been committed and for circumstances they can't control (retributivist: wrongdoing required for punishment).
 - Requires finding out about each defendant anything that correlates with re-offending (young men, poor, minorities).
- Other theories of Punishment: Alternatives

- Restitution. How much of punishment is for the victim. Tort is compensatory.
- Equality (retribution): make a statement about victim's worth.
- Promoting remorse on behalf of the defendant (apology, like restitution), maybe a rehab.
- Punishment is not our only means of crime control (control the preconditions of crime)
 - Prisons are popular, while head start is not; expensive, redist. wealth, slow.
- The theories are not consistent with each other.
 - Deterrence: is it just to punish someone mostly for deterrent buck?
 - Rehabilitation: kid steals candy bar, is it just to lock the kid up for 10 years and give him great rehab programs because there are a lot of indicators that he will get worse.
 - Popular answer is mixed theory: Retributivism sets the outer bounds, one of the other determines the specific punishment. Not a Kantian duty, but a license to punish.
 - Moore's criticism: Chaney v. State. Brutal rape, judge convinced guys are not a danger, 1 year and recommend immediate parole. Isn't it unjust not to punish a violent rapist?
 - Retributivism sets min and max, not just a license, but a duty to meet the minimum.
 - Utility may let rich people do a lot of good for the world to avoid punishment.
 - Sometimes it's just wrong not to punish, even if it doesn't better society

Actus Reas

- a. **Martin Rule: Each and every element of a statutory violation must be voluntary.**
 - i. **Each statutory element must be voluntary**
- b. **Decina: reasonable foreseeability, links voluntary and guilty action**
- c. **MPC pg 1081, rule 2** is general provision for responsibility.
 - i. Section 2.01 To be guilty of an offense the criminal liability must be based on **conduct which includes a voluntary act or the omission** to perform an act of which he is physically capable.
 - ii. very broad. **Some action essential to the crime must be voluntary.**
 - d. **Involuntary requires lack of experience of acting,**
 - i. **lightening strikes & gun goes off.**
 - ii. **Unconsciousness or Sleep**
 - iii. Reflexive response or convulsion, totally uncontrollable
 - iv. Hypnotic suggestions or during hypnosis, does it override the will or just assist them in carrying out their will.

- v. A bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual. (habitual action is voluntary according to MPC).
- vi. A tough choice does not make it involuntary. (there is a mental state defense of duress from seriously constrained choices).
- vii. Physically being carried out by someone else.
- viii. Does brainwashing fall under hypnosis? People fall under someone else's spell? Not just a gun to your head.
- iii. **This involuntary defense lets you get off entirely**
- iv. **MPC catch all-** not the product of effort or determination of the actor. The quality of their intention is separate from mens rea, because they are considered not to have acted.
 - i. MPC is the most difficult involuntary standard for a defendant, so they throw in a catch-all to limit the effect because of the two-dimensions of the issue.
 - ii. The broader the definition of involuntary the more elements required to be involuntary, and vice versa.

Omissions

- Criminal law not that interested in coming up with a philosophically pure act/omission distinction. really trying to figure out blame attribution and not a philosophical distinction
 - **In a really hard case**, know that you are really determining blame attribution and not act/omission distinction.
- Common law tradition has generally refused to criminalize omissions except in limited cases.
 - **Legal Duty Rule:** Jones v. US, Jones let the baby starve to death, has plenty of food.
 - In general, **no obligation to others unless there is a legal duty.**
 - No duty of easy rescue without legal duty is the anglo-american rule.
 - Articulated in Beardsley, this rule comes from the common law.
 - Legal Duty sources
 - Contract
 - Status (with that relationship come legal duties, parent, etc.)
 - Marriage is a status that comes through contract. Mutual obligation.
 - Being a parent is not through contract, but status still obliges.
 - Master/apprentice (quasi-contract)
 - Teacher/student, but not student/teacher
 - Being a child does not give status obligations in our society.
 - Nature does not give status, law does.
 - **Carol court looks at functionality.**
 - **Good Samaritan statutes,**
- **Problems with broader omission liability**

- Unequal who gets punished, depends on who gets caught.
- Encourage Vigilante activity, incentivize inappropriate intervention.
- Basic hindsight bias, not sure what's going on. If I start to intervene and go away, don't I create a liability. People avoid any knowledge of what's going on.
- Unfair distribution of risk.
- Privacy, some people may not want you to report.
- Violate personal autonomy
- Gang violence
- Benefits of broader omission Liability
 - **Aren't we likely to decrease crime by increasing reporting and why (helps decrease violent crime). A Social good in prosecuting more crime**
 - Duty of easy rescue, how do you justify refusing help to people being harmed when there are no bad consequences.
 - Isn't the person like an accessory after the fact. Isn't the line arbitrary.

Mens Rea- Evil mind or vicious will. The mental element of the criminal law. Just as actus reas requires a certain degree of physical control to be culpable, Mens reas requires a certain degree of mental control. Sometimes refers generally (broadly) to culpability, blameworthiness, and fault. (thereby swallowing actus reas)

- **Common Law- Malicious**
 - Cunningham- stole
 - **Maliciously postulates foresight of consequences (common law def.)**
 - Actual intention to do the harm done, or reckless to it. Not just wickedness.
 - Malicious has an important meaning in the common law- Faulkner
 - Malicious requires foreseeing the consequences.
 - Fitzgerald says malicious doesn't require that he did foresee, but just that he could have foreseen, a reasonable person would have seen. He's describing MPC negligence.
 - **Does malice include MPC negligence?** Professor in Cuningham said malice requires foreseeing the result. Negligence does not require actual foresight..
- **4 MPC mental states**
 - **Purposefully- Conscious object.** A person acts purposely with respect to a material element of an offense when:
 - 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;
 - Purpose applies to conduct and circumstances differently than to results.
 - Conscious object of conduct or result.
 - Aware of the existence of attendant circumstances or he believes or hopes that they exist.

- **Knowingly-practically certain.** A person acts knowingly with respect to a material element of an offense when:
 - 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
 - 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.
- **Recklessly-conscious disregard a substantial and unjustifiable risk.**
 - A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.
 - 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.
 - Must consciously disregard the risk. [Must be conscious that risk is substantial or unjustifiable? Unclear]
 - Must be unjustifiable risk
 - Until MPC, consciousness not the definition of recklessness. Before it depended on the degree of the risk, regardless of whether or not you were aware of it.
 - In MPC: malicious includes MPC purpose, knowledge, and recklessness.
 - Has foreseen the kind of harm; actual foresight. Not could have, should have, would have foreseen; consciously aware of the risk.
 - 2.02(5): Substitutes for negligence, recklessness and knowledge
- Default Mens Rea
 - MPC: statutory silence infers recklessness as a min. required mental state.
 - If one mens rea element is specified and others silent, specified will be assumed to apply to the each essential element of the crime.
 - Pushes the legislature to be specific.
- **Negligence- not aware, but should be** (reasonable person would be) aware of.
 - Exact same risk as in Recklessness: substantial and unjustified
 - Not aware of the risk. Does not know this is dangerous.
 - Ordinary negligence means: failing to do something you ought to do.
 - MPC negligence is a gross deviation from the standard of care that a reasonable person would have applied to the situation.
 - Tort negligence uses the lower everyday standard: any deviation from what a reasonable person would do. Not used in the MPC

scheme. Gross deviation required for criminal sanction. Negligence is not enough for criminal liability according to MPC

- Hazelwood: Exon Valdez. Statute says negligence. Negligence in criminal statute, MPC or tort negligence.

- **Three kinds of elements:**
 - Conduct- The thing the person has to do.
 - Attendant circumstances- substance is noxious, ingestion is poisonous.
 - Burglary requires that it be a dwelling and at night, need not necessarily be intended.
 - Statutory rape: the age is a circumstance that makes the crime a crime.
 - Something in the world that is as it is.
 - Result- the ingestion, such that their life is in danger. (Homicide is the classic result element). Something in the world must change.
- MPC negligence/recklessness requires substantial risk. What exactly does substantial mean?
 - If it's supposed to be a constant quantum of risk (more probable than not; 20% chance) why not state the amount explicitly?
 - Maybe not a set quantum, but varies with justification or nature of risk
 - The nature of the risk may be involved in the substantial
 - 2% chance destroy NYC might be greater than 2% chance of one death.
 - **The risk must be of such a nature and degree**, taking into account the purpose of the conduct, all of this tells us whether the behavior met the bottom-line moral standard of whether it was a gross deviation from the reasonable standard of care.
 - Ultimately, the jury must decide.
- Why require a gross deviation from the reasonable standard of care?
 - Some things are just not wrong enough (**retributivism**-based)
 - We're not talking about money, but taking their **liberty** and giving them a **stigma**.
 - Ordinary Negligence
 - Speeding 5 mph, talking on a cell phone, pushing a yellow, rolling stop
 - Gross Deviation Negligence
 - Shaving, putting on makeup and eating all at the same time
 - Reading the newspaper, Driving on the sidewalk, Ignoring bus stop sign.

Strict Liability

- Morissette entered Air Force bombing range, took spent casings, flattened them and sold them.

- SCOTUS reverses, holding that **D must have knowledge of the facts that make the conversion wrongful, in this case that the property had not been abandoned.** They are writing in a provision of intent to steal to the statute.
 - **Theft as Malum in se crime has the common law scienter presumption.**
 - Essential that intent be required for criminal liability so people can choose between good and evil.
 - **Blame should be premised on choice?** all created equal in ability to choose between right and wrong; punish unblameworthy blurs the line.
- Is Strict liability not a good **means of deterrence?**
 - **Retributivism Requires Mens Rea**
 - **Rehabilitation requires Mens Rea**
 - Strict liability inconsistent with rehabilitation; rehabilitates action, instead of decision to act. How can we rehabilitate dumb luck?
- **Public welfare offense-** administrative regulation in the criminal law.
 - Ballint- distributing drugs without the appropriate forms for tax purposes.
 - Dodderwich repackages drugs. Didn't check the labels. But even if they had checked the labels and a maniac switched them. If things go out misbranded, there's a strict liability.
 - Even if you have a great system, if someone makes a mistake, criminally liable.
 - Cons
 - Great potential for unfairness. Non culpable punished.
 - Individual people go to jail. Personal responsibility that can't be insured away.
 - Creates stigma
 - We allow because we think that very often there is negligence behind the injury that is very difficult to prove, so we shift the burden to the individuals who have the best ability to fix it.
 - Securities fraud
 - Environmental pollution
 - Workplace safety
 - Trade regulation.
 - Create a greater measure of deterrence. Criminal law gives a much greater incentive.
 - In Ballint, because of the **dangerousness of the materials** involved there was an obvious duty to discover what regulations govern you.
 - But Criminal liability may be necessary to create the right **incentives** in some cases.
 - We're really trying to make it **easier for prosecutors** to prosecute when huge harm.
 - Jackson: generally strict liability offenses have **small penalties and little stigma.** Traffic
 - What makes something a public welfare offense?

- Item must be **potentially very dangerous, standing in a responsible relationship to some grave public danger, generally low punishment and stigma.**
 - Mens rea that involved with something potentially dangerous and uncommon, awareness that standing in a responsible relationship to public danger.
 - May have less mens reas: Ordinary things can subject them to strict liability
- The **severity of the punishment** has become the key element in identifying public welfare offenses

Causation- the third leg.

If we had action and bad mental state isn't the harm just a matter of fortuity?

- **Paradigmatic heartland of criminal liability, everyone agrees that when there is voluntary action, mens rea, and the cause of harm in the world, that is the appropriate realm of criminal liability.**
 - 1. **Actual cause, cause in fact, but for** cause, sine qua non, is a prerequisite for proximate cause. **Necessary for the result as it happened** to come to pass. Without the cause-in-fact the harm would not have occurred.
 - There are many but-for causes, and involve no culpability.
 - “but-for” easy hurdle depending on levels of generality.
 - First hurdle.
 - **2. Proximate cause**, ALI legal cause, close enough that we make it illegal. Causing harm is not sufficient for criminal liability. This one is a very difficult question.
 - **Proximate causes are foreseeable**
 - **Not the proximate cause** when results are extraordinary, extremely remarkable, unusual
 - Foreseeable in setting fire that firefighters will come, and that they might get injured.
- Warner-Lambert: Warned of explosion risk, foreseeable because they were warned.
- Foreseeability not very helpful because the result depends on the degree of generality applied to it.
- Acosta & Arzon, and Warner-Lambert not consistent with one another.

