

I. WHY PUNISH?

- a. **Retributivism** - Punishment is justified when it is deserved and only when it is deserved
 - i. Deserved when the wrongdoer freely chooses to violate society's rules
 - ii. By punishing the wrongdoer, society demonstrates its respect for him
 - iii. Justification for punishment is that punishment is itself just or morally good
 - iv. Is impartial (cf. revenge, which is emotional)
 - v. Rebalances the scale when criminals take an unfair advantage
 - vi. Problems w/ retributivism
 - 1) Inequality in starting positions undercuts autonomy and equality pillars
 - 2) Proportionality can be a problem (e.g., Hitler)
 - vii. Mixed theory
 - 1) Retributivism gives permission to punish; utilitarianism says how much
- b. **Utilitarianism** - Punishment justified if results in a reduction in the pain of crime that would otherwise occur
 - i. Can satisfy revenge - otherwise ppl take the law into their own hands
 - ii. **Includes 3 purposes**
 - 1) **Deterrence**
 - a) Specific deterrence - punish to keep the specific person from repeating crime
 - b) General deterrence - punish to convince general community not to commit crime
 - c) Want optimal deterrence (b/c max punishment would use too many resources)
 - i) Want the chance of punishment x the punishment to outweigh the individual's taste for crime
 - d) Problems w/ deterrence
 - i) Assumes criminals are rational actors w/ perfect information
 - ii) Punishment doesn't always fit the crime (e.g., 3-strikes laws)
 - 2) **Rehabilitation**
 - a) Can rehab for society's benefit or for the criminal's benefit
 - b) Sentence according to how long it takes to rehab
 - c) Problems w/ rehab
 - i) Resources better spent on needy non-criminals
 - ii) Potential to be paternalistic and discriminatory
 - iii) Punishment might not be proportionate to crime
 - 3) **Incapacitation**
 - a) Makes ppl less able to commit crime - thug in prison can't rape your sister
 - b) Selective incapacitation - figure out who most likely to reoffend and keep them in prison longer (ex 3 strikes laws)
 - c) Problems w/ incapacitation
 - i) Essentially punishing ppl for future crimes
 - ii) Punishment might not fit crime (might be difference b/w those who commit the worst crimes and those most likely to reoffend)
 - iii) Potential for discrimination (lock up all 18-25 yr old men) - most criminal careers done by age 25ish
- c. **Sociological studies - why do ppl obey the law?**
 - i. Not fear of punishment, but b/c ppl internalize the norms of the law
 - ii. Ppl have to believe the law is just and regularly applied
 - 1) When? Most ppl want law to punish ppl when they deserve it and to punish proportionally
- d. **Punishment nihilism**
 - i. What debt do ppl have to society when society has given them nothing?

II. General Common Law Requirements

- a. **Social Harm: General Principles**
 - i. Crimes or elements of crimes can be defined in terms of:
 - 1) **Conduct**
 - a) defined in part in terms of harmful conduct; harmful results not required
 - i) Ex driving under the influence of alcohol
 - 2) **Result**
 - a) Defined in terms of a prohibited result
 - i) Ex murder - kill another; doesn't matter how
 - 3) **Attendant Circumstances**
 - a) In order for any offense to occur, certain facts or circumstances must be present
 - i) Ex burglary - must break and enter dwelling house/of another/at night
- b. **ACTUS REUS**
 - i. **Common Law**
 - 1) **Definition**

- a) Is (1) **a voluntary act** (or omission to do sth you have a duty to do) (2) **that causes** (3) **social harm**
 - i) Possession is an act if the person is aware or should have been aware that she has the thing she is charged with possessing.

2) **Omissions - duty to act**

- a) where a **statute** imposes a duty to care for another
 - b) where one stands in a certain **status relationship** to another
 - i) parent - child
 - ii) husband - wife
 - iii) master - apprentice
 - iv) ship's master - crew and passengers
 - v) innkeeper - inebriated customers
 - vi) still read narrowly despite rise of nontraditional families
 - c) where one has assumed a **contractual duty** to care for another
 - d) where one has **voluntarily assumed the care** of another and so secluded the helpless person as to prevent others from rendering aid
 - e) where one **creates a continuing risk of physical harm to another**, one is under a duty to take reasonable care to prevent the risk from taking effect
- 3) Sometimes hard to tell whether it's action or inaction
- a) Ex driving w/ cruise control and go through a red light - acted or failed to act?
- 4) Arguments in favor of imposing duty to help:
- a) social cohesion,
 - b) making laws compatible with morality,
 - c) deterrence (duty imposed when no cost or risk to yourself)
- 5) Arguments against:
- a) freedom of action, hindsight bias
 - b) difficulty of knowing if helper faces risk,
 - c) variations among moral intuitions,
 - d) hard to prove negative,
 - e) difficulty of enforcing
 - f) where to draw the line

ii. **MPC (§2.01, pg 1081)**

- 1) 2.01(1) - not guilty unless conduct **merely includes** voluntary act or omission of act that able to perform
 - a) bodily movements that are a product of the effort or determination of the actor, either conscious or habitual.
- 2) 2.01(2) - do not include a reflex or convulsion, bodily movement during unconsciousness or sleep, conduct during hypnosis, bodily movements that otherwise are not a product of the effort or determination of the actor - habitual actions do count
- 3) 2.01(3) - not guilty for omission unless omission is
 - a) in a statute; or
 - b) a duty to perform the omitted act is otherwise imposed by law

iii. **Cases**

- 1) Martin – Each element of a crime must result from a voluntary act.
 - a) (Man taken out of his house onto the street by police while drunk)
- 2) Newton – Reflex is not an act.
 - a) (Newton shot the cops saying it was a reflex after being shot in stomach)
- 3) Decina - Criminal liability may be based upon an otherwise involuntary act where the voluntariness element is provided by the actor's prior knowledge that the condition causing this act presented a threat of harm under the circumstances. - Initial act was voluntary.
- 4) Pope – No duty to assist bystanders in emergency
- 5) Jones – Must be legal duty of care for crime of omission.

c. **MENS REA**

- i. Concern of crim law is determining whether a D intended, expected, or should have expected his actions to produce particular consequences

ii. **COMMON LAW**

- 1) **Default rule is that "malice" and other ambiguous terms mean that D was aware his actions posed a substantial risk of causing the prohibited harm**
 - a) Intentional or reckless
 - b) *Regina v. Cunningham* (gas meter)
 - i) Intent or awareness of risk
 - c) *Regina v. Faulkner* (burn down ship)
 - i) Similar outcome to *Cunningham*
 - ii) Malice must be at least intent, foresight, probability
- 2) **Intent**

- a) UC - CL Intent means (1) conscious object to cause the social harm or (2) acting w/ knowledge that harm is virtually certain to occur
 - 3) **Specific v. General Intent** (note: sometimes used inconsistently)
 - a) **Most common:**
 - i) **Specific Intent:** Action must be done w/ some further purpose in mind
 - (1) Ex burglary = break and enter w/ intent to commit a felony inside
 - ii) **General Intent:** doing what in ordinary speech would call an intentional action
 - (1) Ex breaking and entering - have general intent for trespass b/c you did it on purpose
 - b) **Another usage:**
 - i) **Specific Intent:** requires D to have actual knowledge (subjective awareness) of an attendant circumstance crucial to the crime
 - (1) Ex if bigamy is defined as needing to know already married before marrying again
 - ii) **General Intent:** awareness of attendant circumstance need not be proved; lesser mental state, like recklessness/negligence, will suffice
 - (1) Ex if bigamy is defined as not needing to know already married
 - 4) Proving intent
 - a) Presumption that a person is presumed to intend the natural and probable consequences of his acts
 - i) Strict limits on presumptions the jury is required to draw, but is permissive
 - 5) **Negligence: different standards**
 - a) *Hazlewood* - criminal negligence is same as civil negligence (Exxon Valdez case)
 - i) Minority rule
 - b) *Santillanes* - must show more than civil negligence (NM case)
 - i) Majority rule
 - (1) Gross negligence, culpable negligence, etc.
 - 6) Recklessness (UC)
 - a) Majority rule - conscious awareness of substantial and unjustifiable risk
 - b) Minority rule - extreme negligence
- iii. **MPC (§2.02, pg 1082)**
- 1) **PURPOSELY**
 - a) Conduct or result: **conscious object**; and
 - b) Attendant circs: **aware** of them or **believes or hopes** they exist
 - 2) **KNOWINGLY**
 - a) Conduct or attendant circs: **aware** that conduct is of that nature or circumstances exist; and
 - b) Result: **practically certain** that the conduct will cause the result
 - 3) **RECKLESSLY**
 - a) **Consciously disregard** a **substantial and unjustifiable risk** that the element exists or will result from the conduct
 - b) **Disregard** of risk is a **gross deviation** from law-abiding person **in actor's situation**
 - 4) **NEGLIGENTLY**
 - a) **Should be aware** of a **substantial and unjustifiable risk** that the element exists or will result from the conduct
 - b) **Failure to perceive** risk is a **gross deviation** from reasonable person **in actor's situation**
 - 5) For recklessness and negligence, consider the **nature** and **purpose** of actor's conduct and **circumstances known to him**
 - 6) If mens rea not stated for element, minimum level is **recklessness** - could also be knowingly or purposely
 - 7) If particular mens rea has been articulated at all by the legislature as enough for any element, assume it was meant to apply to all elements unless contrary purpose clearly appears
 - 8) Must prove mens rea for each material element of offense
 - a) Material element=element that doesn't relate exclusively to a matter unconnected w/ the harm or evil or the justification/excuse of the offense (ex jurisdiction, venue, statute of limitations, etc.)
 - 9) **Substantial and unjustifiable**
 - a) Question for jury
 - b) For recklessness,
 - c) Risk that's substantial but not unjustifiable - under attack, I'm going to die, so I rip off the gas meter to protect myself
 - d) Risk that's not substantial but is unjustifiable - ordinary negligence
 - e) Have to know it's substantial and unjustifiable for recklessness? Probably yes
 - 10) **Actor's situation**
 - a) Physical characteristics (blindness, just suffered a heart attack, etc.) count, but hereditary factors and matters of intelligence and temperament don't
 - i) Up to courts
- iv. **Strict Liability**
- 1) Don't require any mental culpability - no mens rea

- 2) Preference against strict liability in criminal law - contrasts with torts
 - a) *Morrisette v. U.S.*
 - i) Mere omission of a mention of intent will not be construed as eliminating that element from the crime - mens rea presumed absent a contrary legislative purpose
 - ii) Key element for determining public welfare offense is the penalty
- 3) Public welfare offenses
 - a) *US v. Balint*
 - i) Charged w/ selling drugs, but didn't know they were prohibited - doesn't matter
 - b) *US v. Dotterweich*
 - i) Similar to *Balint* w/ food labeling
 - c) Squaring w/ purposes of punishment (from *Morrisette*)
 - i) Deterrence
 - (1) Hard to deter crimes w/ no mens rea, but makes ppl more careful
 - ii) Reformation (rehabilitation)
 - (1) Probably don't need reformation, but maybe make them more careful
 - iii) Vengeance (revenge or retributivism)
 - (1) Hard to square w/ strict liability - retributivism based on choice and autonomy
 - iv) Incapacitation (not mentioned in *Morrisette*)
 - (1) Ppl w/o mens rea can still be a danger to others (ex sleepwalking killer)
- 4) Can also have strict liability as to elements of crimes
 - a) Ex statutory rape - strict liability as to age of victim (attendant circumstance)
- 5) **MPC (§2.05 pg 1084)**
 - a) **No strict liability** in MPC except for crimes that can be deemed violations (no prison time)

d. CAUSATION

i. Factual cause

- 1) But-for causation - harm would not have occurred but for the D's conduct
 - a) Can have problems when "deprive victim of a chance" - where V might have died anyway, etc.

ii. Proximate (legal) cause

- 1) Act, in addition to being a but-for cause, must bear a sufficiently close relationship to the resulting harm
- 2) Proximate cause takes a slice out of but-for cause, leaving behind extraordinary results, extremely unusual results, or barely cognizable results
 - a) *Acosta* - Helicopter crash held proximate cause of D's leading police on high-speed chase
 - (1) Standard - exclude extraordinary results, and allow the trier of fact to determine the issue w/ common sense
 - b) *Arzon* - Arsonist started fire in warehouse where another fire started and the combination killed a firefighter
 - i) Held not necessary for harm to be intended, as long the ultimate harm is sth which should have been foreseen as being reasonably related to the acts of the accused
 - ii) D's conduct need not be sole cause, as long as sufficiently direct
 - iii) **Problem:** foreseeability of harm is tied to the level of generality from which you view the harm. Prosecution will use high level of generality; defense will use very specific.
 - (1) Can't really square *Warner Lambert* with *Acosta* and *Arzon* because using different standards of foreseeability
 - iv) Foreseeability conflicts w/ year and a day rule, transferred intent, and eggshell skull

iii. Problems

- 1) Moral luck (in practice, usually disregard)
- 2) Vulnerability of the victim - the criminal takes his victim as he finds him
- 3) Unexpected consequences -
 - a) the extraordinary result exception,
 - b) the year and a day rule, and
 - c) the sole cause rule when medical malpractice contributes to death after D harms V (*State v. Shabazz*)
 - i) gross negligence of Dr. will only allow D to escape liability if was the sole cause
- 4) External events
 - a) Subsequent victim behavior
 - i) Foreseeable V behavior sometimes breaks causal chain, but sometimes doesn't
 - ii) If involuntary act, doesn't break causal chain (*Stephenson*)
 - iii) If voluntary, depends - gang member case where gang retaliated b/c another gang shot at them was found not to break the chain, old lady shooting daughter and then daughter deciding to pull the plug was found not to break the chain
 - b) Subsequent acts of 3rd parties usually break the chain if voluntary
 - i) Again depends on foreseeability and circumstances
 - (1) Hoss that caused the loss
 - (2) Uriah the Hittite

iv. **Transferred Intent**

- 1) D's intent to do harm to V1 transfers to V2
 - a) Happens at all levels of mens rea

v. **MPC (§2.03)**

- 1) Keeps but-for causation (2.03(1)(a))
- 2) Keeps the transferred intent rule (2.03(2)(a), 2.03(3)(a))
- 3) Proximate causation
 - a) Links causation w/ mens rea - mens rea for causation of the result is the same as the mens rea for the element that contains that result (2.03(2), 2.03(3)) **unless**
 - i) The actual result involves the same kind of injury or harm as that designed, contemplated, or risked, and is not too remote or accidental to have a [just] bearing on the actor's liability or on the gravity of the offense (2.03(2)(b), 2.03(3)(b))
 - ii) Invites jury to reach commonsense or just result

III. **HOMICIDE**

	Common Law	MPC (§210 pg 1112)
Murder	<p>“Malice Aforethought”</p> <p>Express – <u>Intent to kill</u> (or transferred intent) or <u>Knowledge</u> OR Implied – - intent to commit <u>grievous bodily harm</u> - <u>Recklessness ‘plus,’</u> depraved heart recklessness - <u>Felony Murder</u></p>	<p>- <u>Purpose</u> OR - <u>Knowledge</u> OR - <u>Recklessness plus “extreme indifference” to value of human life. [EIVHL]</u></p> <ul style="list-style-type: none"> o Presumed if certain enumerated felonies are committed <ul style="list-style-type: none"> ▪ D can rebut, unlike common law
Voluntary Manslaughter	<p>Same mens rea as murder, except there is <u>provocation</u>.</p> <p>“Malice” mitigated, by “serious provocation” that results in “sudden and intense” passion [PA Statute].</p>	<p>Only one manslaughter:</p> <p>Same as murder, except there is <u>extreme emotional disturbance</u></p> <ul style="list-style-type: none"> - Must have <u>reasonable explanation or excuse</u> <ul style="list-style-type: none"> o Determined from viewpoint of <u>a person in the actor's situation under the circumstances as he believes them to be</u> <p>OR</p> <p>- Recklessness</p>
Involuntary Manslaughter	<p>Recklessness – “Wanton” “Gross Negligence.” Something more than civil negligence. May not need to be aware of risk (<i>Welansky</i>)</p> <ul style="list-style-type: none"> - Such a departure from prudent man as to be incompatible w/ proper regard for human life (<i>Barnett</i>) - Not 'recklessness plus', which is murder 	
Negligent Homicide		Homicide committed negligently

a. How to decide how to grade offenses?

- i. On what basis?
- ii. Who decides? Legislature or factfinder
 - 1) 2 extremes
 - a) Old NY statute - define all kinds of different ways of killing sb
 - b) Swedish statute - homicide is just taking a life, factfinder decides if "grave" or not
 - 2) MPC and CL take middle ground
 - a) Break into general categories and leave lots of discretion

b. **Intended Killings**

i. **"First Degree"**

- 1) Depends on the state. PA says "intentional killings" are 1st degree, where "intentional" means poison, lying in wait, or any other kind of willful, deliberate and premeditated killing
- 2) **Meaning of First Degree Murder**
 - a) 2 dominant views
 - i) Deliberation is just intent to kill

- (1) *Carroll* view - even w/o planning or preconceived desire, 1st degree as long as intentional, wilful, deliberate and premeditated
 - (A) Since no time is too short, if you intend to kill, you've deliberated
 - (B) Defense: "No time is too short for a wicked man to frame in his mind the scheme of murder" - so for a good man, need more time
- ii) Need to have opportunity for some reflection after intent to kill is formed
 - (1) *Guthrie* view - need to have opportunity for some reflection after intent to kill is formed
 - (2) How do you show opportunity to reflect?
 - (A) Time
 - (B) Planning
 - (C) Relationship - motive
 - (D) Manner of killing - ex *Guthrie* stabbed in jugular
- 3) **Death Penalty in MPC (§210.6 pg 1113)**
 - a) Doesn't use deliberate/intentional
 - b) Uses aggravating circumstances
 - i) Committed by convict in prison
 - ii) Previously convicted of another murder or other violent crime
 - iii) Committed more than one murder
 - iv) Knowingly created a great risk of death to many persons
 - v) MPC felony murder
 - vi) Etc.
 - c) Also has mitigating circumstances
 - i) No significant criminal history
 - ii) Extreme mental or emotional disturbance
 - iii) Victim consented or was participant
 - iv) Etc.

ii. **Provocation**

- 1) **Common law provocation defense for murder - mitigates to voluntary manslaughter**
 - a) Has to be done in hot blood/the heat of passion
 - b) "reasonable person" would feel the heat of passion
 - c) Heat/passion has to be based on provocation by the victim
 - d) Can be no "cooling time"
 - e) **What provocation counts?**
 - i) 2 different approaches to provocation
 - (1) In *Girouard*, it's about categories
 - (A) Mutual combat
 - (B) False arrest
 - (C) Finding wife in adultery w/ another man
 - (D) Seeing sb in family be victim of a terrible crime
 - (E) Pulling on sb nose (just in the very old law)
 - (2) ***Girouard* court says mere words are never enough**
 - (3) In *Maher*, it's about standards
 - (A) The trial judge used categories and excluded the evidence of provocation in
 - (i) Overruled on appeal
 - (B) In determining whether provocation is sufficient, ordinary human nature or average of men should be the standard
 - (C) Was the provocation sth that would cause reasonable person to act out of passion rather than reason?
 - (i) Kick it to the jury
 - (D) Can still recognize categories, but aren't binding
 - (4) On appeal, he won to let the evidence of provocation in
- 2) **MPC - Extreme Emotional Disturbance (§210.3(1)(b) pg 1112) - mitigates to manslaughter**
 - a) Homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.
 - i) Reasonableness determined from viewpoint of a person in the actor's situation under the circumstances as he believes them to be
 - b) EED could come from anything
 - c) No cooling off limitation
 - d) Biggest question is whether it arouses sympathy in the jury
 - e) *Casassa* - wanted to totally subjectivize standard -

Common Law	Model Penal Code
1. Victim does the provoking. Disturbance or	1. Don't have to kill the person who created the

event caused by person killed
 2. More specific—looks at adequacy of provocation (list of specific paradigmatic examples)
 3. Words usually not be enough
 4. Heat of passion means immediate response (no cooling off period)

emotional disturbance.
 2. Not look at adequacy—just whether a reasonable excuse for emotional state.
 3. Words may be enough
 4. Long term emotional disturbances and simmering allowed (immediate action not necessary)

c. Unintended Killings

i. Murder

1) Common Law

- a) Uses a lot of colorful language
 - i) Wicked, depraved, malignant/abandoned, wanton, implied malice (not expressed malice), hard heart, heart regardless of social duty
 - ii) Unwillingness to care abt things that society says we should care about (lives and safety of other ppl)
- b) 'recklessness plus'
- c) Requires conscious disregard of the risk of death
- d) Many states use MPC definition - conscious disregard of substantial and unjustifiable risk under circumstances manifesting extreme indifference to the value of human life

2) MPC - §210.2(b) (pg 1112)

- a) Committed recklessly under circumstances manifesting extreme indifference to the value of human life [EIVHL].
 - i) Substantial and unjustifiable are up to factfinder
 - ii) Awareness (conscious disregard) is subjective

ii. Manslaughter and Negligent Homicide

1) Common Law

a) Involuntary Manslaughter

- i) Has to be 'more' than civil negligence - how much more?
 - (1) *Welansky* - "a high degree of likelihood that substantial harm will result to another"
 - (A) This degree marked by words "wanton" and "reckless" (not MPC reckless)
 - (B) Doesn't require awareness - reasonable person standard - under the same circumstances (some subjectivity)
 - (2) Such a departure from prudent man as to be incompatible w/ proper regard for human life (*Barnett*)
- ii) Contributory negligence no defense
- iii) *Contra, Williams* (Native American parents)
 - (1) Used tort negligence standard for conviction of involuntary manslaughter
 - (A) Extreme minority rule

2) MPC

a) Manslaughter - §210.3 (pg 1112)

- i) Committed recklessly
 - (1) Consciously disregard a substantial and unjustifiable risk
 - (A) Disregard of risk is a gross deviation from law-abiding person in actor's situation
 - (B) *Hall* - lower court said "substantial" meant "more likely than not" *Held*, overturned - substantial needn't be more likely than not
 - 1. Had high likelihood of risk and no justifiability

b) Negligent Homicide - §210.4 (pg 1112)

- i) Committed negligently
 - (1) Should be aware of a substantial and unjustifiable risk that the element exists or will result from the conduct
 - (2) Failure to perceive risk is a gross deviation from reasonable person in actor's situation

iii. Felony Murder

1) Common Law

- a) **Strict version** - felon is strictly liable for all killings committed by him or his accomplices in the course of a felony (*Stamp*)
 - i) Only question is causation (but-for and proximate)
 - ii) Doesn't really exist anymore
- b) **Qualified version** - fatal act must be done w/ intent to commit felony, and also the act must be "known to be dangerous and likely in itself to cause death" (*Serné*)
 - i) Can limit in several ways (see below)
- c) **Rationale**
 - i) Do those who cause death deserve more punishment than others who do the same thing but don't cause death?

- (1) Ken Simons (pg 439) says yes b/c creating a risk by doing sth culpable is worse than creating a risk by doing sth innocent
- ii) Some say you can deter felonies by felony murder rule
 - (1) But others argue that to do that, it makes more sense to just raise the penalties for all felonies
- iii) Some say felony murder rule deters killings during felonies
 - (1) But there's already deterrence b/c felon more likely to get caught, and besides the chances are very very small
- iv) Prosecutors like it b/c it gets rid of the burden of proof, where it's hard to prove intent
 - (1) But it's hard to prove intent for any murder, so why keep it
- d) **How alive** is the felony murder rule today?
 - i) Pgs 444-446
 - (1) Some states have made felony murder 2nd degree
 - (2) Some have reduced felonies to a short list of very dangerous felonies (rape, arson, burglary, kidnapping, robbery)
 - (3) Some say you have to at least find recklessness
First. Makes all involuntary manslaughters committed during felonies 1st degree murder
 - (4) Some states say you can't be guilty if you weren't the trigger person and D didn't solicit or aid the killing, was not armed and had no reason to believe co-felon was armed
 - ii) Michigan court abolished felony murder by grabbing the word "murder" from the statute and saying it has to be a murder
 - (1) Now it just makes any murder a first degree murder
 - iii) California court had same statute as MI but didn't go that way
 - (1) Constitutional limitation through proportionality
- e) **Major limitations**
 - i) **Inherently dangerous felony requirement**
 - (1) **Two tests:**
 - (A) **In the abstract (minority rule)**
 - 1. (*Phillips* - cancer-chiropractor) - elements of the felony in the abstract, not as committed
 - 2. By its very nature, the crime cannot be committed w/o creating substantial risk that sb will be killed
 - (B) **Based on facts and the manner and circumstances in which it was committed (majority rule)**
 - 1. (*Stewart*- RI crack binge) - look at how felony was committed and determine if inherently dangerous
 - 2. *Hines* (turkey hunt) - majority says inherent danger determined by foreseeability
 - 1. Dissent says determined by "high probability" of death
 - ii) **Merger doctrine**
 - (1) Felony murder only applies if D had a "felonious purpose independent of the homicide" (*Burton* - CA armed robbery)
 - (2) If not independent (e.g., felonious assault, involunt. manslaughter, burglary where specific intent is assault, etc.), felony "merges" w/ the homicide and can't support felony murder
 - (3) Necessary to keep all felonious killings from becoming 1st degree
 - (4) Irony: ppl who do assaults, involuntary manslaughter, etc. that end in killing get off, while ppl who do even less serious crimes (ex robbery) get 1st degree
 - iii) **Limits on liability for killings by nonfelons or those not in furtherance of felony**
 - (1) **Two approaches:**
 - (A) **"Agency" Approach (majority rule)**
 - 1. All felons liable for any killing committed by a co-felon
 - 2. As if all one body
 - 3. Can't be held liable for killings committed by 3rd parties
 - (B) **"Proximate Causation" Approach (minority rule)**
 - 1. Held liable for all deaths proximately caused by the felony, whether shooter was a co-felon or 3rd party
 - 2. Question is whether killing was within the foreseeable risk of the commission of the felony
- 2) **MPC (§210.2 (b) pg 1112)**
 - a) EIVHL for 'recklessness plus' murder is presumed (subject to D's rebut) if actor is engaged in or is accomplice to commission, attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or

felonious escape.

IV. RAPE

a. Common Law

i. Classic common law statute

- 1) Vaginal intercourse w/ another person by force or threat of force against the will and w/o the consent of the other person (*Rusk*)
 - a) Can have force but still have consent - some ppl want to be forced
 - b) Can have force but not have non-consent - unconscious person

ii. Marital immunity rule

- 1) In transition; 24 states have abolished rule for all sexual offenses
- 2) Some states say only applies to forcible rape

iii. History of law of rape

- 1) Largely history of racism and sexism
 - a) Statutes made rapes by black D's on white V's a capital crime
 - b) Death penalty for rape ruled unconstitutional in 1977 - 2008 ruled death penalty for rape of child unconstitutional
- 2) Sexism
 - a) Lord Hale: Rape is an accusation easy to be made and hard to be proved, and hard to refuted by the D, be he ever so innocent
 - b) Fear that women use rape charge as weapon in court
 - c) Want to examine and testify the social history of women - assumes that women can't be trusted - maybe they wanted to be rape
 - d) A wide variety of evidentiary requirements
 - i) Corroboration - some physical evidence, witness, sth beyond women's testimony
 - ii) Complaint has to be swift
 - iii) Can bring up women's sexual history - unchaste = likely to be untruthful
 - e) Marital exceptions to rape law
 - i) In some jurisdictions, a husband still can't rape his wife
 - f) In 1969, 1000 complaints that led to arrests for rape - how many convicted? 18 convicted
 - g) Common law definition - vaginal sexual intercourse by force by a man w/ a woman not his wife
 - i) Homosexual rape (even sodomy) was not a crime and was not taken seriously at all by judges, juries
- 3) Now some reforms
 - a) Rape shield laws - can't bring up V's sexual history, get rid of evidentiary rules

iv. Actus Reus

1) **Force**

a) **Traditional Rule**

- i) Rape requires force AND lack of consent
- ii) Definition of force
 - (1) use or threat to use force likely to cause serious bodily harm to the female (or maybe a 3rd person); or
 - (2) Sufficient force to overcome the female's physical resistance
 - (3) Non-physical threat ordinarily NOT forcible rape
 - (A) *Thompson* - principal threatened to not let student graduate, *Held*, not rape
 - (B) *Mlinarich* - foster parent threatened to send girl back to juvi, *Held*, not rape

b) **Reforms, Modern Rules**

i) **Resistance**

- (1) Virtually no states require victim to "resist to the utmost"
- (2) A few states have abolished resistance requirement
- (3) Most states have reduced the amount of resistance required

ii) **Force**

- (1) Some states have defined broadly to mean minor physical acts
- (2) Some have included non-physical forms of coercion
 - (A) Dissent in *Mlinarich*
 1. "to constrain or compel by physical, moral, or intellectual means or by the exigencies of the circumstances"
 - (B) CA statute
 1. "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another"
 - (C) NJ statute
 1. Threatening "to accuse anyone of an offense," "[e]xpose any secret which would tend to subject any person to hatred, contempt or ridicule"; or "perform any act which would" not benefit the actor but would harm

another

(D) MPC - see below

1. Gross sexual imposition: Female submits as a result of a threat that would prevent resistance by a woman of ordinary resolution

(3) Elimination of force requirement

(A) *State in the Interest of M.T.S.* - define "force" to simply be the force necessary to effect the penetration

1. Say it's rape if you have sex in the absence of affirmative and freely given permission
 1. Could be by words or actions
 - a. But passivity, silence, acquiescence wouldn't count as consent
 2. What could be said in favor of the standard?
 - a. Maybe want ppl to start giving affirmative and freely given permission
 - 1) Promotes autonomy?
 - 2) Changes the default - right now default is that women are sexually available unless they say no; want to change to say that the default is that women aren't sexually available unless they say yes
2. Not the majority rule by far - criticized by many
 1. Mens rea problem - defendant might not know there's no consent
 2. Consent isn't a state of mind that can be clearly known - minds change, etc.