Problems of Proximate Cause:

1. Exceptional victims (eggshell skull, not foreseeable but caused the death; cutting a hemophiliac; tough patient doesn't go to the Dr.
 - a. You take your victim as you find them.
 - b. Foreseeability not important for this causation, but for mens rea.
2. Unexpected results (I shoot at you, you duck, and my bullet kills someone else).
 - a. Not a question of causation, but have I murdered? Transferred Intent
 - b. Shoot and miss, but dies of fright.

3. Intervening Acts/events

- a. Natural events (struck by lightning)
 - Year and day rule
- b. Victim (takes poison, during or after)
 - If victim became irresponsible because of D's action. Madge.
 - Intervening responsible actor disrupts proximate cause.
- c. 3rd party (left to freeze and hit by truck)

Stephenson (Head of ku klux klan), Madge takes poison.

- Court said that **she became irresponsible** (like the insane, they are not choosing, in the throws of dilution, the last choosing person is it.) children,
 - Otherwise **responsible actor intervening disrupts proximate cause.**

a. Common Law Rules:

- Year and a day
- Take your victim as you find him. You break it you bought it. Foreseeability unimportant.
- Transfer of intent.
- Intervening actor vs. irresponsible actor
 - Some things are very foreseeable but we hesitate to make guilty.
 - If I ever lose my money I will kill myself. Robber guilty of murder?
 - Intervening actor of will breaks the causative chain
 - But, If my wife ever leaves me I'm going to kill her? But the lover who induces her to leave husband is not guilty of murder. We attribute to the first actor because somehow now a freely choosing actor.
- Rules are sometimes by their very nature in opposition to foreseeability.
- **MPC** tried to avoid overarching standard with contradictory rules of thought, looking for more coherent.
 - What's the same?
 - Still includes but-for causation in first provision
 - 2.03 (4)- foreseeability, which applies only when there is strict liability
 - 2a- transferred intent
 - What's different?
 - **Organized around mens rea instead of foreseeability.**
 - Starts with easiest case, **when what you intend or know will happen is the result, we know you caused it.**
 - When result **brought about is different from result intended**, no liability unless
 - (a) same result, just different person;
 - (b) shoot intending one result (make you scared), but something else happens (scared so much he dies, runs outside and gets killed)
 - (c) The thing I intend happens but not in the way I thought.

- We think of causation in scientific terms. But **in criminal law, the causation question is really asking when is it fair to blame you**. So Warner-Lambert thought tort law should be different than criminal- felon the worst thing you could be.
- Less than ¼ have adopted MPC for causation.
- **Most common causation instruction in homicide is:** intended to kill and caused the victims death. Long instruction on intent, but causation left up to the jury.
- **But-for + foreseeability** applied by appellate court, not but the jury.

Homicide: 2 big interesting questions in crim law

- **common law**
 - **Murder**
 - **Unlawful killing with ‘malice aforethought’.**
 - Common law mental states constituting malice aforethought.
 - **Intent to kill** (transferred intent)
 - **General intent to kill**, not just reckless, overwhelmingly likely someone will die= practically certain (**knowledge**).
 - **Intending only grievous bodily harm**, but causing death.
 - GBH- the kind of harm from which you might die.
 - Shooting in knee-cap may not count
 - Cannot intend to hit over head with iron bar and get out of intending to kill.
 - Commit act likely to cause death, even with no desire that harm come from it. **Reckless indifference.**
 - Not MPC recklessness, something more. Substantial risk thats unjustifiable; on steroids. Reckless +
 - CA, NY, PA statutes: **Felony murder** (strict liability murder).
 - Intent to commit a felony is the malice aforethought.
 - Only one punishment for murder, death.
 - **Manslaughter- Without malice aforethought, not murder.**
 - . No death penalty. Ecclesiastic court, forfeit all goods to the Church. Benefit of clergy. Can only get benefit of clergy once. Branded your thumb to show you had benefit of clergy.
- **MPC**
 - **Murder**
 - Purposeful, [like intent]
 - Knowledge [like knowledge]
 - reckless (+ extreme indifference (EIVHL), [like recklessness +])
 - No MPC GBH
 - Murder while committing one from the list of felonies has a presumption of reckless + EIVHL. The presumption is rebuttable.

Common Law

- **Murder 1 established to set off death penalty,**
- Majority position is Penn 1794 statute, **Murder 1 requires deliberation and premeditation.**
 - **Premeditation Requires? Commonwealth v. Carroll**
 - Deliberate act, intentional. Act is deliberate, not deliberated upon.
 - **No time is too short.** Premeditation can be almost instantaneous with the act, as long as intent precedes action by at least a microsecond.
 - Deliberation and premeditation in this sense mean all intentional murders.
 - **Guthrie, WV.** Stabbed coworker dishwasher in neck because of teasing.
 - Trial court gives improper Shrader instruction- intention need not exist any specific time period prior to killing, but must find deliberation and premeditation.
 - Circuit says instruction was bad, but facts may have been sufficient.
If no time difference required for murder 1, this destroys the 1/2 distinction
 - **Jury should be instructed that there must be actual evidence that the defendant considered and weighed**
 - Pg 387, **must be some period**, but no particular period of time, an opportunity for some reflection, and jury must find that defendant actually reflected.
- Proving premeditation:
 - planning activity
 - Acquiring the weapon-
 - Luring to secluded area
 - Taking off the gloves
 - Escape plan
 - Did research
 - Telling someone ahead of time
 - prior relationship/behavior to victim (really part of motive)
 - nature/manner of killing.
 - Gun more likely to show intent than throwing a shoe.
 - How brutal, how many times you stab or shoot (shows premeditation or maybe not)
- Anderson, CA case: killed girlfriend's daughter. Stabbed 60 times. Threw murder conviction out as having **no evidence of planning activity**, lack of motive (besides recent sexual advances spurned), because the wounds were shallow. Tests for premeditation to raise the bar. Voted out because they were trying to limit the scope of the death penalty.
 - **Interpretation depends on your politics to open or close the gate.**
- **MPC no murder 1 or murder 2, but does have death penalty, 2.10.6**
 - Everyone guilty of murder eligible for death penalty
 - Pecuniary gain (motive)

- Many in danger
- Heinous or cruel murder (how evil was it)
- MPC for death penalty widely adopted in death penalty states after SCOTUS got rid of it because of poor instruction.
 - **Murder 1 or felony murder eligible for capital punishment**
 - **Then consider aggravating factor, at least one from MPC list, then aggravating factors must outweigh mitigating factors.**

Manslaughter tends to take you out of mandatory punishment. 15 yrs minimum for murder, time served minimum for manslaughter.

Voluntary manslaughter- Intentional killing mitigated away from malice.

- Classic common law Mitigation: Husband walks in on wife's adultery and kills wife and man. In Flagrate delicto. On a sudden quarrel. Pulling on someone's nose. False arrest
 - **Mitigated by provocation**, giving rise to **the heat of passion state of mind**, with no **cooling off period**. Immediately under the influence of passion. Hot blooded.
 - Hot blood not as bad because:
 - Excuse- It's more understandable what they did because their deliberation was disturbed. Maybe we would do the same thing.
 - **Other examples of provocation:** abuse/rape of a close family member (not preventing, but has already occurred); sees the motorist run over his daughter, kills the innocent bystander;
 - Justification- victim is somehow morally culpable and had it coming in some sense.
- **Provocation is not a complete defense, just a mitigation.** Less time of prison.

Girouard and Maher Comparison

because **classic common law rule is restrictive with judge as gatekeeper** (mutual combat, abuse of a close relative), this does not fall into any of these boxes. Doesn't fall into the checklist.

Girouard- although comments were needlessly provocative, provocation not adequate to mitigate second-degree murder to voluntary manslaughter. Whether sufficient provocation to kill 392

- There is no reasonable provocation to kill. **Real question: would persons passions be so aroused as to impair the reason.**

Maher- closer to in flagre delicto, doesn't actually witness it but very good reason to believe. **They throw out the categories. Give it to the jury and let them decide.** Got rid of **common law rule that mere words never count as provocation.**

- **No cooling off**

MPC

- 1st degree murder
 - Purpose
 - Knowledge
 - Recklessness + EIVHL
 - (Presumed EIVHL recklessness for enumerated felonies)
- Voluntary Manslaughter- intentional killing - Mitigation
 - **Extreme Emotional Distress (EED) (Man 2)**
 - Reasonable explanation or excuse for the EED

MPC- Must the killing be reasonable or the impairment of reason. MPC 2.10.3(1)b **Extreme mental or emotional disturbance must be reasonable.**

No mitigation for assault, only applies to murder. Maybe really talking about whether the provocation led to the kind and amount of passions that might lead to the killing, even though the killing itself is not justified. Locution mistake to talk about the killing being justified, especially for the MPC.

- **Cassas** argues he has a reasonable excuse for becoming extremely emotionally disturbed.
 - No one doubts he was really upset, EED?
 - His personality attributes, obsession with the deceased: **wants to be judged by the standards of the reasonable obsessed psychotic would-be lover.**
 - **MPC: reasonableness of person in the defendant's situation as the defendant believed them to be.** Tying what seems to be an objective standard of reasonable person, to the subjectivity of his situation.
 - **Makes anything seem reasonable when "situation" takes personality into account.**
 - **NY court says Cassas's strangeness is too peculiar to him, so he doesn't get the benefit of the defense.**
 - **Drafters want to include physical disabilities like blindness, but not temperament.**

Imagine two legal regimes. Murder and Provocation Mitigation. Manslaughter

1. First degree murder as defined in Carrol Pennsylvania: Traditional provocation as defined in Girouard.
 - a. Carrol Murder
 - i. No time is too short to premeditate.
 - ii. Premeditation requires only the conscious intent to bring about death
 - b. Girouard Provocation
 - i. Recognized categories: extreme assault, mutual combat, illegal arrest, abuse of a close relative, sudden discover of adultery.
2. First degrees as defined in Guthrie, and provocation defined by MPC
 - a. Guthrie Murder

- i. There should be some time between intent formation and the killing, although the amount is variable. An elaborate scheme is not required, but instant premeditation is not ok. Spontaneous/non-reflective murder is second degree.
 - 1. Planning activity
 - 2. prior relationship/behavior of perp to victim
 - 3. nature/manner of killing
 - b. MPC provocation
 - i. Extreme emotional/mental distress
 - ii. That has a reasonable explanation or excuse.
- 3. 1st degree, regular murder, voluntary manslaughter.

2.10.6 MPC says if convicted of murder, Judge/jury should have to find one of a list of aggravating factors to apply the death penalty.

- Risk of death to many
- Pecuniary gain
- Cruel death

Balance against mitigating factors.

Involuntary Manslaughter

Common Law, reckless, gross negligence, criminal negligence homicide. Includes a misdemeanor manslaughter provision.

- Murder requires recklessness+ or recklessness + EIVHL, but different in involuntary manslaughter, **recklessness alone is sufficient**.
- Playing a **game with a loaded gun** is almost the quintessential recklessness. Dumb things people do that they shouldn't do that result in death (involuntary manslaughter)
 - **Any kind of MPC recklessness requires awareness. Under MPC, if he wasn't aware that there was any risk, he wasn't reckless.**
 - **Common law does not require recklessness. But may bear on the +.**
- **Recklessness + in MPC terms?**
 - **% of risk, likelihood (substantiality of the risk)**
 - **Reason for the risk, justification**
 - **Awareness of the risk**
- Do we require all three of them, or just one of them? One can be enough.
- Fleming- reckless driving. Driving drunk, driving very fast.
 - **The extremeness of the recklessness**, really fast, weaving through traffic in both directional lanes at 3pm when there is generally a concrete barrier, 3X the legal limit of alcohol.
 - Egregious driving infers a **great awareness of the high risk of great human harm**.
 - No need to be aware of the risk of the only reason you are unaware is because you are intoxicated.

- MPC and Common Law on intoxication- drunkenness is not a defense for recklessness because getting drunk itself is reckless.