(B) *M.C. v. Bulgaria*

1. Says it's a human rights violation if prosecutors don't use *M.T.S.* standard

(C) WI statute

1. No force in the statute, just lack of consent

2) Consent

a) **Traditional rule** (not followed much today)

- i) Have to show both
 - (1) Subjective unwillingness, and
 - (2) External actions refusing consent - physical resistance essential; verbal protests considered insufficient
- ii) Fraud only vitiates consent if impersonate a spouse

b) **Modern views**

- i) Lots of ambiguity; **possibilities** include:
 - (1) Verbal resistance + other behavior that makes unwillingness clear (totality of circ)
 - (A) *Gangahar* NE undercover police - consent must make the victims refusal to consent genuine and real and so as to reasonably make known to the actor the refusal to consent
 - (B) NY statute - lack of consent=circumstances under which victim clearly expressed nonconsent and a reasonable person in actor's situation would have understood words and actions to express nonconsent under all the circumstances
 - (2) Verbal resistance alone (no means no)
 - (3) Verbal resistance OR passivity
 - (A) Anything other than affirmative permission by words or conduct
 1. *MTS* and WI statute approach
 - (4) Anything other than express verbal permission - saying "yes"

ii) **Vitiating consent**

- (1) Maturity - age and mental disease (problem: letting mentally disabled ppl have fulfilling sexual relationships)
- (2) Incapacity - drugs and alcohol
 - (A) All states say unconscious=no consent
 - (B) Most states say if D gives V drugs and alcohol and V becomes severely incapacitated=no consent
 1. But usually not if another person gave the drugs/alcohol
 2. Usually not if V knowingly chooses to consume drugs or alcohol
 1. Means willingness to drink=willingness to have sex?
 - (C) Some states say intoxication, even voluntary, vitiates consent
 1. How much? Driving level? (.08) WA case - .15 was enough
- (3) Pressure and threats? Open question
- (4) Authority and trust
 - (A) Outside of psychiatrist-patient relationships, criminal law doesn't generally

invalidate consent in adult relationships that are strongly influenced by authority or trust

(5) **Fraud/deception**

- (A) "At common law, a seducer is not a rapist" (Dressler)
- (B) *Evans* - D posed as psychiatrist and used ambiguous threats; *held*, no rape (fraud in inducement)
- (C) *Boro* - D said sex would treat V's disease; *held*, no rape (fraud in inducement)
- (D) **Fraud in the factum vitiates consent**
 - 1. V is unaware she has consented to the act of sexual intercourse
- (E) **Fraud in the inducement does NOT vitiate consent**
 - 1. Used fraud to gain consent, but V knew it was sex
- (F) Impersonating spouse usually fraud in the factum - vitiates consent

v. **Mens Rea**

1) Possibilities

	Victim	Defendant
a) Subjective	What did victim believe?	What did D believe?
Objective	What would a reasonable victim believe?	What would a reasonable defendant believe?

2) Generally, honest and reasonable mistake of fact is a defense to rape

- a) So negligence standard as to culpability
- b) But see Sherry, holding no mistake of fact defense even if reasonable (strict liability as to consent)
- c) *Fischer* - D argued that w/ rape law allowing "intellectual and moral force" made it unfair not to consider D's state of mind; *held*, couldn't be a basis for ineffective assistance of counsel (but was persuasive)
- d) Rape is exception to Morissette standard of mens rea b/c rape didn't have mens rea element for consent in common law

b. **MPC (§213, pg 1117)**

i. **Rape: definition (§213.1 pg 1117)**

- 1) A male who has sexual intercourse with a female under any of the following circumstances is guilty of rape:
 - a) Female < 10 yrs old
 - b) Female unconscious
 - c) Compels the female to submit by force or by threatening her or another person w/ imminent death, grievous bodily harm, extreme pain or kidnapping; or
 - d) Administers or employs drugs or intoxicants in a manner that substantially impairs the female's ability to appraise or control her conduct
- 2) Can't rape wife (includes parties living as spouses) unless parties live apart under formal decree of separation
- 3) 1st degree felony in either of these 2 circumstances:
 - a) D inflicted serious bodily injury
 - b) Female was not a voluntary social companion who had previously permitted him sexual liberties
- 4) Otherwise a 2nd degree felony

ii. **Comparison to Common Law**

1) **Traditional elements**

- a) Gender-specific only men can rape only women
- b) Retains spousal exception

2) **Different things**

- a) Sexual intercourse includes oral and anal
- b) Focuses on D's conduct rather than V's lack of consent
 - i) Doesn't require resistance (but can be used as evidence)
- c) Broader in some ways
 - i) Includes submission b/c of threats of force or force directed at 3rd party
 - ii) Includes kidnapping as force
 - iii) Fraud in the factum = no rape (in CL, fraud in the factum=rape)
 - (1) BUT fraud in the factum=Gross sexual imposition (213.2)

iii. **Gross Sexual Imposition (3rd degree felony) (§213.1 pg 1117-1118)**

- 1) Retains spousal and people living together exemptions
- 2) **Definition**
 - a) Male who has sexual intercourse w/ a female in any one of three circumstances
 - i) Female submits as a result of a threat that would prevent resistance by a woman of ordinary resolution

- (1) Ex threaten w/ loss of employment, if that would overcome woman of ordinary resolu
- ii) Male knows that, as a result of mental illness/defect, woman is unable to appraise the nature of her conduct
- iii) Spousal impersonation (Fraud in the factum from CL)

c. **Susan Estrich**

- i. Many cases which are technically rape are “not the kind of rape you prosecute”
- ii. Women in such cases often don’t even report the crime; they see themselves as victims, but “not as legitimate crime victims”
- iii. Police also exercise substantial, mostly unnoticed, discretion
- iv. **Aggravated Rape:** extrinsic violence, multiple assailants, *or* no prior relationship
- v. **Simple Rape:** Everything else

d. **ALSTON:** Fear based upon past experience deemed irrelevant; sex was unwilling, but not forced.

- i. CA legislator on **spousal rape:** “If you can’t rape your wife, who *can* you rape?”

e. **Vivian Berger**

- i. -Argues against Estrich’s proposal to expand rape to cover con artists

f. **Stephen Schulhofer**

- i. -Problem with rape law: overly narrow conception of **force**
- ii. -“Even when the absence of consent is clear and undisputed, rape is committed (under existing law) only when the defendant has used ‘force.’”
- iii. **-A woman needn’t resist when she has reason to fear injury, but what is the reasonableness standard? Subjective or “reasonable person”?**
- iv. -“Our culture is at best ambivalent about whether a bit of physical aggression is attractive or unacceptable in male sexual initiatives.” “A reasonableness standard does little to challenge our culture’s widespread willingness to condone men’s physically assertive sexual advances.”
- v. -Movement to expand “force” from physical force to other kinds of power

g. **Katie Roiphe, “Date Rape’s Other Victim”**

- i. -“One in four college women has been the victim of rape or attempted rape,” according to propaganda popular at colleges.
- ii. -“There is a gray area in which one person’s rape may be another’s bad night.”
- iii. **-“By blocking analysis with its claims to unique pandemic suffering, the rape crisis becomes a powerful source of authority.”**
- iv. -Much of feminist theory on rape promotes an image of women as weak, easily manipulated, and ignorant/innocent.
- v. -Amis: “As far as I’m concerned, you can change your mind before, even during, but just not after sex.” “In the current atmosphere you can change your mind afterward. Regret can signify rape.”

h. **Combating Rape on Campus in a Class on Sexual Consent**

- i. -Antioch’s strict codes.
- i. **If the Old Rules Don’t Apply...**
 - i. “Is rape law now in accord with prevailing attitudes about the expression of consent in sexual contacts? What are those attitudes (and are they the same for women as for men)? Are prevailing attitudes still unfair to women, and if so, should the criminal law move beyond them?”
 - ii. On the 1 in 4 women statistic: “73% of the women counted as rape victims did not label their own experience as “rape” and 42% of them subsequently dated their supposed attackers.”

V. **JUSTIFICATIONS AND EXCUSES**

- a. Justification - accept responsibility but say it was a good thing
- b. Excuse - admit that it was bad but don't accept responsibility
- c. Middle ground - things like provocation

	Net gain	Net loss
Victim is threat	Self-defense Choice of evils (necessity)	Self-defense
Nature is threat (no unlawful aggressor)	Choice of evils	No self-defense No choice of evils No duress - Ex car's brakes go out, can hit person or drive off cliff - no defense if hit person
3rd party is threat	Duress Choice of evils Sometimes called "duress as justification" b/c made the world better - Some jurisdictions only allow this kind	Duress No choice of evils Sometimes called "duress as excuse" b/c made the world worse

e. **Self-Defense**i. **Common Law**

1) Elements of the defense

- a) A non-aggressor is justified in using force upon another if he reasonably believes that such force is necessary to protect himself from imminent use of unlawful force by the other person.
 - i) Deadly force only justified when the aggressor is using deadly force (all other conditions still apply)
- b) **Necessity** component
 - i) Force must be imminent, and can only use force to the extent necessary
 - (1) Can't use deadly force if some nondeadly response will suffice
 - ii) See "Duty to Retreat" below
- c) **Proportionality** component
 - i) Can't use force that is excessive in relation to the harm threatened
 - ii) NEVER can use deadly force to repel what you know is a nondeadly attack
- d) **Reasonable belief** component
 - i) Contains a subjective and objective component
 - (1) Subjective - jury must find D subjectively believed that he needed to use deadly force to repel an imminent, unlawful attack
 - (2) Objective - must be a belief that a reasonable person in the same situation would have possessed
 - (A) Doesn't have to be true! Just that a reasonable person would have believed it
- e) If **unreasonable belief**, traditionally was guilty of murder,
 - i) now can often use an "imperfect" or "incomplete" self-defense to mitigate to voluntary or involuntary manslaughter
- f) **Imminence** component
 - i) Generally, inevitable != imminent
 - (1) Criticism: D would have to wait up all the time until the force became imminent
 - ii) Minority rule: threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out
- g) **Defense of others**
 - i) Widely accepted rule is that someone who comes to the aid of a person in peril can use deadly force under the same circumstances that would justify the endangered person herself
 - (1) Traditional rule: 3rd party "stands in the shoes" of the person in danger
 - (A) If that person didn't have right to use force, then 3rd party had no defense
 - (2) Modern rule: allows mistaken 3rd party a defense, provided he holds a reasonable belief in the facts necessary to support the use of defensive force
- h) **Unlawful force**
 - i) In many states includes deadly physical force or kidnapping, forcible rape, forcible sodomy or (in some states) robbery
- i) **Problem**: the person doesn't actually have to be guilty
 - i) Crazy person threatens you - you can shoot them even though they're crazy and therefore not guilty
 - ii) 3 yr old starts gunning ppl down, can kill the 3 yr old
 - ◇ Could even kill 15 3 yr olds to save own life
 - iii) But can't expect sb to die to save other ppl - not reasonable - especially b/c the threat is unlawful
 - ◇ Can't blame a person for acting like everybody else would
- j) **"Incomplete" self-defense**
 - i) Happens in 2 situations
 - (1) Nondeadly aggressor who is victim of a deadly response must retreat before using deadly force - if doesn't, can be imperfect self-defense
 - (A) Ex I slap you, you pull out a knife, I pull out a gun and shoot you
 - (2) Victim unreasonably believes the factual circumstances justify deadly force

ii. **"Reasonableness"**

- 1) *Goetz* - diminutive white man who had been injured in a mugging before shot four black youths on the subway after one said, "Give me five dollars." (had screwdrivers but didn't show them)
 - a) Wanted to completely subjectivize reasonableness standard
 - b) *Held*, reasonableness standard is not totally subjective, but includes "circumstances" and "situation," which means jury can consider
 - i) Relevant knowledge D has about aggressor

- ii) Physical attributes of all involved, including D
- iii) Any prior experiences D had which could provide a reasonable basis for a belief that the use of deadly force was necessary
- c) Ultimately, "situation" is designedly ambiguous and it's up to the jury to determine if the belief was reasonable
 - i) Lots of questions still open - can argue either way
- d) MPC standard - see below (honest belief but considers mens rea of arriving at belief and allows conviction of crime w/ that mens rea)

iii. Battered Woman's Syndrome

- 1) Syndrome has three stages
 - a) "tension-building stage"
 - i) Battering male engages in minor battering incidents and verbal abuse, while woman, beset by fear and tension, attempts to be as placating and passive as possible to prevent more violence
 - b) "acute battering incident"
 - i) Tension during stage one becomes intolerable and more serious violence is inevitable - triggering event is often event in man's life, but sometimes provoked by woman who can no longer tolerate or control her phase-one anger and anxiety
 - c) "contrition"
 - i) Extreme contrition and loving behavior from battering male. Man will mix pleas for forgiveness with promises to stop/get help - eventually fades and cycle starts again
- 2) Admissibility as evidence
 - a) *Kelly* - stabbed husband w/ scissors, believing he was going to kill her; *held*, may introduce expert testimony to show that she honestly believed she was in imminent danger and as to the reasonableness of the belief - aid jury in deciding whether a reasonable person would have believed there as an imminent danger
- 3) Issue of reasonableness
 - a) Most courts agree syndrome evidence is relevant to reasonableness, but in a limited way
 - i) Battered woman might become "expert" at V's behavior and be able to tell when danger is real or not - jury needs to know this to assess the reasonableness
 - ii) Jury must consider the D's situation and knowledge, which makes the evidence relevant, but the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm
 - b) Some courts have more fully subjectivized standard
 - i) *Edwards*- Say jury must weigh the evidence in light of a reasonable person suffering from BWS
 - ii) *Leidholm* - jury should "assume the physical and psychological properties peculiar to the accused . . . And then decide whether or not the particular circumstances . . . Were sufficient to create a reasonable belief" that force was necessary
 - (1) This view criticized b/c "makes a mockery" of objective standards, like "reasonable person suffering from paranoia"
 - (2) Turns BWS from justification to excuse - excuse out of pity
 - c) Feminist criticism
 - i) Implies that women can't choose lawful conduct when faced w/ unlawful influence from their spouses - incapacity for rational self-control
 - d) Extending BWS
 - i) Some courts admit BWS-like defense for battered or abused children, but some don't
 - ii) How far to take it? *Werner - Held*, "Holocaust Syndrome" testimony not allowed
- 4) Issue of imminence
 - a) *Norman* - husband had subjected wife to horrific abuse, wife had tried to go to police, social services, mental health services to have husband committed, all to no avail. While husband was asleep, shot him in back of head, then two more times; *held*, D not entitled to jury instruction on either perfect or imperfect self-defense b/c did not face imminent harm
 - i) Inevitable != imminent
 - ii) Dissent: for the battered wife, if there is no window of safety, the next attack is always imminent
 - iii) Courts almost never allow BWS defense in these cases, but some do

iv. Duty to Retreat

- 1) *Abbott* - fight w/ the neighbors, *held*, duty to retreat only arises if D resorts to deadly force (don't care abt aggressor's force) - if D doesn't use deadly force, no duty to retreat
 - a) Possibility of retreat=actor knows he can avoid the necessity of using such force with complete safety by retreating - need not risk injury by retreating
- 2) **Traditional view**
 - a) English common law: strict duty to retreat; can only use deadly force after exhausting every chance