MPC Manslaughter

1. Recklessness (EED is Man 2)

Risk creation homicide- we generally think of murder as intentional killing, and not from recklessness; but some types of killing without intent either to kill or harm when engaged in highly risky behavior.

Lesser homicide:

- Accidental gun killings- Malone
- Accidental car killings- Flemming

Whatever it is about recklessness that makes it murder, the plus, was there.

- Common Law: colloquial method of judging the wickedness/evilness of the defendant's attitude (depraved heart killing)- Malone gives every possible formulation.
- MPC- very clinical, did they apply the **appropriate attitude toward life**. Extreme indifference. NY took depraved indifference.
 - What falls under depraved but not extreme?
 - People v. Roe- court debates remorse. **Remorse** may indicate a lack of depravity.
 - Malone said, gee kid, did I hit you?
 - MPC states only want to talk about the **nature of the risk itself**, and let it speak for itself. Get **away from morality**, does it reflect the correct valuation of life.
 - **Depraved wants to talk more about the heart.**
- Plus may be that in the gray area, the quantity of the risk.
- Reasons for taking the risk- What if Fleming was drunk when found out child was dying, and was trying to get to the hospital in time.
- 3. Awareness, of some risk or of exactly the risk they are running.
- 4. Most commonly taken by courts, refer to some other case and compare them.

Welanski- **duty to patrons.**

Common Law Involuntary Manslaughter

Massachusetts involuntary manslaughter: willful, wanton, recklessness. Willful has to modify the conduct and not the resulting harm, intend your actions. In this case intend not to act. Wanton requires a grave danger to others, but chooses to do it anyway.

- Mass common-law recklessness not MPC recklessness
 - Mass: Grave danger, high likelihood a lot like substantial, **same nature of risk.**
 - MPC: 2.02 consciously disregard substantial and unjustifiable risk.
 - Mass: even if so stupid he doesn't recognize the grave risk, still guilty. MPC would not convict without awareness of risk. Just negligent.
 - **Mass reckless includes both MPC reckless and negligent homicide,**
 - Common law not as interested in actual awareness as MPC

- More interested in what the reasonable person would think, not the stupid or the heedless.
- MPC, same risk, aware is manslaughter, not aware is negligent homicide.
- But Mass court defines wanton as negligence, and then says it excludes negligence or even gross negligence. **Really just excluding tort negligence.**
 - Requires grave risk of death. **Small risk of death is tort negligence.**
 - But court says they are excluding gross negligence that is not willful, wanton or reckless. **There is some daylight between ordinary recklessness and wanton recklessness.**
- But other states use gross negligence or criminal negligence for involuntary homicide. They **just mean the kind of risk-taking appropriate for criminal penalty.**

Hall- recklessly skiing down the mountain

- **Something besides percentage goes into substantial.**
- **Hall ends up saying it need not be more probable than not.**
 - **Jury's acquittal probably reflect the low chances of actually killing someone.**
 - **Connection: MPC and common law ask factfinder to apply the squishy substantial risk determination.**
 - **Same deterrence from publishing the bad result?**
 - **People are just going to be negligent.**
 - German law does this by **holding tort negligence criminal if they had the capacity** to meet the standard.

Felony Murder

- Stamp 438- **strict felony murder**
 - **Armed Robbing the store, old owner has a heart attack and dies.**
 - Any causal of death from felony leads to murder.
 - .
 - **Without felony murder, at most guilty of involuntary manslaughter or negligent homicide.**
 - Serne judge doubts whether this is sufficient, says **maybe only inherently dangerous felonies count.**
 - **Serne court was right, we Americans took the strict version, but that was not what was commonly practiced even in England.**
 - Why strict liability in murder
 - Simons 429-430: Negligent during felony worse than same acts not during a felony. **The context increases his culpability.**
 - But no worse than the rest of the armed robbers whose victims don't die from heart attack? **He's not worse, just unlucky.**
 - **MPC brings in line by saying committing the felony create a rebuttable presumption of extreme indifference to human life.**

- Prosecutors like it because it gets rid of the burden of proof of malice, just that the
 - **Limit the felonies that count** (strict version was any felony)
 - **Written in mens rea requirements** (like recklessness) ruling out accidental
 - **Defense** if not triggerman, didn't know friend was arm or intended to kill.
- Courts have limited, done a lot of the heavy lifting
 - (Michigan Aaron Case)
 - Any murder during course of a felony, must prove malice, is first degree.
 - **Can't bump an accidental killing up to first degree murder.**
 - CA Dillon Case 445 -446
 - **If punishment is too severe**, constitutional cruel and unusual punishment prevents being 1st degree murder for a non-intentional killing.
 - **Inherently dangerous felony limitation**
 - **Fraud and theft are not in their nature inherently dangerous**
 - **In this case his fraud was inherently dangerous.**
 - **Makes felony murder much smaller**
 - Stewart
 - **Look at the specifics of the underlying crimes (RI)**
 - Crack mom goes on crack binge
 - Is child neglect inherently dangerous? Few neglected children actually die from neglect, but they can and her kids do.
 - **Focus not on neglect in general, but this neglect.**
 - **Makes felony murder much bigger**
 - Hines
 - Dick Cheney case- felon possesses gun, accidentally shoots friend while turkey shooting.
 - Focuses on inherently dangerous: high likelihood or foreseeable?
 - **Inherently dangerous is a high threshold, high likelihood, and not just foreseeable.**
 - Lots of room for manipulation in the realm of felony murder.
 - Inherently **dangerous sneaks in a negligence or recklessness** mens rea requirement into felony murder rule.
- **Merger Doctrine**- Burton- Armed Robbery serve as an underlying felony?
 - CA courts in Ireland and Wilson said **that assault with a deadly weapon and burglary merged with the murder.**
 - Anything on the **assault ladder is exempted** from the felony murder rule.

- If he had intended to steal or rape, had an **independent felonious purpose independent of assaulting the person**, it wouldn't merge.
 - What kinds of crimes are both **inherently dangerous and have an independent felonious purpose**, so that they tend to form the basis of felony murder?
 - **Arson; kidnapping; rape; robbery** (armed robbery) taking property by force has independent felonious purpose, armed makes inherently dangerous.
- **Felony Murder, uneasy fit in criminal system because**
- Canola- **Complicity and Felony Murder**
 - Four guys rob a jewelry store, the owner shoots one of the robbers who was the one who started shooting.
 - **Accomplice in the underlying felony but not involved in the murder**
 - **Felony murder does reach this far.** 3 Doctrines arisen to deal with this problem.
 - Some states rule that if **co-felon** gets killed, not a crime, because there is no need to redress for the victim.
 - More commonly: dual between two other rules
 - **Agency rule: co-felon, rules of agency make you criminally liable through complicity.**
 - We imagine as if you are one another's legal agents, and you are responsible for what your agent does **in furtherance** of the agreed felony, if you agree or not.
 - Not if he shoots his old enemy without furthering the joint enterprise
 - **Does not require foreseeability.**
 - **Does not punish felon for shootings by victim or police.**
 - **Proximate Cause theory: responsible for anything that is reasonably foreseeable as the probable result.**
 - If co-felon says not armed, offers to let you check, and secretly has one, not responsible.
 - **Does cover shootback of storeowners and police; if co-felon or innocent bystander is killed, this counts.**
 - The court chooses the agency theory: the felons are guilty of murder of the storeowner (agency), but not for the co-felon.
 - Do include shield exception
 - **If Canola had grabbed co-felon as a shield, would have been guilty.**
 - This is a way of describing the felons use of own agency
 - Why agency?

- **Foreseeability is a tort concept, will create wider liability.**
- **Agency stays with criminal** principle of complicity. More to do with mens reas, higher required for complicity than foreseeability. Narrower liability.
- **Judges pick whichever theory is narrower** in the present case in order to shrink felony murder.
- **Accomplice liability only gives liability for the felony, but felony murder extends the liability again to the murder.**

Rape Law

- **Really rape law is less about grading, but changing social morings**, ideas about appropriate sexual behavior that have changed so much so quickly.
 - **Rape by black rapists of white victims was capital in many states whereas vice versa was not. Lots of lynchings, huge fear of black rapists.**
- **Sexism**
 - **Lord Hale- Accusation easy to be made, hard to be defended and proven, so watch out for false rape accusations by women. Long-time jury instructions**
 - Wigmore- Women so likely to have **fantasy about rape** (defense for adultery) and make false charges that sexual history should be testified about by doctors.
 - **Mistrust of victims led to distinctive kinds of evidentiary rules:**
 - **Prompt report cut-off date.** Sign it's a false claim if late.
 - **Required corroborating evidence**, like bruises or physical injury, other witnesses.
 - Armed robbery requires no witnesses
 - **Past sexual history was relevant.**
- Feminists movement of 1970 wanted to change rape law.
 - Very successful in proliferating rape shield statutes, **no sexual history** unless shown really relevant.
 - So prejudicial and dissuades women from reporting.
- **Corroboration requirements and prompt reporting** also changed in the 1970s
- **Feminists failed to agree on how to define rape.**
 - Wisconsin- rape reform statute at behest of reformers, but does it do the job.
 - Common law of rape still alive in many jurisdictions.
 - Some statutory reform
 - Some creative interpretation by courts.
- Rusk (Maryland, home of the common law)- **Common Law Rape**
 - Traditional common law rape:
 - **Sexual intercourse** (male sexual organ penetrate woman)
 - **by force or threat of force**

- Not just non-consent
 - Non-consensual, non-forced sex, objection without requiring force to overcome the objection, completely submissive.
 - May be with an unconscious person.
 - Berkowitz, she said no, but kind of moaning it, he has sex without force. PA supreme court said not rape because no force. Since changed the statute.
 - **Non-consent**
 - Can you have forced sex that is non-consensual? S&M
 - Physical force leaves marks, but how do we know if they **submitted because of fear of force?**
 - **Reasonable person standard: Hazel**
- The rape reform movement (**common law required both force and non-consent**) targeted
- Under common law in rusk court **defines force?**
 - **Torn clothing, bruising etc. Resistance is the common law evidence of force.**
 - **Common law rule: woman must resist to the utmost.**
 - It is the instinct of every proud woman to resist.
 - Has now become watered down to **resistance reasonable in the circumstances.**
 - Now watered down to is her **fear reasonable such that no resistance required.**
- **Focus of feminist rape movement on force.**
- **Common law did not include the following as force:**
 - Threat to fire employee (sexual harassment, not rape under common law)
 - Threat to fire may be threat to lose home in bad economic times
 - Threatening to evict (lose your home)
 - Threatening to reveal a secret unless paid money (blackmail is a crime)
 - Cosby's illegitimate daughter convicted in federal court.
 - Threatening to reveal secret unless given sex is neither blackmail nor rape.
 - Threaten that she will not graduate from high school.
 - Foster father threatens to send her back to Juvie.
 - Judge threatens to take child away if no sex
 - Prison guard requires sex for favors.
- to get money instead of sex.
- Deceit
 - Evans- the abominable snowman case
 - Tells her he is a psychologist, conducting an experiment, takes her to bars, tells her his fiancé died, I could kill you (Tony Curtis Marilyn Monroe)

- **Hard to find force, you have to turn I could kill you I could rape you to turn it into a physical threat for common law rape.**
- What about all the lies? Fraud for money is a crime
- Boro- are people really that stupid? Terrible disease, sex is the only option.
 - **No common law statutes that make sex by deceit criminal.**
 - A few include some threats other than physical force
 - PA adopted statute to broaden force.