- to flee, with "back to the wall."
- b) American view - *Erwin* - "a true man" w/o fault "is not obliged to fly from an assailant"
 - i) Called the "true man rule" or the no-retreat rule
- 3) **Current state of the law**
 - a) Many states retain no-retreat rules (arguably the majority rule)
 - b) Judicial common law tendency is to favor a requirement of retreat in settings outside the home
 - i) Either a requirement or a factor be considered for necessity
 - c) Recent legislation of "stand your ground" laws are abolishing retreat rules
- 4) "**Castle exception**"
 - a) Universal exception to retreat rules when D attacked by intruder in his own home
 - b) Most use castle exception when D kills a guest as well.
 - c) Most recent cases allow castle exception for co-occupant, but some don't
 - d) Social guest being attacked by an intruder in sb else's home? Courts split
 - e) Justification - home should be as far as anyone has to retreat
- v. **MPC §§3.04-3.11 (pg. 1089-1095) (mostly §3.04)**
 - 1) 3.04(1) D is justified using force upon another person if he believes that such force is immediately necessary to protect himself against the use of unlawful force by the other individual on the present occasion
 - a) "immediately necessary"
 - i) Moderately relaxes the imminence requirement - ex husband-wife fight, husband says he's going to get a gun, wife stabs as he turns to leave - CL probably no defense, MPC yes
 - b) 3.04(2)(b) Deadly force only allowed to protect against death, serious bodily injury, forcible rape, or kidnapping
 - c) 3.04(2)(b)(i) Deadly force not allowed if used deadly force to provoke the use of deadly force against himself in the same encounter
 - i) More freedom than common law - can start an encounter w/ non-deadly force and not lose right to self-defense
 - ii) Only loses right if is aggressor who uses deadly or serious bodily injury force in the same encounter
 - d) Retreat rule
 - i) 3.04(b)(ii) may not use deadly force against aggressor if D "knows that he can avoid the necessity of using such force with complete safety by retreating"
 - ii) 3.04(b)(ii)(1) Castle exception - do not have to retreat from home or place of work UNLESS was the initial aggressor is assailed by a co-worker
 - (1) DO NOT have to retreat from home, even if assailed by a co-dweller
 - 2) **Summary (Dressler)**
 - a) D DID NOT start unlawful conflict
 - i) may use deadly force against V if he believes that such force is immediately necessary on the present occasion to combat an unlawful deadly assault by V, assuming one of the following circumstances exists:
 - (1) D has retreated, and V continues to pursue him
 - (2) D knows of no safe place to retreat
 - (3) Even if D could have retreated, D is in his home or place of work and V isn't a co-worker
 - b) D DID start the unlawful conflict
 - i) If did so w/o the purpose of provoking a deadly conflict, D may use deadly force under all the circumstances above (can still be prosecuted for initial unlawful force)
 - ii) If did so w/ purpose to cause death or GBH, may not use deadly force
 - (1) Unless withdraws from the conflict
 - 3) **Unreasonable belief §3.09 (pg 1094)**
 - a) Recognizes "imperfect" self-defense
 - i) Initially, each justification defense is just whether the D subjectively believed force was necessary under the circumstances
 - ii) Under 3.09, that belief is appraised for reasonability
 - (1) If reckless or negligent in forming belief, can't use defense for any offense where recklessness or negligence, as the case may be, suffices to establish culpability
 - (A) Ex negligent in forming belief that deadly force was necessary -> negligent homicide
 - 4) **Risks to innocents §3.09 (pg 1094)**
 - a) Self-defense justification not available against innocent bystanders harmed by the self-defense
 - i) But convictions are hard b/c would have to show that risk was unjustifiable
 - 5) **Defense of Others §3.05 (pg 1090)**
 - a) D can use force to protect 3rd party X, if three conditions are met:

- i) D uses no more force than X could have used to protect self, based on the circumstances as D believes them to be
 - ii) Under circumstances as D believes them to be, X would be justified in using such force in self-defense
 - iii) D believes that his intervention is necessary for X's protection
- b) Unreasonable belief subject to §3.09
 - c) If D were protecting himself, only has to retreat if retreat will secure X's complete safety
 - d) D is required to secure X's retreat if X would be required to retreat under 3.04, but only if D knows that X can reach complete safety by retreating

f. Necessity (Choice of Evils)

i. Should there be a defense of necessity?

- 1) Purposes of punishment - what arguments favor a necessity defense?
 - a) Prison on fire/flooded; prisoners flee - can charge them w/ jailbreak?
 - b) Running a red light to get sb who's dying to the hospital
 - c) You're at a picnic; kid eats a peanut and goes into allergic shock - you see a life-saving medication in a locked car - you break the window, get the medication, and save the kid's life
 - d) San Francisco fire - destroy a house to create a firebreak - save the city
 - e) Does deterrence support necessity?
 - i) Ppl aren't going to be deterred
 - ii) Don't want to deter ppl from choosing the lesser evil - want to encourage ppl
 - f) Retribution?
 - i) What the person does isn't blameworthy
 - g) Rehabilitation?
 - i) The person doesn't need rehab
 - h) Incapacitation
 - i) Don't want to incapacitate those ppl
- 2) If don't have necessity defense, have to rely on discretion, which can be unreliable

ii. **General Requirements**

- 1) Faced with **clear and imminent danger**
 - a) Not all statutes have imminence requirement,
 - i) ex IL statute in *Unger* (prison escape b/c fears sexual assault)
 - ii) MPC (see below) - no imminency
 - b) *Leno* (MA AIDS case) - operated needle exchange; *held*, no necessity defense b/c did not show that danger they sought to avoid was clear and imminent
- 2) **D reasonably expects** that his action **will be effective in abating the danger he seeks to avoid**
 - a) Direct causal relationship b/w his action and the harm to be averted
 - b) *Schoon* (protest El Salvador) *held*, no necessity defense b/c indirect action was unlikely to abate the evil (protesting IRS to prevent killings in El Salvador)
- 3) **No effective legal alternative** to avert the harm
 - a) *Schoon - held*, no necessity defense b/c had legal alternative to obstructing IRS (could have petitioned Congress)
- 4) **Harm D will cause must be LESS SERIOUS than harm he seeks to avoid**
 - a) Objective standard for whether D weighed the evils correctly
 - b) Must D turn out to be right about the danger?
 - i) Some statutes say yes
 - (1) NY statute - "imminent public or private injury which **is** about to occur"
 - ii) MPC says no (see below - harm **sought** to be avoided)
 - c) "Only get defense if it turns out you made the world better" (?)
- 5) **Lawmakers must not have previously anticipated the choice of evils and picked a side** in conflict w/ D
 - a) *Hutchins* (MA med marijuana) - *held*, no necessity defense where legislature implicitly intended to preclude the defense
- 6) **D has not substantially contributed or wrongfully placed situation** where needed to break the law
 - a) MPC - negligent in creating situation = can be prosecuted for negligence mens rea crime (see below)
 - b) Raises problems, ex hiker recklessly gets caught in snowstorm and breaks into a cabin to survive

iii. *Lovercamp* factors - prison escape

- 1) Specific threat of death/sexual attack/SBH in near future
- 2) NO time for complaint/history of futile complaints
- 3) NO time/opportunity to resort to courts
- 4) NO evidence of force/violence toward prison personnel or innocents
- 5) Immediately report as soon as safe from immediate threat
- 6) *Unger - Held*, factors aren't all necessary, but persuasive

iv. **Defense to Homicide?**

- 1) *Dudley and Stephens - held*, necessity is no defense to murder

v. MPC (§ 3.02 pg 1088) - Choice of Evils

1) **Conduct is justified IF (3 conditions)**

- a) D believes conduct is necessary to avoid harm to himself or another
- b) Harm or evil sought to be avoided is GREATER than that sought to be prevented by the law defining the offense charged
 - i) Sought=subjective standard as to what the harm was
 - ii) But objective standard for balancing the evils
- c) No plain legislative purpose to exclude the justification claimed

2) **Differs from Common Law in that...**

- a) Rejects imminency requirement
- b) Do not lose defense if negligent or reckless in getting in the situation
 - i) Instead, defense is unavailable for any crime for which negligence or recklessness, respectively, are sufficient mens reas
 - (1) Ex D recklessly starts fire and then purposely burns V's property to stop it - can't be prosecuted for purposely starting the fire, but can be prosecuted for recklessly starting it

g. Duress

i. Lots of anxiety abt duress defense even though purposes of punishment justify it

- 1) Retributivism
 - a) Not really blameworthy; we would all make the same choice
- 2) Deterrence
 - a) Can't really deter ppl from preventing their own death/serious bodily injury
- 3) Rehab/incapacitation
 - a) Doesn't fit

ii. *Tuscano* (NJ Mafia threats) - *held*, adopt MPC version except as to murder - duress is defense if D engaged in conduct b/c he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist

iii. General Elements - Requirements of Defense

- 1) Under common law, **does NOT apply to murder**
 - a) Great majority of recent cases and statutory revisions continue to deny as a defense to murder
 - b) Sometimes includes other very serious crimes
 - c) MPC allows as defense to murder (see below), as do a few states that have adopted MPC def
- 2) Another person **threatened to kill or grievously injure** the D or a 3rd party, **particularly a near relative, unless D committed the offense**
 - a) **"Do it or else"**
 - b) Does NOT include property damage, economic hardship, or damage to reputation
 - c) Threat MUST come from a human being, not a force of nature
- 3) **D reasonably believed that the threat was genuine**
- 4) The threat was **present, imminent, and impending** at the time of the criminal act
 - a) MPC has no imminence requirement, but says it's a factor to be weighed (see below)
 - i) Most courts reject
 - b) Many common law courts treat as absolute requirement - some statutes say "instant death"
 - i) *Kim* (Korea war prisoner) - charged w/ collaborating to produce propaganda, defense was that Kim had made threats that he'd have to hike 150 miles in winter or go to the caves - either place, good chance of death; *held*, no duress defense b/c not imminent
- 5) There was **no reasonable escape** from the threat except through compliance with demands of the coercer
 - a) *Contento-Pachon* - swallowed cocaine balloons after threats against wife and son; *held*, juror might find there was no reasonable avenue of escape
- 6) **D was not at fault in exposing self to threat**
 - a) Afraid of gang members, etc. invoking duress defense after they voluntarily joined gang and ran the risk
- 7) Inducements instead of threats=no duress defense

iv. MPC (§2.09 pg 1086-1087)

1) **Definition**

- a) Duress is an affirmative defense to unlawful conduct by D IF
 - i) D was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist
 - (1) Commentary: "the law is ineffective in the deepest sense, indeed . . . It is hypocritical if it imposes on the actor . . . A standard that judges are not prepared to affirm that they should and could comply with"
 - ii) **Defense is unavailable if D was reckless** in getting into situation where it was probable he would be subjected to duress
 - iii) **If D was negligent**, defense is unavailable if negligence suffices for the mens rea of the crime

charged

2) Compared to Common Law

a) Differences

- i) Abandons CL requirement that D's unlawful act be a response to an **imminent, deadly** threat
 - (1) **Allows** non-imminent and non-deadly threats, or even prior use of non-deadly force, as long as person of reasonable firmness in his situation would have committed offense
- ii) **CAN BE defense to murder**
- iii) Doesn't require that the imperiled person be the D or a member of his family

b) Similarities

- i) Limited to **unlawful force** - doesn't apply to natural forces
 - (1) If D compelled by X to hit V with car --> duress defense
 - (2) If D's brakes fail and chooses to hit V rather than drive over cliff --> no duress defense
 - (3) Difference: In first situation, can hold X liable; in second situation, can't hold anyone liable
- ii) **Only threats against bodily integrity** allowed
 - (1) Threats to property or reputation "cannot exercise sufficient power over person of 'reasonable firmness' to warrant consideration." (Commentary)

h. Insanity

i. Terminology defined

- 1) "Mental illness" - medical term
- 2) "Insanity" - legal term that refers to a person's mental state at the time of commission of a criminal offense when that mental state legally precludes a finding of criminal responsibility
- 3) "Incompetence" - legal term that refers to a person's mental state at the time of the legal proceeding
 - a) Requires that D does not lack capacity to understand the proceedings against him or to assist in his own defense
- 4) Can have any combination of these three

ii. What purposes of punishment and served or not served?