MTS uses judicial interpretation of a statute to

- Facts: Court believes neither version completely
 - Girl says she was fast asleep and guy who was living in the house with her was fast asleep (clearly rape)
 - He says it was completely consensual until she said get off, at which point he did.
 - **Judge believes she was awake, he had sex with her without obtaining explicit consent, and she didn't express non-consent until middle of sex act.**
 - Juvie court, so no jury.
- According to MTS court there was rape
 - **NJ statute requires force, the force in this case according to the judge is any act of sexual penetration without the affirmative and freely given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.**
- Force is sex as non-consent. All that rape is is sex with non-consent.
 - But how does this require affirmative consent?
 - She never said no before the penetration.
- **Non-consent is defined in MTS as lacking affirmative permission.** Pretty close to Antioch. Evidence of affirmative and freely given permission.
- Where does passivity lie
 - **Ambivalent woman decides she wants to leave, he's not done, had consent when started, in CA need force that's more than the force involved in intercourse.**
 - Most states require force beyond intercourse (he has one broken arm)
 - **He holds onto her waste with the other arm. [Holding was force]**
 - **In Maryland you cannot take consent back.**
 - **In CA can take consent back, but must be some force necessary.**
- Sherry is an example of the mens rea problem
 - 3 doctors take nurse to Rockport house from party
 - She has sex with all three, she claims rape, they say she consented.
 - Legal Issue: Defendant requested instruction of victim clearly expressed lack of consent or forced, and that **Defendant had actual knowledge of non-consent**

- **Euro Human** rights says it is a human rights violation for Bulgarian legal system to require force, adopts MTS and autonomy standard.
 - **Amount of force can include subtle coercion (MTS like)**
 - **But Defendant's must be consciously aware that they are employing such coercion**
 - Extreme decision on opposite ends of the pole.
- Court holds that jury must look to **defendant's actions and victims responses, look at the entire atmosphere and not just the defendant's perceptions.**
 - **Physical resistance is not necessary**
 - **Any resistance (verbal) may be sufficient**
- Requested instructions would require purpose or knowledge mens rea
 - Recklessness requires awareness of the risk creation, in the context of rape they must be **aware of a substantial risk that she might feel coerced.**
 - Probably would include recklessness
- Court avoids mistake of fact defense question: which would be that perpetrator truly, honestly and reasonably believed there was consent
 - **Honest and reasonable belief is negligence**
 - English courts (men told by husband that wife liked sex with lots of men and roughly) held that **honestly belief of consent is a valid defense**
 - That defense would require **purpose or knowledge, preferenceing the viewpoint of the man.**
 - If negligent in forming your belief, liable for rape. If just honest mistake, back up to purpose or knowledge.
 - **MA later refuses to give honest and reasonable belief instruction.**
 - Strict liability, no mens rea required. Massachusetts
- Actual consciousness (purpose, knowledge or recklessness)
 - England, Sherry defendant, MC v. Bulgaria
- **Majority American position is that an honest and reasonable belief of consent excuses you.**
- **Strict liability- Massachusetts.**
- **Like MC v. Bulgaria, if broaden definition of force, require mens rea**
 - As legislative drafter, one decision affects the others.
- .
- Previous exam: gave **Schulhopper rape code**, tell me three things that are an improvement from the common law, and 3 problems.
 - **Gradation between sexual assault by force and sexual assault by non-consent**
 - NY does this the same way: 1st degree by violence, 3rd degree by non-consent (misdemeanor up to 1 year prison)
 - WISC- worst offense is non-consent that results in pregnancy or serious injury. Below that is non-consent by force.

- Schulhoffer has 1st degree (using a weapon or inflicting serious bodily injury), 2nd degree using force, 3rd degree non-consensual.
- Schul and NY think sex by force is the worst
- WI says non-consensual + certain results (pregnancy, STD, injury)
- **Foster parent or guardian, inflict bodily harm should perhaps be higher**
 - Accuse anyone of a criminal offense (falsely accuse?)
 - **Sectoin 5 is MTS, but adds the mens rea, you know you don't have freely given consent**
 - **MTS and Schulhoffer presumes there is no consent**
 - Violating any right of the victim or any other harm that would not benefit the actor. What does that mean? Very broad and vague.
 - Trying to get at that you can threaten things that are a benefit to you.
 - **How far ahead of the way people act right now should the criminal law get to change people's behavior?**
 - Criminal law inherited were built on entirely different assumptions
 - Came out of a world in which sex outside of marriage was illegal.
 - Fornication was a felony
 - Adultery was a serious crime.
 - Only defense was rape. There were a lot of false claims of rape.
 - Distrust of women came about because rape was a defense against other sex crimes.
 - Trying to protect human autonomy
 - But also trying to protect people's intimacy

Self-Defense

Defenses as justification, anyone can step in. Excuses are specific to the actor.

Peterson Case- Thumbnail **common law** version of self defense using deadly force.

- **Must be a threat, which may be either actual or apparent, of imminent and immediate danger of death or serious bodily harm to use deadly force.**
 - **Deadly force requires threat of death or serious bodily harm.**
 - **Normally, force can be used to repel force, but generally must be against your person, generally proportional to the threat itself.**
 - **Proportionality described as necessary, must be necessary**
 - **Reasonable belief and honestly maintained.**
 - **No preemptive strikes in rape law.**
- Self defense
 - **Threat of force**
 - **Imminent**

- **Unlawful Force-** cannot use self-defense against people lawfully trying to shoot you. No self-defense of self-defense, or against police.
 - Doesn't mean the person using the force against you is a criminal.
 - **Toddler using an uzzi, you can shoot it.** Though toddler won't go to prison, the shooting is still unlawful. Crazy people too. Unlawful though innocent aggressors can be shot.
 - Off-duty cop starts shooting at me when I'm in a play and reasonable, cop didn't read the signs so the cop is unreasonable
 - What if we're both lawful
- **Proportional (necessary)- especially deadly force**
 - Cannot continue to kill someone who's already on the ground and defenseless.
- **Honest- sincerely believe under threat.** If others sincerely believe you are under threat but you don't, not enough.
- **Reasonable**
 - **Does not mean right. The gun can be empty after shooting all of us, but it reasonably appeared at the moment he posed an imminent threat.**
 - Super glued to the gun.
 - Crazy guy with uzzi
- Use of deadly force presents special issues
 - Cannot be used to prevent a slap or a punch
 - **Can be used to prevent threats of deadly force**
 - **Can be used to prevent rape and kidnapping in every jurisdiction**
 - **In some jurisdictions (NY) robbery can be repelled using deadly force.**
 - **Prevention more important than punishment, can't take it back**
- **Pre-emptive (Judy Norman battered woman case) not allowed**
- **Peterson: Serious bodily harm- so serious you might die from it.** Threat you will be beaten up, you can't pull a gun. If no ordinary force available, still cannot shoot to avoid an ordinary beating. Black eyes and chipped teeth not sufficient.
- **Self defense ends up being whether reasonable to think there was a threat.**
 - **Conduct of a reasonable man in the defendant's situation. But reasonable to him?**
 - Statute- when and to the extent that he reasonably believes necessary to defend himself from what he reasonably believes to be a threat
 - **Traditionally, would a reasonable person believe the same thing.**
 - Goetz, would a reasonable Goetz believe the same thing- like the MPC
 - Look at MPC to decide what NY statute means.
 - **MPC- uses just belief. Pg 1089- 3.04**
 - **When the actor believes force is immediately necessary.**
 - **NY added the word reasonably.**

- **Would MPC allow defense for patently absurd but honest belief? Not really**
- **Uses mens rea: if reckless or negligent in coming to your belief, guilty of reckless or negligent homicide. (involuntary manslaughter or negligent homicide)**
 - Goetz not charged with murder, nobody died, so charged with attempted murder. **Mens rea for attempted murder is purposefully killing.** Sincere but unreasonable attempted murder would be not guilty.
- **What is the mental state of recklessness? Conscious of a risk. If you believe you need to use self defense, and are conscious at the same time of a substantial risk that you are wrong, seems to undermine the very existence of belief.**
- **Court says not reasonable to Goetz, reasonable person in his circumstances.**
 - References MPC, situation. Not guy on a cloud, totally objective. But reasonable person in his situation
 - **Take into account his prior experiences,** relevant knowledge about the particular person threatening him, the physical attributes.
- **Big question back then: woman using lethal violence against abusers, can they use expert testimony for Battered Women's syndrome. Why is it relevant?**
 - **Kelly- judge lets BWS testimony in because it is relevant because knowing what other battered women are like makes her seem more reasonable in her circumstances.**
 - Explains why she didn't leave.
 - **Expert testimony allowed when juries tend to believe something that isn't true- show it is common for people to be beaten badly and not leave.**
 - **3rd type of salience, rejected by Kelly judge: BWS changes the standard of reasonableness: changes definition of reasonable person to reasonable battered person.**
 - Imminence (like the midnight deadline, can't shoot at 11am)
 - **Even though Norman fully believed husband would kill her when he woke up, self-defense didn't apply.**
 - **Should imminence be modified to allow certain preemptive strikes?**
 - **Doesn't it encourage premeditation, have the victim bait the abuser?**
 - **It's become an excuse, not a justification.**
 - **Self-defense is transferable.**
 - She had other options, but didn't believe she had a choice.
 - **Self-defense shouldn't include inevitable or unavoidable harm to avoid justifying the hitman.**

- **MPC uses immediately necessary, talks about the necessity of the use of force as opposed to the threat against them.**
 - **Excuse: she did have options, but she didn't understand she had options.** Reasonable for her to believe, though erroneously, there were no other options.
 - **Honestly but unreasonably believes they have to use force**
 - **For perfect (full) self defense, you have to both honestly and reasonably believe**
 - **Is there any defense when honest but not reasonable?**
 - **MPC-**
 - **just honest belief, then were you reckless or negligent in coming to that belief, can't be guilty of murder, but guilty of reckless (manslaughter) or negligent homicide.**
 - **Trickier when lesser included offenses, like attack someone and seriously injure them, but don't kill them. Under MPC, there is no reckless or negligent assault or battery. Lesser included offense might be a very minor crime, like a misdemeanor/**
 - **Common Law**
 - **Called voluntary manslaughter when honest but unreasonable belief**
 - **Pg 377, PA voluntary manslaughter provision. Serious provocation, or unreasonable belief that self-defense is justified. They both turn intentional killing into voluntary manslaughter**
 - **But generally not for crimes other than murder, if not a perfect self defense, no mitigation.**
 - **Defense of a third party**
 - **Third party can defend you when it is honest and reasonably necessary**
 - **Traditionally at common law, you stand in the shoes of the person. No matter how reasonable your believe, you couldn't have the defense unless the person you helped would have it.**
 - **Now you stand in your own shoes, no longer . Retributivism wants stand in your own shoes to avoid undeserved punishment, whereas public policy might want to narrow the defense**
 - **What if legitimate self defense, but in exercising it you endanger other people.**
 - **Yes and no. When in heat of self defense, can't ask you to sacrifice yourself. But you can't kill innocent people to save yourself under self defense.**
 - **But dissent says you can't reckless endanger innocent people in your self defense. (MPC agrees with dissent).**
 - **Defense of necessity**
 - **Common law says very little necessity left over after self defense**

- **Self defense is a defense of necessity, and what we can expect people to put up with, rather than what society wants.**
 - **Society would let one die to save ten school children.**
 - **Self-defense does not necessarily require that the world be better off afterwards.**
 - **Allows you to kill more than you save.**
 - **Most states don't allow you to kill out of necessity, even to save more lives.**
 - **We all think there should be necessity defense**
 -
 - **In all those, the person chose the lesser evil.**
 - **What should have a defense of necessity**
 - **MPC 1088- Choice of Evil (Necessity) 3.02. Most generous necessity defense**
 - **Emergency situation, imminent, no preemptive strike.**
 - Immediate problem**
 - **Prevent hungry person from stealing bread, unless they are about to die.**
 - **Balance what trying to do against harm caused in doing it.**
 - **Need not "clearly" outweigh. Jury just must agree that harm sought to be prevented greater than harm incurred.**
 - **Need not be a harm to you, may be to someone else.**
 - **Cannot be a law explicitly prohibiting necessity defense, or a clear policy.**
 - **If you are at fault for bringing about the situation of necessity. If creating the situation was reckless, charged with a reckless mens rea crime, if negligent, etc. Moderates defense according to your fault.**
 - **Conduct actor believes to be necessary**
 - **If reckless or negligent in forming your belief**
 - **NY- classic necessity. (805)**
 - **No imminence requirement, but must be necessary, no other legal option.**
 - **Balance harm sought to be prevented, must be greater than harm being committed.**
 - **Must "clearly" outweigh. Not just 51%**
 - **If it's a close case, you don't have the defense.**
 - **Necessary situation cannot be the actor's fault, no defense. New York takes your defense if you are at all at fault.**
 - **Is actually necessary.**
 - **Limit necessity by saying that cannot use it to justify homicide, to avoid life vs. life problem**
 - **Unger- necessity defense for prison break, court wants to limit necessity defense for prison break because prisons have a lot of violence and everyone wants to get out of prison. General necessity defense may be applicable to situations we don't want**

them to be

- **Lovercamp is a survey of how we limit necessity**
 - **What harms are allowable. Death, rape, serious bodily harm.**
 - **Imminence, immediate future**
 - **no time to complain to authorities, or courts. No legal, functional alternative.**
 - **Can't harm others to do it.**
 - **Specific to prisons**
 - **Schoon-**
 - **General rule, you can never raise a necessity defense in an indirect civil disobedience defense (how all courts in general throw them out)**
 - **Judge says balancing publicity with destruction of government property.**
 - **because their actions cannot abate the harm.**
 - **Reasonably anticipated direct causal relationship between their conduct and the harm to be avoided**
 - 1
 - **3. Since only dissemination of information, there must therefore be a legal alternative, like legal protest, vote, etc.**
- **MPC necessity defense for protests**
 - **Drafters think you can limit political protesters use of necessity.**
 - **Is it necessary to abate the harm? Generally not.**
 - **But does want to kick a lot of these to juries.**
 - **Unless legislature clearly intended to exclude necessity defense.**
 - **Or their purpose suggests not intended necessity defense.**
 - **Mere fact that there is a law doesn't mean they intended to prevent an unexpected use.**
 - **Plainly appears requires some connection**
 - **4 part test**
- **Necessity, impetus to formalizing instead of relying on official discretion because brings criminal law into line with utilitarianism and retributivism**
 - **Chose the lesser of two evils**
 - **Not deserving of punishment**
 - **If we have to trust official discretion, raises the question that the criminal law is not legitimate.**
 - **But want to avoid perverse incentives, like for prisoners and political protestors**
 - **Lots of opportunities for fabrication**
 - **Allowing litigation makes the rule not really a rule.**
 - **Control with**
 - **Emergency**
 - **Imminence**

- NY “clearly” outweigh, MPC lowers culpability
- All limitations create strong role for judges as gatekeepers. They don’t let many go through
- MPC is very much at one end of the pole, lets lots get through, allows necessity for homicide.
- The trend has been toward limiting necessity, not broadening it, against MPC

Duress

- Duress has different theoretical foundation than necessity, though sometimes used interchangeably.
 - Choosing the lesser evil was the right thing to do, and utilitarian concerns, make **necessity a justification.**
 - Duress is a classic excuse. There is overlap, where sometimes is both necessity and duress. But duress goes further, and in some cases, allows people to choose the greater evil.
 - Three non-duress doctrines that duress has strong connections with
 - MPC treats duress and provocation similar, along with self-defense, because evaluates the actor’s situation.
 - Outside influence on an actor, and out of compassion to the frailty of humans, we understand.
 - 1. Connects to Actus reas, involuntary actions.
 - You are not controlling your bodies movement, I didn’t really act. I had the literal gun to my head. Do it or else command.
 - Not duress because essential attribute of a third party saying do it or else.
 - Woman used to be able to claim duress when husband told them what to do. Presumption that a woman acted at the command of her husband. MPC in 1962 did away with that presumption.
- Duress is an excuse not a justification, a do it or else coming from a third party.
- What kinds of threats are sufficient, what is their nature.
 - Under NJ common law, Duress only for a present, imminent and impending threat of death or serious bodily harm.
 - Not imminent, must have been someone there at that moment when he committed the crime,
 - Death or serious bodily harm, this threat was not specific enough. Serious enough you might die from it. Break your thumbs in not enough.
 - Cannot use duress to kill other people at a minimum. Not useable for capital offenses.
 - No requirement to turn yourself in once threat ends
 - Three classic limitation: imminence, limited forces (some jurisdictions only allow instant death), limitations of the kinds of harm you will do.

- **MPC**
 - **Imminence-no imminence, in either necessity nor duress (in self-defense, the use of force had to be immediately necessary, not the threat, but the action). No immediacy required at all.**
 - **Threat of unlawful force (meaning physical force), but not just death or serious bodily harm. Kick you in the shins.**
 - **The threat must be such that a person of reasonable firmness in your situation would be unable to resist.**
 - **Situation only doesn't count how resistant to threats you are.**
 - **Under MPC you can kill under duress. Only a few jurisdiction have accepted that.**
- **Duress with net gain sometimes called duress as justification because you chose the lesser evil, it is also necessity. When with even or loss, duress as excuse because you didn't choose the lesser evil.**
- **Duress when a person causes it directly, but not when nature does.**
 - **Why am I expected to be able to resist the flood, but not the homicidal maniac?**
 - **Law says, in the absence of fault, harm falls where it falls.**

Insanity

- **Insanity defense, our internal nature. Like duress, there is an analogy to the involuntary act defense. Unable to choose, and therefore not culpable.**
 - **Unlike duress, insanity is not due to external circumstances. By very definition, an insane person is not a reasonable person** Unlike any other criminal defense, this defense leads to a **distinctive verdict**. Instead of guilty or not guilty, not guilty by reason of insanity. In defense, duress or necessity, just not guilty. Acquitted by insanity, does not walk out the door but is committed to a facility for the criminally insane.
 - **Defendant's never raise insanity defenses to minor crimes, because would risk long sentence.**
 - **Three things to distinguish**
 - **Mental illness- medical term decided by doctors. Diagnosis.**
 - Disagreed whether psychopathology is mental illness, homosexuality,
 - erectile dysfunction, depression, eating disorders, are currently listed.
 - Some are highly functional and some are not
 - **Insanity- legal conclusion that someone's mental state is such that they are not legally, criminally responsible for an act.**
 - Psychiatrists are only experts on the underlying mental state, not insanity.
 - **Competence- mental state at the time of trial. Can you contribute to your defense, do you understand enough to be brought to trial.**

- **McNaughten test:**
 - **D in such a state of mind that he could not tell his acts were wrong.**
 - **You kill someone because you think they are trying to kill you**
 - Dillusion about the justification for his action, but knows he is killing.
 - Thinks he has a legal defense, justification or excuse.
 - **Abraham trying to kill Isaac.**
 - Thinks God told him directly to do it
 - May know that other people disagree with them
 - There is no, “God told me to defense”
 - Does wrong mean legally wrong or morally wrong, because the two may be different.
 - We don’t normally require that you know acts are legally wrong. So odd to allow that as a defense.
 - But morally wrong is a much more diffuse values.
 - Some believe terrorism is not morally wrong
 - **Did not know the nature or quality of the act**
 - **You choke your wife but think you are squeezing lemons**
 - **Hallucination or disociative state, not even aware that acting.**
- **Insanity defense only applies to people whose beliefs are a product of a mental disease or defect.**
- **The ambiguity of wrongness presents a problem of determination. In addition, fails to encompass:**
 - **The irresistible impulse.** Some people know what the voices say are wrong, but feel like they can’t resist.
- 1950’s DC judges came up with **Durham test** because didn’t like **ambiguity of right and wrong** and the volution issue
 - **Was the criminal action the product of a mental disease or defect.**
 - Dominated for a couple of decades in DC
 - **Only psychiatrists could tell you whether the causal link existed.**

Ultimate arbiters

 - Medical science changed std, legal std. changed right away.
 - Extreme version of insanity merging with medical std.
- **MPC enormously influential for insanity defense. ¾ of states adopted it, until shifted back. Changed landscape for all of US. Insanity and mens rea states of mind are biggest contributions of MPC.**
- **MPC Insanity pg 877**
 - **Volitional- what you can control**
 - First prong tends to incorporate the second prong. If you don’t know what you are doing, you can’t know you are doing something wrong.
 - Differs from irresistible impulse in also adding a continuum

- Common law used the policeman at the elbow test, you would do it even with a cop watching.
 - **Lack substantial capacity to conform behavior to the law**
 - Cognition- what you understand
 - D must appreciate the wrongness (**M'Naughten requires only knowing**)
 - **Lacks substantial capacity to appreciate wrongfulness**
 - **Need to completely lack capacity, a continuum of cognition.**
 - **M'Naughten treats cognition as an on/off switch.**
 - In reality, there seems to be more of a continuum.
 - **Does not mean substantially impaired, only that what you lack is substantial capacity. Only a little capacity is not sufficient.**
 - **A generous defense to defendant's, dimmer switch instead.**
- **Reprise of M'Naughten, Hinckley tried to kill Reagan because in love with Jody Foster.**
- Federal Law- 1984 note 2 pg 883.
 - **Returns to M'Naughten- at time of act, as a result of severe mental illness, unable to appreciate the quality of wrongness of acts. (on/off)**
 - **Affirmative defense requires D to prove it.**
 - **Congress placed burden at clear and convincing (~75%) instead of preponderance (~51%).**
 - **Totally wipes out volitional prong and reduces cognitive prong.**
- Lyons 5th Circuit 1984- rejects the MPC
 - **Rejects the volitional prong because hard to tell the difference between people who can't do it and those who don't want to do it enough.**
 - Difference between an irresistible impulse and an impulse not resisted, is probably no sharper than the line between twilight and dusk. How can anyone tell
- Where we are today
 - **Basically back at M'Naughten. 2/3 of states have some version of M'Naughten, many of them just have the right wrong prong. Including Clark v. Arizona.**
 - **Guilty but insane used to reach a compromise.**
- Clark v. Arizona
 - **Arizona had only cognitive prong, and not volitional wrong. Since M'Naughten is only recent, our understanding of the defense has changed back and forth so much, you can't say there is a right to any particular insanity defense.**
 - **Maybe if no insanity defense at all, that may be unconstitutional.**
 - **What if you want to raise your mental illness not as a general defense, but only to negate the mens rea**
 - **AZ law only allows mental disease evidence for full-fledged insanity defense, but not to negate mens rea.**

- **In the insanity context, though we can struggle with how to define it, it may not matter**
- Big debate in 1960's whether there should be broader **excuses**.
 - **Involuntary intoxication, duress, and insanity.**
 - Why are they widely recognized? Criminal law is trying to **recognize limitations on choice**. Refuse to punish wrongdoers.
- Should criminal law excuse other limitations on people's choices?
 - Born into **poverty**: poverty produces crime. Where there is poverty there are higher crime rates. **Rotten Social Background Excuse**.
- **Defense of diminished responsibility**
 - Like mitigation in homicide for insanity defense. **Mentally ill but knew the difference between right and wrong. Should you get a discount at criminal punishment across the board.**
- You can't really accomplish all of our **purposes of punishment** at once.
 - **Tended to allow excuses only when deterrence does not work. Excuses way short of culpability.**

Expanding Liability

- **Act/causation or mens rea is missing**
 - **Felony murder was missing mens rea, making it fit uneasily with the rest of our criminal law.**
- **Attempt is missing causation. Intent, but no bad result in the world. Also missing full act requirement.**
 - **Now attempt is pegged to crime if actually committed, but discounted**
 - .
 - **MPC punishes attempt the same as commission except for 1st degree felonies.**
 - **Smallwood charged with attempted murder for raping women knowing he has AIDS.**
 - **Depraved indifference to the value of human life. Easy murder conviction.**
 - **Attempt requires specific intent (purpose) to bring about the bad result. (common law requirement).**
 - **Specific intent only of rape. Could be guilty of attempted felony murder if that were a crime. Only Arkansas has that. Not in MPC**
 - **Reckless endangerment, crime of risk creation. Generally a misdemeanor or low level felony. Is in the MPC**
 - **Colorado at least used to define attempt as an incomplete version of the completed crime, ties mens rea to the completed crime. Incomplete murder. Majority is way against it.**
 - **For murder it works pretty well.**