- 1) Incapacitation
 - a) Biggest justification - these ppl are scary and don't want insane ppl living out in society
- 2) Rehabilitation
 - a) Give ppl treatment for condition - not always successful, but they try
- 3) Deterrence
 - a) Can't really deter insane ppl
 - (1) King v. Porter (pg 874) - can't deter ppl who are insane b/c not rational calculators of costs and benefits
 - b) Counterarg - can deter ppl from invoking the insanity defense - can deter ppl from faking it
- 4) Retribution
 - a) Ppl don't deserve punishment - have to choose to do sth wrong in order to deserve punishment
 - b) Ppl can't understand their punishment - ex don't know why they're being executed
 - ◆ But that's not purpose of retribution

iii. History

- | | | | | | | |
|-----|------------|----------------|------------------------|-----------------------|-----|-------------------|
| iv. | Wild beast | M'Naghten Rule | "irresistible impulse" | Durham "product test" | MPC | Back to M'Naghten |
|-----|------------|----------------|------------------------|-----------------------|-----|-------------------|

v. Procedure

- 1) Presumption of legal sanity at trial
- 2) Then, depending on state, "some" evidence, or "enough to raise a reasonable doubt" must be raised
- 3) Then, either
 - a) Prosecutors must prove sanity beyond a reasonable doubt (12 states)
 - b) Defense must prove insanity (38 states)
 - i) Fed cts: clear and convincing standard
- 4) If found not guilty by reason of insanity, usually mandatory civil commitment until D can prove to judge that he meets the conditions for release

vi. Insanity tests

1) M'Naghten Test - Vast majority of states use this

- a) D is insane if, at time of the act, he was laboring under such a defect of reason, arising from a disease of the mind, that he:
 - i) Did not know the nature and quality of the act he was doing; **OR**
 - ii) If he did know it, he didn't know that what he was doing was wrong
- b) "**know**"
 - i) Can be defined broadly or narrowly (we defined narrowly - just have to know what's going on)
- c) "**nature and quality of the act**"
 - i) D doesn't know she's doing the act - ex squeezes V's neck b/c thinks it's a lemon
- d) "**wrong**"

- i) Legally or morally wrong?
 - (1) Ex D kills V even though knows it's against the law b/c thinks God told her to
 - (2) American courts are divided
 - (3) If morally wrong, question is whether D knew her conduct violated societal morality, not D's personal morality
 - e) Problems
 - i) Doesn't recognize degrees of incapacity
 - ii) Places tight shackles on psychiatrist's testimony
 - iii) Doesn't talk about volition
 - (1) Might know right from wrong, but be unable to control behavior
 - 2) **"Irresistible Impulse" Test**
 - a) 3rd prong added to M'Naghten test by some courts
 - b) If impulse is "so overwhelming as not to be resistible"
 - c) What's difference b/w irresistible impulse and sth that you just really really want to do?
 - i) APA: "the line b/w an irresistible impulse and an impulse not resisted is probably no sharper than b/w twilight and dusk."
 - 3) **MPC Test (§4.01 pg 1095)** (very influential when introduced, abandoned after *Hinckley*)
 - a) D is not responsible for his criminal conduct if, at the time of his conduct, he lacks substantial capacity either to
 - i) Appreciate the criminality (wrongfulness) of his conduct; or
 - ii) Conform his conduct to the requirements of the law
 - b) Excludes psychopaths
 - c) Uses "lacks **substantial capacity**"
 - i) Recognizes that mental illness isn't an all-or-nothing proposition
 - (1) Ppl can be very impaired w/o being completely unaware
 - ii) If lack substantial capacity, then have insignificant capacity to do it
 - d) Standard takes away the all-or-nothing approach
 - e) Adds "to **conform his conduct** to the requirements of the law"
 - i) "irresistible impulse"-ish part
 - (1) Give equal weight to lack sub capacity to appreciate, but also to conform conduct
 - (A) Not just cognitive, but volitional
 - f) Adds "**appreciate the wrongfulness**"
 - i) Sometimes ppl can say they know sth is wrong, but don't really understand the wrongness
 - (1) What does it mean to know sth?
 - (A) Rote level or "affective level" where the person appreciates
 - g) Reflects fact that culpability is a spectrum, just like mental illness is a spectrum
 - h) D has burden of proof**
 - 4) **The Product Test (*Durham*)**
 - a) Two parts:
 - i) Was the D suffering from a mental disease or defect at the time of the crime?
 - ii) If so, did the disease cause the criminal conduct in a but-for sense?
 - b) Problems:
 - i) Failed to define "mental disease or defect" - left totally in the hands of psychiatrists
 - ii) Allowed psychiatrists to usurp jury authority - battle of experts, jury just picks who to believe
 - iii) Excluded deterrable and morally blameworthy actors
 - (1) Ex X suffers from delusion that if he kills Y he can marry Z, so kills Y even though knows it's wrong and could be deterred
 - c) NO jurisdiction uses this test
 - 5) **Federal Test**
 - a) Enacted after *Lyons* (bringing back the M'Naghten rule and just adding "appreciate" instead of "know")
 - b) Statutory definition 18 U.S.C. §17(a):
 - i) Prove by clear and convincing evidence that, at the time of the offense, as the result of a severe mental disease or defect, D was unable to appreciate:
 - (1) The nature and quality of his conduct; or
 - (2) The wrongfulness of his conduct
 - c) Requires **severe** mental disease or defect
 - d) Cognitive incapacity must be **total** (not "substantial" like MPC)
 - e) Uses **appreciate** instead of **know** - broader than M'Naghten in this respect
- vii. Policy choices
 - 1) How severe the defect, standard and burden of proof, volitional/knowledge
 - 2) Also can have different verdicts
 - a) guilty but insane

- i) Guilty, serve prison sentence, etc. but have to get mental treatment in prison
- ii) Kind of incoherent - if you're insane enough, maybe should be acquitted
- 3) Some states have abolished the insanity defense (just a handful of states)
 - a) Is insanity defense constitutionally required?
 - i) Does there need to be some way for insane ppl not to be convicted?
 - ii) Cruel and unusual punishment?
 - iii) SCOTUS says it's OK to just have one prong of M'Naghten rule - not going to say whether it's constitutionally required to have any insanity defense at all (*Clark*)
 - (1) Those rights aren't so rooted in history as to affect DP

i. Diminished Capacity

i. Evidence of mental abnormality is not offered to excuse conduct, but rather as **evidence to negate the mens rea element**

ii. **Admissibility of evidence**

- 1) States have different rules
 - a) Majority rule - no special restrictions on use of mental health evidence to rebut a required mens rea
 - b) Capacity restriction - no mental health evidence for capacity to form mens rea, but OK to use for determining whether D in fact had the mental state
 - c) Specific intent rule - only allow mental health evidence for negating specific intent
 - i) Common rule-used by fed cts as in *Browner*
 - d) *Clark* - man shoots cop, says he thought cop was alien; *held, Mott* rule in AZ permissible (disallows psychiatric testimony for anything other than insanity defense)
 - i) Concerned about
 - (1) Controversial categorization of mental disease
 - (2) Potential of mental-disease evidence to mislead jurors
 - (3) Juries accord greater certainty to capacity evidence than experts claim for it
 - ii) Allow testimony from regular ppl as to "observation evidence"
 - iii) They think psychiatry is junk - not real science - don't have any real expertise in what was really going on in D's mind
 - iv) Kennedy - prefer to take the acquittal and deal w/ the person's mental illness in a different way
 - (1) Punishment is for ppl who know what they're doing
 - (2) He lacks the culpability required for retributivism

iii. **MPC (§4.02 pg 1095)**

- 1) Allows mental health evidence **whenever it is relevant** to prove that D did or did not have the state of mind that is the element of the offense - **for any offense**

j. Diminished Responsibility

- i. Entitles D to reduction in sentence b/c of mental disease even though prosecution has proved all the elements technically required for conviction
 - 1) Some Euro countries have adopted
 - 2) Closest thing US has is sentencing guidelines - allows downward departure if D had significantly reduced mental capacity that substantially contributed to commission of crime, unless
 - a) Was caused by voluntary use of drugs or other intoxicants
 - b) Need to protect public b/c offense involved violence/threat of violence
 - c) Criminal history indicates need to incarcerate
 - 3) **MPC**
 - a) Does not allow statutorily authorized reduction of punishment for reduced levels of mental capacity
 - i) Commentary: "diminished responsibility brings formal guilt more closely into line with moral blameworthiness, but only at the cost of driving a wedge b/w dangerousness and social control"
 - (1) Decreases incentives for ppl to behave as if they were normal
 - (2) Blurs law's message of minimal standards

k. Environmental Deprivation

- i. Why do we and should we limit the insanity defense only to ppl whose lack of capacity for meaningful choice only comes from mental disease instead of just life experience?
 - 1) What abt poverty and deprivation?
 - a) All the bad stuff from poverty is criminogenic - produces crime
 - i) Poor ppl commit much more crime than rich ppl
 - ii) Should ppl be able to use life experiences as a defense (rotten social background)?
 - (1) Hard to draw line on what life experiences are relevant
 - (2) Rich ppl could have rough background too
 - (3) Can't incapacitate poor ppl
 - (A) Hard to know what the therapy is for poverty
 - (4) Treating poor ppl as if they can't control themselves is disrespecting their dignity
 - (A) But also a recognition of a different degree of culpability

- b) What about a partial defense?
 - i) Diminished responsibility as grounds for mitigation (pgs 910-911)
 - (1) Very uncommon in US; far more common in Europe
- c) What about using that for prosecutorial discretion, jury nullification, sentencing discretion, executive discretion?
 - i) Should this be valid grounds for discretion?

VI. EXPANDING LIABILITY

a. Attempt

- i. Missing piece of criminal liability: causation
 - 1) Have intent and (maybe) act, but have no causation b/c there's no harm
 - a) "last act attempt" - do everything you can, but you fail
 - b) Maybe you're foiled along the way
 - i) Question is when sth becomes an attempt
- ii. Why do we want to punish attempt in absence of harm?
 - 1) Person needs rehabilitation
 - 2) Deterrence - we don't even want ppl to try
 - 3) Incapacitate - ppl who attempt are still dangerous
 - 4) Retributive - whether you hit or miss isn't relevant to moral culpability
 - 5) Every theory of punishment supports punishing attempts
- iii. Why give a "discount" punishment?
 - 1) Why not punish attempts the same?
 - a) Vengeance - society isn't as riled up by it
 - b) Law and economics - if punishment is the same, ppl are going to want to go through with it
 - i) Solution: just add penalties with each attempt
 - (A) Can always create incentive to stop - give defense of abandonment
 - c) Very hard to say that the person was really going to go through with it - maybe if they didn't go all the way through with it, they're not as guilty

iv. Common Law

1) Mens Rea

- a) Attempt requires a **purpose (or "specific intent") to produce the proscribed result, even when some lesser mens rea would suffice for the completed offense**
 - i) *Smallwood* - man w/ HIV rapes women, charged w/ attempted murder; *held*, no attempted murder b/c no showing that he intended to kill the women - he just didn't care
 - ii) For **result crimes** (ex murder), must commit actions w/ the **specific purpose of causing that result**
 - (A) Ex D blindfolds self and fires into a crowded room, but hits no one - no attempt b/c no purpose to kill anyone
 - iii) Rationale for intent requirement
 - (A) Linguistic - attempt means to try - can't try if don't want to succeed
 - (B) Moral - if intend to do the harm, more culpable than if reckless/negligent
 - (C) Utilitarian - those who intend to commit crimes but fail are ongoing threats; if reckless/negligent, unlikely to try again
- b) **Attempted felony murder?**
 - i) Most states say no
 - (A) Consistent with specific intent requirement
 - (B) Somewhat inconsistent w/ felony murder itself - if intent to commit felony can substitute for murder, why not attempted murder?
 - (A) Could lead to absurd results - bring a gun, automatic attempted murder
- c) **Attempted manslaughter?**
 - i) CANNOT be convicted of "attempted involuntary manslaughter"
 - (A) Impossible to intend to commit an unintentional result
 - ii) CAN be convicted of attempted voluntary manslaughter
 - (A) Ex D discovers spouse in bed w/ another, shoots the other person and misses
- d) **Intent or just knowledge?**
 - i) Hard question - MPC's answer is that knowledge suffices ("with the belief that his conduct will cause" - see below)
- e) **Attendant circumstances** (ex attempted statutory rape?)
 - i) Virtually everyone says intent should not apply to attendant circumstances (Dressler)
 - ii) Some say recklessness as to attendant circumstances is sufficient
 - iii) Some say apply same mens rea to attendant circumstances as would be applied to the full crime

2) Actus Reus

- a) Lots of disagreement

- i) First step not necessarily sufficient and last step not necessarily required
 - b) Problem of punishing thought crimes
 - i) *McQuirter v. State*
 - (A) D convicted on "confession" that he was going to rape the first woman who came along
 - (B) What is the crime?
 - (C) Attempt to commit an assault with intent to rape
 - 1. Attempt not the only kind of inchoate crime
 - (a) Assault with intent to commit
 - i) Assault = causing fear of bodily harm
 - (b) Means he took a substantial step toward causing fear of bodily harm with intent to rape
 - i) Gets dangerously close to just being a crime of intent
 - (A) Makes the whole case turn on the confession - no action is required
 - c) Problem: the closer you get to the intent end, the closer you get to punishing thought crimes
 - d) On the other hand, the closer you go to the act, the more likely you'll have to let off ppl who really are dangerous
 - i) *Ex State v. Duke ("Niki")* pg 556
 - e) **Tests**
 - i) **"Last Act" Test**
 - (A) *Eagleton* - the accused must take the last step which he was able to take along the road of his criminal intent
 - (A) Ex murder - have to pull the trigger
 - (B) REJECTED (although is a sufficient condition)
 - ii) **"Dangerous Proximity" Test**
 - (A) *Rizzo* - NY thugs drive around looking for a specific guy to rob, can't find him; *held*, no attempted robbery b/c not "dangerous proximity to success"
 - (B) *Duke* - undercover cop gets guy to meet "Niki" and flashes lights as a signal; *held*, no attempted sexual battery b/c D's overt acts didn't go far enough
 - (C) Problem w/ law enforcement not being able to press charges against ppl who would have committed a crime b/c got there "too soon"
 - (D) Afraid of taking away the D's "locus penitentiae" by moving threshold earlier
 - (A) One solution: defense of abandonment (see below)
 - iii) **Res Ipsa Loquitur Test**
 - (A) Attempt occurs when D's conduct, standing alone, unambiguously manifests her criminal intent
 - (B) *Miller* - guy walks into field w/ gun where the V and constable were, V fled, C took away gun; *held*, no attempt b/c don't know whether D intended to kill or just to demand arrest
 - (C) Strict version has few adherents
 - (D) Criticized as impractical - ex light match next to haystack -> maybe lighting your pipe
- 3) **Factual/Legal Impossibility**
 - a) What if you're trying to murder sb who's already dead?
 - i) Common law - defense of impossibility
 - (A) Factual impossibility - ex picking an empty pocket - would be a crime if things were as you thought they were
 - (B) Legal impossibility - ex attempting to receive stolen goods that aren't really stolen
 - (A) Even if things were as you thought they were, it wouldn't be a crime
 - (C) CL rule: legal impossibility is a defense, factual impossibility is not
 - (A) Impossible to understand
 - ii) MPC gets rid of factual/legal impossibility distinction (see below)
- 4) **Defense: Abandonment**
 - a) AT CL, **traditionally not a defense**
 - i) Many courts continue to decline to recognize it
 - b) To the extent recognized, requires:
 - i) D voluntary and completely renounces her criminal purpose
 - (A) Repentance or genuine change of heart
 - (B) NOT voluntary if motivated by
 - (A) Unexpected resistance, absence of instrumentality essential, etc.
 - (C) (usually) can't have taken the last act
- v. **MPC (§5.01 pg 1099-1100)**
 - 1) **Definition**
 - a) A person is guilty of attempt to commit a crime if, acting with the kind of culpability otherwise

required for commission of the crime, he

- i) **Purposely** engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
 - ii) When causing a particular **result** is an element of the crime, does or omits to do anything with the **purpose of causing or with the belief that it will cause such result** without further conduct on his part; or
 - iii) Purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime
- b) 5.01(1)(a) and (b) refer to **completed attempts** (tried but failed) (Dressler)
- i) 5.01(c) refers to **incomplete attempts** (substantial step)
- c) **Mens Rea**
- i) Generally **purpose**, but two exceptions:
 - (A) For **result** crimes, enough that person **believes the result will occur**
 - (A) Ex bomb on airplane, want to kill 1 person but there are others on board, bomb fails to go off --> attempt for the others if bomber believed they would die
 - (B) Attendant circumstances - only need degree of culpability required for the target offense
 - (A) "acting with the kind of culpability otherwise required for commission of the crime"
 - (B) Ex need recklessness as to V's consent in rape --> need recklessness as to V's consent in attempted rape
 - (C) Ex strict liability for V's age in statutory rape --> strict liability for V's age in attempted statutory rape
- d) **Actus Reus**
- i) **"substantial step in a a course of conduct"** planned to culminate in commission of crime
 - (A) 5.01(2) - substantial step must **strongly corroborate D's criminal purpose**
 - (A) Kind of like unequivocality test, but not as strict
 - (B) Actor's conduct, considered in light of all the circumstances, must add significantly to the other proof of criminal intent (confession, etc.)
 - (C) Long list of circumstances that can't be held insufficient as a matter of law
 - (a) Means can't overturn jury's decision based on insubstantiality
 - i) Lying in wait, enticing V, reconnoitering place, unlawful entry of contemplated scene of crime, possession of materials designed for unlawful use or have no lawful use, etc.....
 - (A) *Rizzo* would have been guilty under MPC
- e) **Attempt to Aid**
- i) 5.01(3) - guilty of attempt for the crime if satisfies accomplice liability under 2.06, AND
 - (A) Engage in conduct intended to aid another to commit a crime and person attempts the crime; OR
 - (B) Engage in conduct intended to aid another to commit a crime and person DOESN'T attempt crime, but IF THEY HAD committed or attempted the crime, would have been an accomplice under 2.06
 - (C) Ex D1 gives X1 gun so X1 can kill V1, and X1 attempts to kill V1 --> D1 GUILTY of attempted murder as accomplice
 - (D) Ex D2 gives X2 gun so X2 can kill V2, and X1 DOESN'T attempt to kill V2 --> D2 STILL GUILTY of attempted murder as accomplice b/c would have been guilty had X2 attempted to kill V2
 - ii) Why? Person who attempts to aid is as dangerous as one who successfully aids
- f) **No Defense of Impossibility** (except pure legal impossibility - conduct actually wouldn't be crime)
- i) **MPC gets rid factual/legal impossibility distinction**
 - (A) 5.01(1)(a) "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be"
 - (a) So if shoot sb who's already dead, then guilty of attempted murder
 - (b) Have sex w/ sb you think is minor, but actually an adult - attempted statutory rape
 - (c) Take an umbrella you think is sb else's, turns out it's yours - attempted theft
 - (d) Why?
 - (i) Justified by all the purposes of punishment - retributivism, deterrence, rehab, incapacitation
 - (e) But still brings up concerns
 - (i) What if ppl's beliefs are just crazy and it's impossible for that person to harm anyone by the means they choose
 1. Ex "Voodoo killer" - sticking pins in a doll with all the intent to kill
 2. Ex person trying to open a bank safe by magical incantations

(ii) Those ppl would be guilty of attempt under MPC, but

1. Exception for "so inherently unlikely"

A. **5.05(2)** - "so inherently unlikely" that doesn't present a public danger, can impose sentence of crime of lower grade or, in extreme cases, dismiss the prosecution

g) **Defense of Renunciation (Abandonment)**

i) 5.01(4) - Affirmative defense if D abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a **complete and voluntary renunciation** of his criminal purpose

(A) Doesn't affect liability of an accomplice to D's crime

(B) NOT complete and voluntary IF

(a) Motivated in whole or in part by circumstances not present or apparent at inception of actor's course of conduct that **increase probability of detection or apprehension or make more difficult** the accomplishment of the criminal purpose

(b) Motivated by a decision to **postpone the criminal conduct** until more advantageous time or **transfer the criminal effort** to another but similar objective or victim

(i) Ex substantial step to rob Bank A, then decide want to rob Bank B instead

b. **Complicity**

i. Don't have to be a but-for cause - not required that the person who did the act wouldn't have done it if you didn't encourage him

ii. Why not required?

1) All criminal liability is based on the idea of free will (pg 589)

a) If said one person caused sb else to take an action, would be taking away that person's free will

iii. Some ways to be an accomplice

1) Encourage (Stephens in Dudley and Stephens)

2) Help plan it

3) Help in the commission - be a lookout, hold a person down, sharpen the knife, give advice on how to more effectively commit the crime

4) Provide resources

5) Help after the fact

iv. Common law accomplice liability (590)

1) Principal in the first degree - person who did most of the stuff

2) Principal in the second degree - present at time of the offense and aiding and abetting it

3) Accessory - not present but is concerned somehow either before or after the fact

a) Before the fact - commands, counsels, etc. - ex Mafia kingpin

b) Before the fact - relieves, comforts, or assists the felon after the fact

v. **Modern law merges principals (both degrees) and accessory before the fact** (but not accessory after the fact)

1) Why?

a) Higher ups are just as guilty as the ones who commit the crime

2) Judges can then use discretion in sentencing to adjust for major and minor roles in the crime

a) Problem: mandatory minimum sentences

3) What about aiding a drug kingpin under the drug kingpin law

a) Have to get mandatory sentence

vi. **BEING AN ACCOMPLICE IS NOT A SEPARATE OFFENSE, it's a WAY TO COMMIT AN OFFENSE**

1) Being an accomplice of a drug kingpin is a way of violating the drug kingpin statute

2) Being accomplice to murder = murderer

3) Troubles Posner (pg 591-592)

4) In for a penny, in for a pound

vii. **Basic Requirements**

1) **Must intend to aid**

2) **Must actually aid**

3) *Hicks* (murder on horses) - *held*, must have **specific intent to encourage** and must **actually encourage**

4) *Gladstone* (drug dealer referral) - *held*, no accomplice liability b/c although D aided, did not have purpose to aid

5) **Communication** b/w accomplice and principal **not required**, ex I trip dean while prof chases w/ machine gun - I intended to aid, and I did aid

viii. **Mens Rea**

1) **Accomplice must possess two states of mind:**

a) **Intent to aid** the primary party to engage in the conduct that forms the basis of the offense

b) **The mental state required for commission of the offense (or result)**, as provided in the offense's definition

- i) Ex accomplice to negligence-based crime --> must have intent to aid in the conduct, and negligence as to the commission of the crime (or result) (*McVay*)
 - ii) UNLESS reasonably foreseeable crimes (*Luparello*)
 - 2) **Purpose versus Knowledge**
 - a) Learned Hand: the D must "in some sort **associate himself with the venture**, that he participate in it as in something that **he wishes to bring about**, that he seek by his action to make it succeed"
 - b) **Common law has held steady the standard of purpose + ordinary facilitation for all crimes**
 - i) Maybe exception for child's age in sex crime
 - c) **MPC** considered lowering mens rea to knowledge and raising actus reus to "substantially facilitated its commission" - REJECTED
 - i) Problem: merchants, etc. would have to ask too many questions
 - d) Compromise: make aid w/o purpose a separate crime w/ a lower penalty than the crime aided
 - i) NY "criminal facilitation" statute
 - (A) Person is guilty of criminal facilitation if, believing it to be probable (recklessness standard) that he is rendering aid to a person who intends to commit a crime, engages in conduct which provides such person with means or opportunity to commit the crime and in facts aids such person to commit a felony - MISDEMEANOR - separate crime
 - e) Another solution: **make knowledge the mens rea for serious crimes**
 - i) *Fountain* (prisoner helps other prisoner kill guard) - *held*, knowledge sufficient for aiding and abetting murder
 - f) Make statutes for specific acts of accomplice liability
 - i) Ex money laundering - not guilty of whatever crime got the money, but guilty of money laundering
 - ii) Ex providing guns to minors
 - iii) Ex material support to terrorists - "knowing" provision of "material support," meaning "any property tangible or intangible, or service"
 - 3) **Attendant Circumstances**
 - a) Not much from common law; MPC leaves "deliberately ambiguous"
 - 4) **Results**
 - a) Need only be the **mens rea required for the crime**
 - i) *McVay* - purposely aided conduct that led to boiler exploding b/c of negligence; *held*, indictment for involuntary manslaughter as accomplice valid
 - b) Why different from attempt (which needs purpose as to result, see *Smallwood*)?
 - i) In attempt, crime doesn't happen; in accomplice liability, crime does happen
 - 5) **Luparello**
 - a) D enlisted help of friends to extract information about former gf "at any cost." Friends visited possible informant, couldn't get info, and shot him. *Held*, D liable for 1st degree murder as accomplice b/c acts were the "**natural and probable consequences**" of the offense which was **aided and abetted** (the target offense)
 - b) Ask 4 questions (*Dressler*)
 - i) Did P commit target Crime A?
 - ii) If yes, was S an accomplice to Crime A?
 - iii) If yes, did P commit any other crimes?
 - iv) If yes, were these crimes, although not contemplated or desired by S, reasonably foreseeable (the natural and probable consequence) of Crime A? If yes, S is guilty of those crimes.
 - c) Effect: accomplice may be convicted of a crime of intent although his culpability regarding its commission may be no greater than negligence.
 - d) **MPC rejects this rule**
- ix. **Actus Reus**
 - 1) *Wilcox* (*Jazz musician case*) - reporter met musician at airport, attended concert, clapped (or at least didn't boo), and wrote favorably of it in his magazine; *held*, accomplice to immigration offense
 - 2) Once determined D assisted the principal, **any aid, no matter how trivial, suffices**
 - 3) *Tally* (wild west judge) one of V's friends had sent telegram warning that ppl w/ guns were following, D sent telegram to telegraph operator and said not to deliver, ppl w/ guns caught up and killed V; *held*, accomplice in the killing. Need not be a but-for cause, as long as deprived of "**a single chance of life**"
 - 4) **Causation not necessary** - would take away **free will** if said that one person caused another person to do sth
 - 5) **Liability for Omissions**
 - a) YES, if ommitter has a duty to intervene and doesn't, and has requisite mens rea
 - b) MPC, yes, but need to omit w/ purposeful mens rea
- x. **Liability of Secondary Party in Relation to Primary Party**
 - 1) At common law, accomplice liability is totally vicarious - in fact, principal had to be found guilty before accomplice liability could be adjudicated: principal not guilty means accomplice not guilty

2) Under MPC, the liability of accomplices is individual (see below)

xi. **MPC (§2.06 pg 1084-1085)**

1) **Definition**

a) Guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is **legally accountable**, or both

b) **Categories of Accountability**

i) **Innocent or irresponsible person** (2.06(2)(a))

(A) Legally accountable for the conduct of innocent or irresponsible person (X) **IF**

(a) D has the **mental state** sufficient for the commission of the offense, AND

(i) Ex reckless crime --> must have reckless mental state when causing X to commit the crime

(b) **Causes** the innocent or irresponsible person to engage in the criminal conduct

(i) Must have done something to manipulate or otherwise use X

ii) **Code or law defines accountability**

iii) **Is an accomplice**

(A) Independent of irresponsible person category

(B) Accomplice liability depends on the relationship of the parties to a SPECIFIC OFFENSE- rejects *Luparello*

2) **Nature of Accomplice**

a) **Conduct**

i) S is an accomplice of P in the commission of an offense IF, with the requisite mens rea, he

(A) Solicits P to commit the offense (solicitation as in MPC solicitation)

(B) **Aids, agrees to aid, or attempts to aid** P in the planning or commission of the offense

(a) **Aids** - helps in some way

(b) **Agrees to aid**

(i) Just have to **agree, do not have to fulfill promise**

1. Doesn't require proof of encouragement

(ii) NOT the same as *Pinkerton*

1. Must agree to aid the **specific offense**, not just foreseeable offenses

(c) **Attempts to aid**

(i) Liable if attempts to aid, EVEN IF aid is ineffectual

1. Ex *Tally*, even if telegraph operator didn't deliver telegram, Tally still guilty as accomplice b/c attempted to aid

(ii) Guilty of attempt of crime if aids under this section, EVEN IF person never commits or attempts crime (see attempt, 5.01(3), above)

1. Ex S gives P gun so P can use to rob bank, then P arrested before substantial step - P not guilty of attempt, S YES guilty of attempt

(C) Has a legal duty to prevent the offense, but makes **no effort** to do so

(a) Must omit **with the purpose of promoting or facilitating** commission of offense

b) **Mental State**

i) Must assist **with the purpose of promoting or facilitating** commission of the offense

(A) Rejected liability for knowledge after debate

(a) Ex S drives P to liquor store to help P rob it - S is accomplice

(b) Ex S sells P dynamite and knows P will use it to blow up a safe, but doesn't have purpose - not an accomplice

ii) **Crimes of lesser mental states (recklessness, negligence, etc.)**

(A) Person is an accomplice to the commission of the offense IF

(a) Was an accomplice to the **conduct** that caused the result (i.e., had **purpose** as to conduct)

(b) Acted with the level of culpability regarding the result that is sufficient for the offense

(B) Ex S encourages P to speed in a school zone, P ends up hitting and killing a child

(a) 3 step process

(i) Determine P's potential responsibility (ex negligent homicide)

(ii) Ask whether S was an accomplice to the **conduct** (i.e., driving fast)

(iii) Ask whether S acted w/ the requisite culpability to the **result** (i.e., was negligent as to death of the child)