- **Doesn't work so well for negligence crimes.** Driving negligently or recklessly. That's why no attempted manslaughter.
 - **Risk creation grades of crimes makes lots of criminals.**
 - **Attempted involuntary manslaughter, (not in any state or MPC)**
 - **MPC 1099 5.01 Criminal attempt, mens rea requires mens rea of the actual crime, with either purposeful conduct, or purpose to cause or belief that sufficient to cause without further conduct on his part.**
 - **Only in Colorado is it a crime to have attempted involuntary manslaughter. No attempted reckless homicide (Exam alert). Common law requires specific intent for attempt. Any specific intent to kill someone is attempted murder. If merely reckless, not guilty of murder if they don't die.**
 - **Most states accept attempted voluntary manslaughter. Still has mens rea, just there is mitigation. There is intent to kill. Would be murder, except mitigated by provocation.**
 - **English and American statutory rape case say you don't need purpose, but just mens rea of the completed crime. 552-53**
 - **MPC drafters' commentary say they agree, but the language doesn't seem to agree. If circumstances were as would lead actor to believe it would be a crime.**
 - **Seems weird to say they are attempting to do something if they don't know they are doing it.**
- **Absence of bad result has led to an increased mens rea requirement.**
- **Raises special actus reas problems.**
 - **Courts try to distinguish between mere preparation and the crime of attempt**
- **Rizzo Test is widely used to distinguish preparation from attempt.**
 - **couldn't find the payroll clerk.**
 - **To be an attempt, the actors must be so near the accomplishment that in all probability, the act would have occurred without interference. Dangerous proximity to success.**
 - **Factfinder must believe crime would have been committed but for the intervention of the law enforcement.**
 - **Justice Holmes: Dangerous proximity to success**
 - **Both start at completed crime and ask how close to it were you**
 - **Imagines a danger zone**
 - **MPC pushes the lines earlier but gives a defense of abandonment**
- **MPC- a majority of states have abandoned the common law and recognized a defense of abandonment. Pg 1099 5.01**
 - **To have successful abandonment defense must:**
 - **Complete and voluntary renunciation of the criminal purpose..**
 - **MPC has that defense to avoid the dangerous proximity defense. Instead:**

- **Taking a substantial step that is strongly corroborative of the criminal purpose**
 - Not how close you are to completing, but **how far you've come from intending.**
 - Relates to king v. Barker case: Haystack, lights match, then blows it out when he sees the cop. What if he had a pipe. **race ipso loquitor.** Thing itself speaks. The thing speaks for itself.
 - **The quality of your act must imply the intent**
 - **The last step theory, nothing left for me to do. Eagle case. Limit liability to completed attempts. Few if any jurisdictions do this.**
- **Rizzo is the general rule, the common law rule. Dangerous proximity and no abandonment defense. Starts from the end.**
- **MPC- in addition to being substantial, must also be strongly corroborative of your purpose**
 - **Not quite race ipso, but strongly corroborative.**
 - **Assault itself is an attempt.** Preliminary act to batter. Preliminary preliminary action with intent to rape.
 - Inchoate offense- requires no result. Like attempted possession of epinephrine, a precursor to meth.
 - **Stacking inchoate offenses (possession and assault, burglary (entering home with intent to commit felony there)) creates a problem.**
 - **Pushes far back on the timelines.**
 - **McQuirter is an charged with an attempted attempt. Maybe not strongly corroborative.**
 - **Once we know your intent, happenstance becomes strongly corroborative of the intent.**
 - If we are deriving the intent from the corroborative evidence, maybe doesn't tell us intent. Should intent have to be derived independently of the corroborative action. **Do we have to pretend there is no other evidence of mens rea to determine if it's corroborative, or do we just say knowing his intent, is this corroborative. [Latter is race ipsa loquitor]**
- **What if you are attempting to do something, have the mens rea, but you are wrong about your ability to complete the crime.**
 - Using voodoo to kill someone. Voodoo doll. You believe it will work.
 - **Intent is clear. You meet the last act test. You meet even the toughest tests**
 - MPC: Under the circumstances the actor believes them to be. **Just because you put blanks in the gun doesn't mean it wasn't a valid attempt.**
 - **MPC gives an out in 5.05(2)- punishment for criminal attempt, here they introduce gradation. If so inherently unlikely to actually commit the crime intended, judge can dismiss or lower the grade.**
 - **Are we concerned with moral culpability (voodoo should get convicted) or dangerousness (they wouldn't)?**

17 Nov 2008

iā

Complicity

iā

NOTE: Complicity is not an offense (DONT say X is guilty of complicity)... it is a way of being guilty of an offense

- Complicity makes you guilty of the acts of another, making you guilty of what they are guilty of

iā

With complicity, actus reus and causation are missing

- Complicit actor's actions do not need to have been necessary for the crime

- There are much more minimal requirements for the actus reus

- **Principal:** he is the actor or present, **aiding and abetting** the fact to be done

- **Accessory:** not the chief actor, nor present but some way concerned either **before or after the fact committed**

iā

Common Law

- used to have difference between being an accessory present at the time of the crime or not

- Now there is only one distinction: being an accomplice (before and during, guilty of the same crime) & accessory after the fact

- used to have different degrees depending on *how* the accomplice contributed (and some other countries still do this)

- Now the accomplice's participation is taken into account during sentencing

- Modern statutes: (1) only accessory after the fact is given less punishment, others are same, (2) no longer need to convict principal first, (3) no longer necessary to charge w/ a particular form of complicity

iā

MPC 2.06

- **Makes accomplices of a person accountable for that person's conduct** and define people as accomplices if they solicit that person to commit such an offense or aid that person in planning

- Original proposal would allow the degree of aid given to substitute for purpose, as long as there was knowledge (did not require purpose)

- Now **requires actor have the purpose of promoting or facilitating** the commission of the crime

- **Original** MPC required that aid rendered **substantially** facilitate the crime

- **NOTE:** In most statutes, complicity is not a separate offense (guilty of same crime and same penalties), although accessory after the fact is

iā

Hicks v. United States, 1893 (p. 593) - **very accurate statement about the common law and current law on complicity**

iā **Facts:**

- Hicks is present when Rowe shoots Colvard; Rowe killed during arrest
- Hicks took off his hat and told Colvard to take off his hat and die like a man
- Then Hicks and Rowe ride off together
- **P:** Hicks indicted for murder, found guilty; Appeal 2 jury instructions
- **Instruction 1:** That Hicks only had to intend to say the words he said and that the words must have lead to the crime - did not instruct that Hicks must have intended to encourage the commission of the crime
- **Instruction 2:** If Hicks refrains from aiding and abetting b/c it was not necessary to aid, then he is still guilty of the murder
- **H:** Reversed - the judge should have instructed that **Hicks must intend to encourage the crime & must have actually aided and abetted or have conspired at an earlier time**

iā Why is mere intent & presence insufficient? Why must you have conspired before?

- Because by *saying* you'll be there beforehand encourages the commission of the crime

iā Variations to Hicks on p. 595

iā i) Hicks hears that Rowe intends to kill Colvard and goes along to watch the spectacle

- Not complicit - no purpose of aiding or encouraging, and there is mere presence w/o any prior communication

iā ii) Same as (i), but while watching Hicks shouts "Go get him!" and "Atta boy!"

- Could just be an expression of joy or satisfaction - may or may not be proof of purpose
- But it is clearly encouragement

iā iii) Same as (i), except that Hicks resolves to make certain that Hicks resolves to make certain Rowe succeeds by helping him if necessary

- Definitely have purpose
- No actual aid or encouragement

iā iv) Same situation as (iii) but Hicks tells Row that he will help if necessary

- Probably complicit, because this shows purpose and encouragement

• **Rule from Hicks: Need to doing something to aid or encourage, and need to have intended for that to aid and encourage**

iā **State v. Gladstone, 1970 (p. 595)**

- **F:** Gladstone tells Thompson (hired by police) that he can buy marijuana from Kent

- Gladstone knew he was facilitating the sale of drugs (knowledge) - is it enough to know that you are helping?

- **Hand: it is necessary that the defendant in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed" (=> need purpose)**

- **P:** Jury found Gladstone guilty of aiding and abetting Kent in unlawful sale of marijuana; only evidence was conversation w/ Gladstone (**QQ:** guilty of aiding and abetting - is this a separate crime, or is he actually just guilty of unlawful sale?)

- **iā H:** Remanded w/ directions to dismiss- **evidence does not show purpose, and knowledge is not sufficient**

- Court says knowledge is not enough

- **iā** Says there is no communication between Gladstone and Kent - prior communication with Kent would have shown purpose

- => **communication is not necessary, but might be evidence of mens rea**

- **iā Reasoning**

- He was charged w/ aiding and abetting the sale of marijuana, not the purchase - no evidence that he communicated w/ Kent

- "abet" => purposive attitude, no evidence of purpose

- MPC originally required only knowledge - but was later changed to require purpose (which is consistent with CL)

- **iā United States v. Fountain (p. 600):** Posner says that **for serious crimes, only knowledge is required** (case where prisonmate provides knife used to kill guard)

- Steiker: This is the first time we've seen an attempt to disaggregate criminal law, and treat more serious crimes differently than other crimes

- **iā** Legislatures have created new crimes (ex. "material support of terrorism") that only require knowledge and not purposes

- New York has created "criminal facilitation" w/ lesser crime than aided, requiring only belief that it is probable that his aid will provide someone w/ the means to commit a crime (belief that it is probably => lowers bar to just recklessness)

- MPC originally required that aid "substantially" facilitate

- NOTE: MPC provides liability for *attempt* if someone aids or attempts to aid someone who doesn't end up committing the crime

18 Nov 2008

Complicity- misses conduct and causation elements.

- Both attempt and complicity require a greater mens rea burden.
 - **MPC and common law are less demanding about mens rea for complicity than attempt**
 - **MPC flip flops on dropping purpose to knowing while increasing facilitation to substantial facilitation.**
- **People v. Luparello**, charged with first degree murder.
 - **Under traditional accomplice mens rea rules, Luparello not guilty because had no purpose to kill Martin, he wanted information from him, not what he wanted.**
 - **This court says Luparello guilty of 1st degree murder, in exception to general rule.**
 - **Action that occurred was probable and foreseeable, and he put it in motion**
 - **complicity. Any illegal intent becomes intent for whatever occurs.**
 - **There must first be primary accomplice liability.**
 - **So only defense is that it wasn't reasonably foreseeable.**
 - Sounds like a reasonable person. Usually so interpreted.
 - **Not what Luparello actually believed, but what a reasonable person would have believed knowing what Luparello knew.**
 - **At common law you have to intentionally aid and abet.**
 - **Court holds that he purposefully behaved negligently**
 - **He intended the act that was in itself negligent, sailing the ship with boiler.**
 - Law of complicity is different from attempt, because **in attempt purpose must extend to results, and in complicity need only go to conduct.**
 - **If inspector stopped them from taking off, no attempted manslaughter allowed. There is no attempted manslaughter because in attempt, purpose must go to the result. Attempted manslaughter is attempted murder.**
 - **Attempt, purpose required both for conduct and results.**
 - **In complicity at common law, purpose need only go to conduct.** Less robust mens rea.
 - **Trying to prevent the harm from group crime; groups are more dangerous.**
 - **In complicity, we have the bad result, and in attempt we don't.** It's less problematic to punish all those who brought about a bad result than those who we think tried to.
 - **Mens rea for result, but only the mens rea required for the actual crime.**
 - **MPC agrees with McVey**
 - **Guilty of offense if committed by own conduct, or by another person when legally accountable for them**

- **Causes an innocent or irresponsible actor**
 - **If some provision says you are responsible (parents for kids)**
 - **Accomplice 1088 5.06**
 - **Purpose of promoting or facilitate that offense.**
 - **Duty to prevent the offense and don't.**
 - **Law says accomplice.**
 - **4-McVey holding**
 - **2.06(7)- need to prosecute or convict the principal.**
 - **Traditionally principal's culpability was required.**
 - **MPC says accomplice culpability is not entirely vicarious.**
- **Act requirement for being an accomplice- Wilcox shows us is very limited.**
 - Jazz writer for newspaper, accomplice to unlawful employment. Meets him at the airport, claps at the performance, and writes about it in the magazine.
 - **Encouraged the violation, English court said that was enough.**
 - **Woman raped in bar, touchers convicted, cheerers acquitted.**
 - Judge Tally, prevents telegram from being sent.
 - **If he did in fact help, or they knew he was trying to help, sufficient.**
 - **Must either help, or embolden them through encouragement.**
- **Renunciation**
 - **MPC has renunciation defense: 2.06(6)c- renounce purpose and wholly deprive prior complicity of effectiveness, by taking the gun back, turning them in to police, otherwise try to prevent the offense.**
 - **Harder to renounce complicity than attempt (when you can just decide not to do it)**
 - **Lots of states have adopted renunciation defense.**
- **Complicity and Attempt**
 - **What happens if you aid and abet but they never commit the crime**
 - Tally sends message, but brothers change their minds, get killed, or can't find him. Is there **attempted complicity?**
 - **Not at common law.**
 - **MPC has attempted aiding and abetting. 5.01(3)**
 - **Helping the Rizzo wouldn't be guilty because they weren't guilty of attempt, but Tally would be guilty of attempted complicity.**
 - **Try to aid and abet but unsuccessful- telegram operator delivers the telegram anyway, and Skelton brothers are not emboldened by him.**
 - **At common law, Tally not guilty.**
 - **Under MPC 2.06(3)a(2)- guilty of attempted complicity.**