(C) Special significance if state has felony murder

(a) S has purpose as to P's conduct, P accidentally kills sb

(i) S guilty of felony murder b/c had purpose as to conduct, and result is strict liability

iii) **Attendant circumstances**

(A) Deliberately ambiguous

- iv) **Rejects *Luparello*** - only accomplice to specific offenses, not to foreseeable offenses
- c) **Liability of accomplice in relation to the perpetrator**
 - i) **Is individual**
 - (A) Can be convicted as accomplice in the commission of an offense upon proof of its commission by another person, regardless of whether the person is convicted, acquitted, or not prosecuted
 - (B) Can be convicted of a different offense or different degree of offense than the perpetrator
 - (a) So if perp is acquitted, doesn't preclude accomplice's guilt, as long as can prove someone committed the offense
 - (C) Can be convicted even if it was legally impossible for accomplice to commit the offense himself
 - (a) Ex husband can't legally rape his wife, but could be accomplice to sb else raping his wife
 - d) **Limits to accomplice liability**
 - i) Not an accomplice if any of 3 circumstances exist
 - (A) S is a **victim** of the offense (ex parent pays ransom to kidnapper to get child back)
 - (B) S is **inevitably incident** to offense's commission
 - (a) Ex buyer of drugs can't be accomplice to sale of drugs b/c buyer is inevitably incident
 - (C) Has successful defense of **abandonment**
 - e) **Defense of abandonment**
 - i) S is not an accomplice in the commission of a crime IF
 - (A) He **terminates his complicity before the crime is committed, AND**
 - (a) **Wholly deprives his complicity of effectiveness** - UNDOES his aid, **OR**
 - (b) Gives **timely warning to law enforcement OR** otherwise **makes proper effort to prevent the commission of the offense**
 - ii) Unannounced and spontaneous withdrawal not enough
 - iii) Must communicate withdrawal to the principal and neutralize the complicity
 - (A) Ex provided a fuse to dynamite the building, must remove the fuse and, if it has been set, put it out
 - (B) If mild encouragement, maybe can just communicate objection to the crime, as long as not too late to stop the event
- c. **Conspiracy**
 - i. Is separate crime from the crime itself, and UNLIKE attempt, can be guilty of BOTH
 - 1) Ex murder + conspiracy to commit murder
 - ii. What's missing?
 - 1) Causation
 - 2) **The act of conspiracy is the act of agreement**
 - 3) In common law, had to commit an overt act - ANY act, even if not substantial or not illegal
 - a) Ex agree to kill sb and one person looks up her address
 - 4) MPC requires an overt act but not in the most serious crimes - there, agreement is enough
 - iii. Why punish? Special dangers of group criminality
 - 1) More strength, opportunities, resources - harder to police
 - 2) Less likely to abandon criminal purpose
 - 3) Division of labor
 - 4) Can attain more elaborate goals
 - 5) More likely that crimes will be committed unrelated to original purpose
 - iv. **Prosecutorial Advantages**
 - 1) Conspirator is guilty of every offense committed by every other conspirator in furtherance of the unlawful agreement - *Pinkerton*
 - 2) Hearsay evidence exceptions
 - 3) Joint trial - jurors believe birds of a feather flock together
 - 4) Venue - any jurisdiction where any member did any act in furtherance (and where agreement formed)
 - v. **Common Law**
 - 1) **Definition**
 - a) Agreement between 2 or more persons to commit a criminal act or series of criminal acts, or to accomplish a legal act by unlawful means
 - 2) **Criticism**
 - a) Vague - lets prosecutors suppress inchoate conduct they consider dangerous or undesirable
 - b) Inchoate - can be convicted of a crime before doing ANY ACT (at CL, MPC different)
 - c) Predominantly mental - consists mostly of 'meeting of the minds' + intent
 - i) Gets really close to punishing thought crimes

- 3) **Actus Reus**
 - a) **Agreement is the act**
 - b) Don't need to prove express agreement
 - c) Agreement can exist even though don't know all the details
 - d) Can have conspiracy even though don't agree to facilitate each part of offense
 - i) Minimum: each person agrees to facilitate some of the acts leading to substantive crime
 - e) Coconspirators need know each other, as long as each knows that it has a scope and that for its success it needs an organization bigger than the individual
 - f) **Usually inferred from circumstantial evidence** - nature of crime is secrecy
 - i) *Interstate Circuit* (movie price fixers) - when all movie theatres charge same high price, shows conspiracy b/c normal behavior would be to compete
 - ii) Can use a counterfactual - what would happen if they didn't agree?
 - g) Object need not be illegal, as long as corrupt, dishonest, fraudulent, or immoral
 - h) **Many states require overt act**
 - i) But overt act need not be illegal, and doesn't matter how trivial
 - ii) Overt act can be by any member and counts for all members
- 4) **Mens Rea**
 - a) Rule: **generally need purpose** (except for really serious crimes: see Posner and Fountain), **but intent can be inferred from knowledge**
 - i) Must **intend to agree AND intend the object** of the conspiracy
 - ii) Posner got his idea from the Lauria case - drop purpose to knowledge for really serious crimes
 - (A) Ex being an answering service for a terrorist organization
 - iii) Since need purpose, can't conspire to commit involuntary manslaughter (like attempt)
 - (A) But could be guilty of manslaughter under *Pinkerton*
 - b) **Circumstances where intent can be inferred from knowledge**
 - i) Purveyor of goods has a **stake in the venture** (*Hand-Falcone*)
 - ii) **No lawful use of goods and services exists** (book of prostitutes and their services)
 - iii) **Volume of business with buyer is grossly disproportionate** to demand (900 bottles medicine)
- 5) In most jurisdictions, **bilateral requirement**
 - a) Can't be guilty of conspiracy if other person didn't agree - rule breaking down
- 6) **Scope**
 - a) **Wheel Conspiracy**
 - i) In center is **hub**, who transact illegal dealings w/ various other ppl (**spokes**)
 - (A) Also need **rim**
 - ii) *Kotteakos* (loan fraud) - *held* NOT a wheel conspiracy b/c no rim between spokes
 - iii) *Anderson* (abortion) - *held* YES a wheel conspiracy b/c spokes needed a big enterprise to get their finder's fee or hub wouldn't keep the business going
 - b) **Chain Conspiracy**
 - i) Each person/group has specialized responsibilities that link together various aspects of the unlawful conduct
 - ii) *Bruno* - *held*, conspiracy b/w smugglers, wholesalers, and retailers (NY/LA) b/c each part necessary
 - (A) But retailers look like spokes in a wheel - link b/w them? Court doesn't say
 - c) **Don't need to know the existence of every part**, but must have general awareness of both the scope and objective
 - d) **Insider Trading**
 - i) *McDermott* - D passes stock tips to mistress, who passes to her other boyfriend; *held*, no single conspiracy
 - ii) **3 ways** could get single conspiracy **in these cases**
 - (A) If scope of the trading agreement was broader
 - (1) Ex - she asks if it's ok to pass on tips to other ppl and he agrees
 - (B) If reasonably foreseeable
 - (1) Maybe if shared a tip w/ a married person - expect that person to share w/ spouse
 - (2) Maybe if the tipeg had shared info in the past
 - (C) If he knew there was a relationship b/w tipeg and remote tipeg
 - iii) Pretty broad rule - reasonable foreseeable - WHY? Hard to detect these crimes
- 7) **Duration**
 - a) Statute of limitations starts running after object achieved or abandoned
- 8) **Defenses**
 - a) Impossibility usually NOT a defense (policy reasons)
 - b) **Abandonment**
 - i) Once offense is complete, can't abandon
 - ii) Can withdraw and avoid liability for subsequent crimes (but not for ones already committed)

- iii) Usually require that abandoning party communicate withdrawal to coconspirators
- vi. **Pinkerton**
 - 1) Rule: guilty for **any crime your coconspirator commits as long as:**
 - a) Was it done **in furtherance** of the conspiracy
 - b) Was within the **scope of the conspiracy**
 - c) Was **reasonably foreseeable**
 - i) Scope of what they agreed to - agreement has to encompass the acts
 - (A) Killing sb to keep them quiet?
 - (1) Would be in furtherance, but not in the scope
 - (B) Ordering boxes for alcohol
 - (1) Would be in furtherance and in the scope
 - (C) If sth is within the scope, it will always be in furtherance + reasonably foreseeable
 - ii) Was it reasonably foreseeable?
 - d) **Scope limitation eventually falls out** (*Bridges* - party fight case; *Alvarez* - hotel shooting case)
 - 2) Difference b/w Luparello and Pinkerton - same rule?
 - a) If didn't have Luparello rule, could get Luparello under Pinkerton?
 - i) Conspiracy? Yes - going to go threaten (at least) Martin
 - ii) In furtherance? No - killing the guy wasn't in furtherance b/c they were trying to get info
 - (A) So Luparello is broader than Pinkerton (but does require that there be accomplice liability)
 - iii) So **Luparello has higher barrier to entry** (accomplice) **but lower requirement once you're in** (just reasonable foreseeability)
 - iv) **Pinkerton has lower barrier to entry** (conspiracy) **but higher requirement once you're in** (in furtherance)
 - 3) **MODERN FOCUS: Reasonably foreseeable (negligence standard) + In furtherance**
 - a) Maybe limitation for **minor players**
- vii. **MPC (§5.03-5.05 pg 1101-1102)**
 - 1) **Definition**
 - a) A person is guilty of conspiracy with another person/persons to commit a crime if with the purpose of promoting or facilitating its commission he:
 - i) Agrees with such other person/persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime, or
 - ii) Agrees to aid such other person/persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime
 - 2) **Types of Agreement**
 - a) Four types of agreement fit definition. Can agree to:
 - i) **Commit** an offense ("engage in conduct that constitutes such crime")
 - ii) **Attempt** to commit an offense
 - iii) **Solicit** another to commit an offense
 - iv) **Aid** another person in planning or committing offense
 - 3) **Overt Act Required (Unless 1st or 2nd Degree Felony)**
 - 4) **Mens Rea**
 - a) Must have **purpose of promoting or facilitating** the commission of the substantive offense
 - b) Leaves mens rea as to attendant circumstances up to courts
 - 5) **Unilateral**
 - a) Can be guilty even if other person didn't really agree or is incapable of being convicted of conspiracy
 - 6) **Scope**
 - a) If conspire with another person and **know** that person has conspired with another person, **also conspired with that third person**
 - i) Ex A conspires w/ B and **knows** that B conspires w/ C --> A conspires with C
 - ii) Can be unilateral - in *McDermott*, remote tipee would have conspired w/ tipster, but tipster not conspired w/ remote tipee
 - 7) **Duration**
 - a) Terminates when crime(s) that are object are committed or abandoned
 - b) Abandonment presumed if neither D nor coconspirators do any overt acts during applicable SOL
 - c) If individual wants to terminate conspiracy as to him, must tell coconspirators of abandonment or inform law enforcement of conspiracy and his participation therein
 - 8) **Abandonment**
 - a) Must **thwart the success** of the crime under circumstances showing **complete and voluntary renunciation of criminal purpose**
 - 9) **Immunity from Conspiracy**
 - a) Can't be convicted of conspiracy if
 - i) **Law** defining the crime so provides; or

- ii) Are the **victim** of the crime
 - (A) ex statutory rape - V can't be guilty of conspiracy, but D can b/c unilateral
- iii) Conduct **inevitably incident to its commission**
- 10) **Punishment**
 - a) Same as object of the conspiracy - conspiracy to commit murder=punishment for murder
 - i) EXCEPT 1st degree felony
 - ii) If have multiple crimes, take worst punishment
- 11) **Usually can't be convicted of both conspiracy and the crime**
 - a) Unless can be proved that other crimes not yet committed/attempted were part of conspiracy
 - i) Ex conspire to rob banks V1, V2, V3, but caught after V1 - V2 and V3 don't merge
- 12) **Object of conspiracy must be illegal**
- 13) **Rejects Pinkerton**
- viii. **RICO (Racketeer Influence and Corrupt Organizations Act)**
 - 1) Passed in 1970
 - 2) Attacks both organized crime and legitimate businesses or organizations involved in criminal enterprise
 - 3) Crime to invest in, acquire interest in, exercise control over or participate in any enterprise that is engaged in a pattern of racketeering activity.
 - a) **Enterprise** = any individual, partnership, corporation, association, or other legal entity and any union or group of individuals although not a legal entity.
 - b) **Pattern** has been hard to define – at least 2 acts of racketeering activity within 10 years (called predicate offenses), and “continuity plus relationship” (which doesn't mean much)
 - c) **Racketeering activity** includes a long list of offenses, including murder, kidnapping, extortion, etc.
 - 4) Punishment under RICO is up to 20 years, and you can also be charged with the predicate offenses as well as conspiring to violate the RICO Act.

VII. SOME CONSTITUTIONAL CONSTRAINS ON THE DEFINITION OF CRIMES

a. **Ban on Status Crimes**

- i) *Robinson* (crime to be an addict) *held*, violates 14th Amendment's due process clause for cruel and unusual punishment
 - 1) Said like punishing for having an illness - retributive
 - 2) No actus reus - status is the act
 - a) What if got addicted in Nevada and then came to CA?
 - b) In theory, could immediately arrest a baby born an addict
 - c) Sb could give you drugs when you're a kid and you don't know what they are
 - d) Continuously guilty of violating the statute
 - i) If in the state for a year, you're continuously violating the statute - weird procedurally
 - e) It's a thought crime - punishing for really wanting to use drugs
- ii) *Powell* (drunk in public)
 - 1) Court splits 4-1-4
 - a) 4 think conviction should be affirmed
 - b) 4 think conviction should be reversed
 - c) Justice White agrees w/ the reasons of the "reversed" group, but w/ the judgment of the "affirmed" group
 - 2) Marshall's opinion
 - a) Says alcoholism is not a disease
 - b) Could Powell prevent himself from drinking? What if sb offered him a million dollars?
 - i) Says ppl have lots of compulsions, but criminal law can't refuse to punish ppl for doing compulsive things
 - 3) 4 dissenters
 - a) Emphasize the lack of blameworthiness
 - i) Say it's a sickness and it's involuntary
 - (A) So can't punish them for drinking
 - 4) Justice White
 - a) Says he feels bound by Robinson b/c this case is the same
 - i) Says the dissent is interpreting it right
 - (A) Says can't punish for drinking
 - ii) But still votes to uphold Powell's conviction b/c he went in public, which was voluntary
 - (A) Like the opposite of Martin - drank involuntarily but appeared in public voluntarily
 - 5) Takehome - **Constitution requires an act**
 - a) But no mens rea requirement in the constitution

b. **Requirement of Legality**

- i) *Nullum crimen sine lege, nulla poena sine lege*
 - 1) No crime w/o law, no punishment w/o law

ii) **Ex Post Facto**

- 1) *Keeler* (fetus killing) held, can't punish crime w/o fair warning (even though fair warning is fiction)
- 2) *Rogers* (abolish year+day) held, not violation of due process b/c may give retroactive effect unless reading of statute is "unexpected and indefensible" when interpreted in light of previous judicial opinions

iii) **Void for Vagueness**

- 1) Vague statutes unacceptable b/c deny fair notice and give prosecutors/police too much power
- 2) *Chicago v. Morales* (loitering) held, unconstitutionally vague definition of loitering - "remaining in any one place with no apparent purpose"
 - a) Lets police target ppl they don't like
- 3) *Papchristou v. Jacksonville* - held "vagrancy" law unconstitutionally vague
 - a) Was being used to target union organizers, interracial couples, etc.