Conspiracy

- **Crime of conspiracy is agreeing with someone else to commit a criminal act.**

- **Complete upon agreement, nothing further must be done.**
- In some ways it looks like attempt, trying to get at criminal activity before bad things happen.
 - But if they succeed, you can't charge with attempted murder and murder.
 - **Conspiracy is inchoate, in that requires no bad result. But is separable from the completed crime. Conspiracy to commit murder and murder, both punishable.**
- Think about how conspiracy expands liability. What is missing?
 - **Criminal act Missing. Traditionally, only the agreement was required.**
 - Modern law sometimes requires an **overt act** in furtherance of the conspiracy.
 - **Need not be criminal act. Anything in furtherance.**
 - **Need not be substantial**
 - **Need only be by one member of the conspiracy**
 - **MPC requires overt acts for lesser crimes but not for serious crimes**
- Why would we want a crime of conspiracy when we already have attempt and complicity
 - **Crime of conspiracy pushes things further back from the act than attempt, designed to offer more protection for society by allowing us to intervene earlier.**
 - **Allows us to address the particular danger of group activity.**
 - **Today you have to conspire to violate an actual crime.**
 - Prosecutors like it
 - Easier to prove, just prove an agreement
 - Higher penalties.
 - **MPC tried to limit conspiracy punishment by object crime, so conspiracy only tacks on time if objective has higher punishment than actual result. Not adopted very much.**
 - Used to be that misdemeanor object crimes could make felony conspiracy
- **Procedural advantages**
 - **Try all conspirators together in one trial, guilt by association and spillover prejudice.**
 - **All acts and statements by any member of the conspiracy are evidence against every member of the conspiracy.**
 - **Statements by co-conspirators are treated as admissible hearsay exception, considered to be your statements.**
 - **Hearsay, statement outside courtroom offered in courtroom for the proof of the statement.**
 - **All co-conspirators can be tried in jurisdiction where any part of the conspiracy took place.**
 - **Biggest advantage: Pinkerton Liability**

- **This is a doctrine of accomplice liability- if you agree with someone to do something illegal, and they do it without your assistance, are you also guilty of doing it? Pinkerton says yes. Automatic accomplice liability.**
 - Does not mean you are guilty for whatever your co-conspirator does, **just for what you agreed with them to do;** and
 - 1. **In furtherance of the conspiracy**
 - Avoiding detection of conspiracy is within the scope even if never agreed to.
 - 2. **Within the scope of the unlawful activity.** What is in furtherance but not within the scope?
 - Killing the law enforcement agent, if you never discussed it, may not be within the scope.
 - 3. **Reasonably foreseeable**
 - Depends on the nature of what you agreed to.
 - **As announced in Pinkerton, Pinkerton conspiracy liability is not much further than complicity because really limited by within the scope of the agreement.**
 - Bridges and Alvarez interpret pinkerton
- **Bridges**
 - **If we take scope really seriously, clearly he didn't agree to any killings.**
 - **Court says that the co-conspirator can be liable for substantive crimes outside the scope if reasonably foreseeable as the necessary or natural consequence of the conspiracy and in furtherance of the crime.**
 - **Just drops the scope limitations requirement.**
- **Alvarez- same as Bridges but in Federal Court**
 - **Alvarez court adds a culpability limitation. Perhaps a truly minor player, if role in conspiracy and illegal conduct are so attenuate that unjust to punish.**
- **is huger, and is strong majority. Luparello is a high minority.**
- **Moves to limit pinkerton**
 - **Alvarez, may not apply to minor players**
 - **Added overt act requirement to the common law conspiracy.**
 - **MPC limits consecutive sentences for substantive and conspiracy**
 - **Made conspiracy to misdemeanor not a felony.**
 - **MPC allows you to get out of the conspiracy.**
 - **Every state allows you to withdraw from a conspiracy.**
 - **MPC: 1101, 5.03(7)- Conspiracy terminates when object crime is committed or when abandoned.**
 - **Abandonment presumed if no further overt acts.**
 - **Individual can withdraw by informing co-conspirators or telling police.**
 - **Both very dangerous.**
 - **Ending the conspiracy is not a defense for what you did while in it, just limits future liability for conspiratory acts.**

- 5.03(6) renunciation of criminal purpose is an affirmative defense if you thwart the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation. Erase the previous liability.
 - Renunciation
 - Attempt- voluntary renunciation required after corroborative step, not just because better victim, police there, or couldn't finish the crime.
 - Complicity- if provided encouragement or aid, must voluntarily renounce criminal purpose and either take back your help (wholly deprive assistance of effectiveness), inform the authorities, try to stop it.
 - Conspiracy, not enough that you try to stop it, you must succeed. You must thwart the success of the conspiracy.
 - Common law didn't have this defense
- Pinkerton vs Luparello
 - Luparello says if you agree to do one thing, and reasonably foreseeable, you are guilty.
 - Luparello is less popular than Pinkerton because it was a big jump as opposed to the incremental Pinkerton
 - If guilty by conspiracy, almost always guilty of complicity as well. But conspiracy is communicative, while complicity is not.
 - Court imagines that in the absence of agreement, these distributors would not act this way.
 - **Court regularly use circumstantial evidence to infer agreement.**
- MPC focus on mental states, purpose vs. Knowledge (practically certain). The difference really matters
 - Conspiracy shows how important the difference is purpose vs. Knowledge
 - In Attempt, HIV rapist, knowledge not sufficient for attempt, purpose req.
 - In complicity, giving directions to undercover agent to buy drugs, knowledge not sufficient, but no purpose (court said nexus)
 - In conspiracy, Loria answering service had some prostitute clients, knowledge was not sufficient, purpose required.
 - **Both knowledge of unlawful use of goods or services and intent to further that use are required for conspiracy.**
 - Purpose required, knowledge generally not sufficient, unless
 - Intent can be inferred from knowledge of certain facts.
 - No legitimate use.
 - Loria Holding, in general you need purpose, he didn't have purpose, not guilty.
 - In serious crimes we might not require purpose.
 - How to tell difference between knowledge and purpose.
 - Confession of purpose.
 - Infer purpose from knowledge (stake in the venture-overarching goal)

- Charge inflated prices, benefiting especially from the illegal use.
 - Cover costs of nature of the crime.
- No legitimate use
- Volume of business with the buyer is disproportional to demand.
 - Sale volume of narcotics so great, shows a stake
- Knowledge + these underlying facts showing financial stake in the venture.
 - Infer that you care that the illegal activity be promoted

Mens Rea

- Attempt
 - Conduct- MPC- and Common Law (Smallwood): Purpose
 - Results
 - Common law: Purpose
 - MPC- purpose (belief for completed attempts)
 - Attendant circumstances- mens rea required for the completed crime
- Complicity-
 - Conduct- MPC and common law: purpose
 - Posner Fountain exception for serious crimes.
 - Results (McVay) mens rea for the completed crime. Captain had purpose that they fire the boiler.
 - Attendant circumstances- MPC and common law both internally inconsistent
- Conspiracy
 - Conduct
 - MPC purpose
 - Common law- purpose or knowledge you can use to infer purpose
 - Lauria defection for serious crimes

Conspiracy is like complicity in that it's about groups, but attempt requires purpose as to the result (no attempted involuntary manslaughter), but for complicity only need mens rea for the completed crime.

- Did McVey captain conspire for involuntary manslaughter (couldn't have attempted involuntary manslaughter)
 - MPC is the same as the common law: you can't conspire to do things that happen by accident, like attempt law. **Conspiracy requires purpose for the result**
- Why is conspiracy more like attempt and less like complicity?
 - Both are inchoate charges, whereas complicity is the charge itself.
 - Inchoate, crime hasn't been committed, there is not bad result.
 - No causation requirement
 - Very minimal act requirement.
 - Time is pushed back far, higher mens rea required.

- Maybe case against Kotteakos was weaker than everyone else's.
- **Hub and spoke conspiracy, but no rim. What could be a rim?**
 - **If it only works if others are in on it and know that other people are involved**
 - Must work together to prevent detection.
 - Send it in together as a batch of 10.
 - Then each one would be dependent on the others
 - **The rim is a stake in the venture.** Shared common purpose.
- , not as a casual practice, and Anderson knew it.
- She knew that other people were referring to him for abortions.
- **If she wants her referrals to continue to generate money for her, he has to still be in business. Her business alone is not enough to keep him in business. She knows that there have to be other people referring, and her ability to refer to him for pay depends on it.**
- Kotteakos say you need to inquire about a spoke, but Bruno says courts are not very demanding about what really connects the spokelike prong.
 - 1970- no need of wheel or chain conspiracy, crime to participate in unlawful enterprise. No agreement needed.
 - Must be engaged in a pattern of racketeering activities
 - Murder, Kidnapping, drugs, bribery, extortion, pimping, etc. Listed crimes.
 - Continuity of enterprise
 - Relationship of racketeering activities to one another within 10 years.
- To have conspiracy with remote tippee, must at least have knowledge of remote tippee. Knowledge will tip others.
- Transitive property of conspiracy
 - Must argue that didn't know about other person
 - Argue that really not the same offense.
- Want to kill someone, agree to get a gun, buy bullets, etc. etc. Guilty of conspiracy to kill the person, or of multiple conspiracies for each criminal objective.
 - Common law and MPC the same, # of agreements, not of criminal objectives.

Corporate Liability

- **Respondeat Superior- NY central and Hilton Hotels**
 - **within the scope of their employments**
 - **Scope just means his job let him decide, he had the authority, the ability to decide.**
 - **to benefit the corporation.**

- **Unfair, in that despite official policy and policy communicated to employee, so long as part of employees job and with intent to benefit employer, corporate liability.**
 - **They want the company to police it's own people (deterrence)**
 - **Difficult for the government to ferret out individual's who are liable.**
 - **MPC is more limited**
 - **Conduct must be authorized, commanded, ratified, recklessly tolerated by a high-ranking manager**
 - **High-ranking manager is someone with position such that their action can be construed to be corporate policy.**
- **MPC is hybrid between American and English rule because of exceptions allowing American rule sometimes.**
 - **In ordinary crimes, high manager must at least recklessly tolerate the actions.**
 - **When there is a legislative purpose to impose**
 - **Violation of regulatory offense, then American rule (2.07(1)a).**
 - **MPC has no strict liability laws, but permits strict liability violations, (not real crimes, not criminal offenses.**
 - **Like parking tickets or MA marijuana**
 - **These violations get respondeat superior, these are geared towards corporate liability.**
 - **(5). But when the American rule applies, there is a defense of having exercised due diligence to prevent the occurrence(in 1a, 3a, American rule) except when absolute liability has been imposed. When legislature specifically applies strict liability.**
- **How would MPC liability work for BFC.**
 - **Bribery is a classic MPC crime, requires high managerial approval**
 - **They were recklessly tolerating because they didn't stop the money.**
 - **In GMC v. Pontiac, court adopts MPC and says it can be met through**
 - **We're making up a consciousness for the partnership because it doesn't have one, the individual has their own.**
- **U.S. v. Park, CEO of Acme Foods. Charged with violating law on food safety. Rats got into the food stored in the warehouse.**
 - **MPC would call this a violation, and fed gov calls a crime under FDA,**
 - **The court instructions in this case say he stands in responsible relation (Dockerwich, strict liability), it doesn't matter how hard we works to prevent it.**
 - **Strict liability + corporate context = everyone from warehouse manager to President and CEO become guilty. All of these people stand in responsible relation to the public danger.**
 - **Dissenters want to say that constitutional due process requires a due diligence defense, requiring negligence as a minimum culpability.**

- Park and Robinson & Powell Sequway
 - In Park (Acme rats), circuit court had thrown out conviction, and SCOTUS reinstated it.
 - Thrown out because jury not instructed to find an act or an omission. If no guilty act/omission in instruction, being found guilty based only on his status as CEO
 - SCOTUS rejected, because as CEO he stood in responsible relation to the warehouse, and therefore acted/omitted to act. Only a status crime if physically impossible for him to get rid of the rats.
 - Impossibility defense instead of a due diligence defense.
 - Actus reas, you can't hold someone responsible without an act, not merely for status.
 - Court rejected both, and instead had selective incorporation, clause by clause.
 - Pretty much everything ended up being incorporated, except:
 - Grand Jury clause for indictment
 - Maybe part of the jury trial right of the 7th amendment.
 - Unanimity of jury.
 - 8th amendment cruel and unusual, cite 14th to incorporate against the state.
 - Real point is that the addiction itself is not necessarily culpable.
 - Douglas: Like an illness, wrong to punish someone for an illness, didn't intend to get sick, not a status anyone wants, and once you have it you can't help feeling it.
 - Not right to punish someone for something they can't help.
 - Two ideas
 - Drug addiction is something people can't help and it's wrong to punish people for things they can't help.
 - Status and no bad act, bad act required because it shows that you really mean it. Actus reas.
 - Which does Robinson really mean.
 - 1. is almost like mens rea, culpability requirement, almost like must be voluntary
 - 2. is an actus reas
 - Court hints at constitutional defense for things you can't help
 - [Robinson relies more on the actus reas distinction]
 - Powell:
 - State may criminalize public behavior that creates a substantial health and safety hazard for him and the public.
 - Focuses on act distinction.
 - Even if they did think he couldn't help it, no constitutional doctrine of blameworthiness, and sufficiently voluntary.
 - Tools created by the states for determining what is criminal

- Left to the states to decide.
 - Federal would reduce experimentation.
 - Robinson merely requires actus reus. This is a prohibited act, not a status.
 - Getting drunk and going into public, two acts in TX
- Holdings with 5 votes
 - Alcoholism is a disease
 - You can't punish people for a disease they can't control, so you can't punish them for getting drunk.
 - He should have taken precautions for appearing in public, could have helped that.
 - Clark v. Arizona, Court says no insanity defense required. Still no constitutional requirement of no punishment for things people can't help.
 - Powell and Robinson stand for Harlan view- Act requirement.
 - Culpability requirement from 8th amendment has died out in US
 - Canada has it under charter of rights, no strict liability allowed in Canada.
 - If broad Robinson had lived on, it would be the same here.

The three common law requirements for criminal liability are to some extent constitutionalized

- Robinson says that at least part of the act requirement is a constitutional requirement under the cruel and unusual punishment clause of the 8th amendment.
 - How robust is that requirement? Voluntary?
 - Voluntary to a point of culpability?
 - Must they have a choice? The opinion falls apart.
 - Robinson opinion has seeds of both act and culpability.
 - In Powell it splits right down the middle
 - White says unconstitutional to punish people for things they can't help.
 - But this guy could've helped being drunk in public.
 - In Clark v. Arizona, court revisited topic in terms of insanity, limiting the insanity defense is not unconstitutional, but abolishing it may be.
 - Defend Keeler Opinion
 - Separation of powers, legislative branch defines crimes, we just apply it.
 - Due process: fair warning to residents that what they were doing was murder.
 - [
 - Ex post facto- two provisions, Congress and States can't pass them.
 - Non-criminal act becomes criminal, retroactively.
 - At the time it was performed it was legal, and now it is illegal.
 - Ex post facto applies to legislature, not judiciary.

- Murder has always been a crime, not changing the terms of the statute.
- Does due process, which gives fair procedures in court, apply ex post facto to judges? Can judges interpret statutes more broadly than before?
 - Considerable and unforeseeable- meaning Keeler couldn't have known or thought of himself as a murder
 - Widely regarded that judges limited by due process like legislature by ex post facto.
- Rogers v. Tennessee- Judge throws out year and a day rule, changing the common law.
- Are Keeler and Rogers reconcilable?
 - Rogers is dealing with common law, Keeler on statute.
 - Ex post facto applies to statutes.
 - In Keeler, common law definition of what a human being is, in Rogers the common law definition of causation.
 - The common law rule was never really adopted in Tennessee.
 - **Supreme Court** is not saying judges aren't bound at all, just that due process doesn't mean that judges can never judicially enlarge statute, only if unfair and unexpected.
 - Mosk said change would be unexpected because of the abortion debate.
 - Court held that year and a day rule had a tenuous hold in Tennessee, no one had used in a long time.
 - Changing that rule violated no expectations.
 - Mosk talks about due process and ex post facto as if they're the same.
 - Court says that due process has not the same bite as ex post facto.
- Rule of lenity, in criminal cases only, judges interpreting criminal statutes should interpret them narrowly.
 - Derived from the due process idea, that judges should not enlarge statute in unfair or unanticipated manner.
 - Rule of lenity as quasi-constitutional status.
 - **High cost of error in criminal law.**
 - No prohibition on civil laws. **No rule of lenity in civil statutes.**

Legality

- Capacity for fair notice
- Rejection of retroactive expansion of criminal liability
 - Mostly to legislatures, ex post fact
 - Some to judges, due process
 - In Keeler and Rogers, definition was too narrow.

- In Keeler judge refused to expand, foetus death.
 - In Rogers, judge expanded.
 - Can also be too broad.
 - Vague laws
 - Jacksonville law against vagrants,
 - Void for Vagueness, so broad in their reach that constitutionally invalid.
 - Papachristou- hard to know whether we need all of these aspects, or if any one of them is sufficient.
 - Lack of fair notice
 - Inability to conform behavior to law, or involves innocent or protected behavior.
 - Status
 - “common thief” means reputation of being a thief. Round up the usual suspects.
 - Lots of discretion to police officers
 - Not clear enough notice, ordinary citizen doesn’t know what is prohibited.
 - Discretion is too broad
- Lack of vagueness and fairness are central to the doctrine.
- O’Connor suggests changes to make less vague
 - More specific definition of loiter- add mens rea
 - She wants there to be a mens rea, a loitering with intent.
 - Intent to establish control or conceal criminal purpose
 - 1. Harmful purpose statutes would be allowed
 - Has become the dominant loitering law method.
 - 2. Not restricted to gang members, other laws target only gang members.
 - 3. No geographic limits. Maybe if limited by time (night) or location.
 - Fairness in a procedure, minimally understandable, followable, gives notice, not a blank check of discretionary authority.
 - **Court says Linda R can’t force prosecution, not because the distinction is legal, but because she lacks standing to sue, because there is no remedy for herself.**
 - Court says that even if the plaintiffs have standing, they can’t force it.
 - **Standing doesn’t matter**, although never holds that anyone has standing.
 - In Linda R, pg 1010, despite speculative, clear line: private citizen lacks judicially cognizable interest in the criminal prosecution of another.
 - **Private individuals can never have enough interest to force a prosecution, it’s a public decision.**
 - **Separation of powers** problem. Power to prosecute is uniquely executive.
 - **Both courts and private citizens lack the power to force it.**
 - **Both in the constitution, and would be a bad thing**
- Atticca is pretty extreme: no judicially cognizeable remedy for lack of prosecution.

- Judges don't have the power to order prosecution.
- **More oppression gets down from prosecuting than when they don't prosecute- constraints on bringing charges.**
 - Federal Grand jury- not much of a constraint. They almost always do agree.
 - Selective prosecution- violation of the equal protection clause.
 - Vindictive prosecution- violation of due process clause
 - If either of these are found, courts can dismiss the charges.
- **Selective Prosecution- Armstrong 1996**
 - **Court held in Wayte that purpose to discriminate required.**
 - **Just to get discovery, must only show evidence of discriminatory effect**
 - **Selective prosecution is a real doctrine, but only one has won in federal court.**
 - **Even if you get discovery, files won't show purpose, only effect.**
 - **Cannot show purpose by disparate impact here.**
- **More reversals on vindictive prosecution**
 - **Bordenkircher v. Hayes**
 - **Mentions NC vs. Pearce- vindictiveness means prosecutor is punishing D for successfully defending against the first trial.**
 - **Brady was voluntary because he had a lawyer, knew what he was doing.**
 - **Can court regulate plea bargaining through vindictive and selective prosecution**
 - **Brady and Bordenkircher have said no, even when expressly motivated to get you to give up a right.**
 - **Plea bargain is an exception to vindictive exception.**

Discretionary Sentencing:

- **Enormous prosecutorial discretion, unchecked by other branches**
 - **Decision not to prosecute basically unchallengeable.**
 - **Decisions to prosecute are challenged in court**
 - **Vindictive prosecution- charges brought or made more severe because D invoked Constitutional right.**
 - **Right to appeal protected by presumption of vindictiveness, any higher sentence after appeal is presumed vindictive.**
 - **No presumption in plea bargaining. Allowed to seek higher charge because you exercise your jury right.**
 - **Primarily rehabilitative from progressive era.**
 - **Victim is misled about how long that person will be in prison.**
 - **Procedurally, judges can consider things D doesn't have chance to rebut or even know about.**

- **Two considerations**
 - **Criminal history- past record (6)**
 - **Nature of offense (43)**
 - **Constrained by tight ranges, on average 25%.**
 - **Judge is allowed to depart upwards (down on chart) or downwards (up on chart) if there are factors**
 - **Not taken into account in guidelines**
 - **Or not adequately taken into account in guidelines.**
 - **Judge must still calculate the box, and give a written opinion justifying the departure.**
- **Appeal**
 - **Under original sentencing, could appeal only if outside statutory range, but if in the range, essentially unappealable, seems like the right sentence to me. Unless says based on race or religion.**
 - **Under guidelines, can appeal designated box and upward or downward departure.**
 - **Increased appeals on sentences**
- **Comissioners tried to limit prosecutorial discretion- Frank Bowman- base sentence on underlying conduct.**
 - **Real-offense sentencing, real offense committed, not necessarily the offense charge. Take into account**
 - **Relevant conduct: charged for one gram sold but had whole kilo, consider the weight of drug in gym back even though not charged with it.**
 - **Thompson,**
 - **Unusual means really, really unusual and irreplaceable.**
- **Blakely, constitutional challenges to guidelines- reasonableness review**
 - **SCOTUS said recently, circuit can constitutionally say that any sentence within the advisory guidelines is presumptively reasonable.**
 - **Jury must find factual findings sufficient to increase the penalty beyond the maximum penalty of another crime.**
 - **Apprendi raised statutory maximum for the crime. If a fact raises the statutory maximum, that fact must be found by the jury.**
 - **In Blakely,**
 - **Any facts that push the sentence upwards from the guideline range required by law constitutionally required to be found by jury.**
 - **Because cruelty was an authorizing fact, law of guidelines says sentence not authorized without that fact, fact is essential.**
 - **Discretionary sentencing and Williams survives Blakely.**
 - **Federal approach after Booker**
 - **Keep the guidelines, good effort, 20 years, understood**

- Make the guidelines advisory, judges aren't bound by them
- Discretionary sentencing with recommendation.
- **Ring v. Arizona struck down MPC allowing judges to find aggravating factors in murder justifying death penalty. Jury must find.**

Proportionality Requirement

- **Does constitution have proportionality principle? Yes but it's narrow.**
- **How do we know when applies? When grossly disproportionate punishment.**
 - **Plurality want to compare the crime to the sentence imposed**
 - **Concurring: Scalia and Thomas- leaps up and smacks you in the face. Life in prison for parking violation**
 - Dissent wants to add to leap up and smack you on the face
 - 3 factors came from Solem v. halem, only time sentence was disproportionate. Life without parole for 3rd strike.
 - Gross disproportionality between crime and punishment
 - Intrajurisdictional
 - Interjurisdictional
 - Harmolem, said you have to get past #1 to apply #2-3.
- **Scalia and Thomas: there is no proportionality principle, these are just policy judgments**
 - 1. Probably 4-1-4, Justice Kennedy, the other part of the 3, narrow proportionality principle.
 - **Federal proportionality review is not a robust regulation of punishments.**
 - **If Androtti, Kmart video can go to prison for life, what else can.**
 - **Proportionality is robust for death penalty jurisprudence.**
- **Once any purpose of punishment is a state decision, who is the court to say they are wrong.**