VIII. DISCRETION IN THE APPLICATION OF SUBSTANTIVE CRIMINAL LAW

a. Legislature will make different laws depending on how much discretion judges/prosecutors/juries have

- i) Ex murder laws - if don't have much discretion, want to get the categories right
 - 1) If do have lots of discretion, doesn't matter as much

b. 3 discretionary actors

- i) Prosecutors
- ii) Juries
- iii) Sentencing

c. **Charging**

i. Decision Not to Charge: Essentially Unreviewable

- 1) Standing: In order to compel prosecution, the plaintiff must show that failure to prosecute caused harm to the plaintiff, and prosecution would remedy the situation. *Linda R.S.* did not have standing, but the *inmates of Attica* would have standing.
- 2) Separation of Powers: Neither Congress nor the courts can compel prosecution because of the separation of powers. (This is only true in state systems to the extent that state constitutions require separation of powers.) Why?
 - a) - Limited resources force prosecutors to make decisions about priorities; judges don't have the expertise to make such decisions.
 - b) - Public safety interests in protecting the secrecy of circumstances surrounding prosecutions and investigations, such as policies to prosecute only drug possession above a certain amount.

ii. Decision to Charge: Reviewable in Two Cases

1) **Selective prosecution** (*Armstrong*)

- a) Selective prosecution violates the equal protection clause. There must be a **discriminatory effect** and a **discriminatory purpose**.
 - i) For **discriminatory effect**, the defendant must show that "similarly situated" people who could have been prosecuted were not. How similar? Same drug? Same amount?
 - ii) For **discriminatory purpose**, the defendant must show that the government had no good reason for this pattern of prosecution. In this case, if they had gotten to the question of discriminatory purpose, they would need to decide if the government's statement that crack manufacture and distribution was controlled by Jamaican, Haitian, and black gangs showed discrimination or not.
- b) The remedy for selective prosecution is dismissal of charges.
 - i) In *Armstrong*, they could still be charged by the state, but the penalties are much lighter at the state level.

2) **Vindictive prosecution** (*Bordenkircher and Brady*)

- a) Vindictive prosecution violates the due process clause. The government cannot place a burden on the exercise of your rights.
 - i) Bringing greater charges after someone successfully defends a first charge, or (for judges) imposing a greater sentence after the first sentence has been reversed, is presumed to be vindictive unless the prosecutor/judge can show otherwise.

d. **Plea Bargaining**

- Are the courts protecting the separation of powers by refusing to interfere with an executive function, or eroding it by allowing prosecutors to largely determine sentences?

Alternatives to Plea Bargaining

- 1) Streamlining trials, by granting more bench trials. Not a popular solution - doesn't save nearly as many resources or provide as many benefits to defendants as plea bargaining. (Judges are more likely to convict.)
- 2) Increase the procedural protections within the pleading process, in recognition of the fact that in many cases prosecutors are essentially judge, jury, and sentencer.
- 3) Invest more resources in defense lawyers and encourage prosecutors to choose to charge fewer crimes and take them to trial. However, many, many more resources will be needed, given that 90% of defendants currently plead guilty.

Why isn't plea bargaining vindictive prosecution?

- a) The *Brady* court says plea bargaining is **mutually advantageous**; the government saves resources; both sides avoid the uncertainty and risk of going to trial.
 - i) The idea of mutual advantage is premised on some parity of bargaining power; of course, here there is vast inequality of bargaining power.
- b) Purposes of punishment:
 - i) Prompt punishment may better deter other people.
 - ii) The *Brady* court says plea bargaining promotes rehabilitation because admitting the wrongfulness of your actions is a step toward rehabilitation.
- c) The court distinguishes *Brady* from *Bram*, a case of a confession:
 - i) Two things are prohibited during interrogation: threats and promises. During an interrogation, a lawyer would always tell the client that the promises and threats are false and it's never in the client's interest to say anything to the police.
 - ii) The court says Brady's situation was different because he had a lawyer. Of course, his lawyer couldn't make the threats and promises disappear the way a lawyer would during interrogation. Obviously the court thinks that the threats and promises are legitimate.
- d) The *Bordenkircher* court says if prosecutors couldn't ratchet up charges through plea bargaining, they would instead charge defendants with everything they could and offer leniency, so there's no way to really end this bargaining process.

e. Sentencing

i. Discretionary Sentencing and Its Alternatives

The most controversial area in criminal law

The old **discretionary system** (still in effect in most states) allows judges complete discretion within very wide limits (a maximum would be set). Newer models—like the **federal sentencing guidelines**—have been tried to limit judicial discretion.

In **indeterminate sentencing**, the sentence is [1/3]–maximum; parole board, not judge, decides when you get out. These systems led to huge sentencing disparities, and to a lack of **truth in sentencing**: a person sentenced to life could be out in about seven years.

- Discretionary: Judges had huge ranges within to choose sentences (maybe 2-20 years)
- Indeterminate: The sentence would be a range (like 3-9 years). The judge basically sets a cap, then cuts it in 3, and the parole board decides when someone has rehabilitated enough to reenter society.

Problems with this system:

- Lack of uniformity, including huge geographic disparities, racial disparities, and differences among individual judges.
- Victims' rights advocates saw indeterminate sentencing as a bait-and-switch – they thought the convict was sentenced to 9 years, only to find out after 3 years that he was released because of good behavior and/or prison overcrowding.
- An alliance between the left and right for a combination of these reasons led to sentencing guidelines.

Federal Sentencing Guidelines

Sentence is determined by a combination of two factors:

- 1.) Offense level (the crime committed)
- 2.) Criminal history category (your record)

These two factors produce a narrow range of sentences. If the judge chooses to depart from this range, the judge has to explain the reasons for the departure. Both determining the range and deciding to depart from it are appealable.

The guidelines were originally mandatory, but SCOTUS made them advisory.

Apprendi

The Supreme Court struck down a hate crime enhancement and set down a bright line rule: If a legislature passed a sentencing enhancement that gave the judge the authority to go beyond the statutory maximum prescribed for the offense committed, based on the existence of a particular fact, then that fact had to be found by the jury, not the judge.

McMillan

The Supreme Court distinguished McMillan from Apprendi because this was a case of mandatory minimums. If someone needs to have sold a particular amount of a drug in order to be subject to a mandatory minimum, does the jury need to find the fact of the amount of the drug? No, because the mandatory minimum was within the statute anyway.

2. *The Jury's Role*

—**BLAKELY v. WASHINGTON – SCOTUS (Scalia, 2004): What info can judges use in sentencing?**

The judge imposed an “exceptional sentence” 37 months higher than the standard maximum on the ground that D acted with “deliberate cruelty.” The WA system allows for exceptional sentences but requires judges to make findings of fact to support them; the standard of review is clear error.

Apprendi (2000): Any fact increasing sentences beyond a statutory minimum (one the judge could not impose solely on the facts reflected in the jury verdict or admitted by D), other than prior conviction, must be submitted to a jury on a beyond reasonable doubt standard.

Thus, the State's sentencing procedure violated the Sixth Amendment right to a jury trial. Scalia: "Just as suffrage ensures the people's ultimate control of the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." "One can certainly argue that [efficiency and fairness] would be better served by leaving justice entirely in the hands of professionals," but that is not what the Constitution permits. This led to **BOOKER**, in which the court found the **federal sentencing guidelines unconstitutional** because they require judges to consider factors not put before the jury. However, Justice Ginsberg switched sides to join Justice Breyer's solution: making the guidelines "advisory," with appellate review only for "reasonableness."

Blakely v. Washington (p. 1064) 542 U.S. 296 (2004)

Facts: Blakely pled guilty to second-degree kidnapping, which under Washington's Sentencing Reform Act carried a sentence of 49-53 months. In order to impose a sentence above the standard range, the judge must enter findings of fact, based on factors other than those used in computing the standard range sentence, and conclusions of law supporting the exceptional sentence. The judge held a 3-day bench hearing and entered his findings of fact and conclusions of law. Blakely appealed on the grounds that this procedure violated his right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Holding: The Supreme Court held that Washington's sentencing procedure violated the Sixth Amendment, and therefore Blakely's sentence was invalid. In *Apprendi*, the Court had held that the statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, without any additional findings. Thus, a judge cannot constitutionally be compelled to rely on facts outside the trial record to determine a sentence.

Notes: After this decision, mandatory sentencing guidelines were struck down in the federal system and many states. In the federal system, the guidelines were made advisory, and a court of appeals can overturn any sentence, whether within the guidelines or not, only when it is "unreasonable."

3. Proportionality as a Constitutional Restraint

—**EWING v. CALIFORNIA – SCOTUS (O'Connor, 2003): Proportionality test in the Eighth Amend?**

Under CA's Three Strikes law a repeat felon was sentenced to 25 years to life for stealing \$1600 in golf clubs. Does this sentence violate the constitutional ban on cruel and unusual punishment?

O'Connor/Rehnquist/Kennedy: No. The Eighth Amendment has a "narrow proportionality principle" for noncapital sentences, which has only been applied once [SOLEM, for a life sentence with no parole]. It does not require proportionality but merely bans sentences which are "grossly disproportionate." The Court does not sit as a "superlegislature" to second-guess state policies; this sentence is not grossly disproportionate, so the Court can do nothing.

Scalia: The proportionality principle applies only to capital cases. Also, proportionality is only a coherent concept under a retributivist system. It cannot be applied to deterrent statutes like CA's here.

Thomas: The Cruel and Unusual Clause contains no proportionality principle.

Liberal dissents: Proportionality *is* required by the Constitution and can be reviewed by judges. The dissenters then present a proportionality test under which the CA sentence is unconstitutional.

Facts: Ewing was convicted of felony grand theft for shoplifting three golf clubs. Ewing's criminal history included two offenses that triggered California's three strikes law. He argued that his sentence of 25 to life was so disproportionate to the crime that it violated the cruel and unusual punishment clause of the Eighth Amendment.

Judgment: The court affirmed.

O'Connor's opinion (joined by Rehnquist and Kennedy): Ewing's sentence was not disproportionate to the offense of felony grand theft after previously having been convicted of two "violent" or "serious" felonies. In addition, the sentence was based on a rational policy enacted by the CA legislature for purposes of incapacitation and deterrence.

Scalia, concurring in the judgment: The plurality was not applying law, but evaluating policy. Its discussion of incapacitation and deterrence cannot possibly relate to the proportionality principle, which only arises from a retributivist purpose of punishment.

Thomas, concurring in the judgment: The cruel and unusual punishments clause of the 8th Amendment. does not contain a proportionality principle; only bail and fines are specifically prohibited from being "excessive."

Breyer, Stevens, Souter, and Ginsburg dissenting: The proportionality principle applies to the cruel and unusual punishment clause. A claim of gross disproportionality must be evaluated first by comparing the crime committed and the sentence imposed, and then by comparing the sentence to other sentences imposed on criminals in the same or other jurisdictions. Ewing's claim passes both tests; his sentence is virtually unique in its harshness and therefore unconstitutional.

4. Just Sentencing Outcomes

—**UNITED STATES v. MICHAEL MILKEN (S.D.N.Y; Kimba Wood, 1990): Sentencing Decision**

Notes: In this sentencing transcript, Judge Wood explains her sentence of 10 years for Michael Milken, who was convicted of several violations of securities laws, tax laws, and other laws. Judge Wood says that she took into account Milken’s service to the community and support to his family, but also the facts that he set a bad example for his underlings and committed crimes that were particularly difficult to detect, and the important role of prison time as a general deterrent to members of the financial community.

—**UNITED STATES v. JACKSON (Easterbrook, 1987); Posner’s unhappy concurrence**

Facts: Half an hour after being released from prison, where he had been sent after being convicted of two bank robberies, Jackson robbed another bank. He was sentenced to life without parole under a statute forbidding possession of weapons by career criminals.

Holding: The court affirmed, noting that the sentence was permissible as it was within the statutory range and served the purposes of general deterrence and incapacitation. The goal of specific deterrence for Jackson had failed.

Concurrence: In a concurrence, Judge Posner wrote that he believed the sentence was too harsh, but Jackson had presented no ground on which the court was authorized to set it aside. Posner said the sentence was not justified by retribution, since murderers and rapists aren’t usually punished so severely. Since criminality reduces with age, a shorter sentence (perhaps 20 years) would sufficiently incapacitate Jackson. Finally, deterrence is just as well served by a 20-year sentence as life, especially since the chances of being caught and convicted are high while the average gains in a bank robbery are small.

—**UNITED STATES v. GEMENTERA (9th Cir; O’Scannlain, 2004): Shaming Penalties/Humiliation**

D was sentenced to wear a sandwich board saying “I stole mail” while standing outside a post office for one day.

That condition reasonably related to the legitimate statutory objective of rehabilitation. However, a less reasonable condition may be invalid.

Facts: Gementera pled guilty to mail theft. The judge imposed a sentence of two months in jail and community service, including writing apologies to any identifiable victims, lecturing at a local school, and standing outside a post office wearing a sandwich board stating “I stole mail. This is my punishment.”

Holding: The court affirmed, holding that the court’s stated rationale aligned with the purposes of rehabilitation, in the sense of helping Gementera understand his crime’s impact on the community and realize his wrongdoing, and deterrence. Shaming as an element of punishment does not always render the punishment objectionable. The Sentencing Reform Act allows the imposition of “any other condition [the district court] considers to be appropriate.”

Notes: The dissent and various commentators have argued that shaming and humiliation should not be a part of the criminal justice system.

APPENDIX A: MPC “SITUATION” (FROM BRUGATO)

What (potentially) counts?

- Blindness
- Traumatic injury
- Had just suffered a blow
- Had just suffered a heart attack
- Extreme grief
- Relevant knowledge the defendant had about the potential assailant, **physical attributes** of all the persons involved, the **prior experiences** of the defendant
- Stark, tangible factors that differentiate the actor from another, like his size, strength, age or health
- Mental retardation (**Commonwealth v. DeMarco, PA 2002**)

What doesn’t?

- Belief in the rightness of killing (generally, an “integral part of moral depravity”)
- “Heredity”
- Intelligence (but not when it’s as low as “mental retardation”)
- Temperament

Straight MPC:

MPC Comments to §210.3 at 62-63 (p. 406-407)

“The word “situation” is designedly ambiguous. On the one hand, it is clear that personal handicaps and some external circumstances must be taken into account. Thus blindness, shock from traumatic injury, and extreme grief are all easily read into the term... On the other hand, it is equally plain that **idiosyncratic moral values are not part of the actor’s**

situation...In between these two extremes, however, there are matters neither as clearly distinct from individual blameworthiness as blindness or handicap nor as **integral a part of moral depravity as a belief in the rightness of killing**...There thus will be room for interpretation of the word “situation,” and that is precisely the flexibility desired...In the end, **the question is whether the actor’s loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen.**”

MPC and Commentaries, Comment to §2.02 at 242: (p. 425)

“There is an inevitable ambiguity in “situation.” If the actor were blinded or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered...But the heredity, intelligence or temperament of the actor would not be held material in judging negligence and could not be without depriving the criterion of all its objectivity. The code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts.”

People v. Goetz (NY. Ct. App. 1986) (p. 739-743)

The reasonableness test is the familiar one from the MPC circumstances facing a defendant in his situation. This includes relevant knowledge the defendant had about the potential assailant, physical attributes of all the persons involved, the prior experiences of the defendant.

MPC And Commentaries, Comment to § 2.09 at 372-375. (836-838)

“[L]aw is ineffective in the deepest sense, indeed ... it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat ...it is divorced from any moral base and is unjust...The Model Code...standard is not, however, wholly external in its reference; account is taken of the actor’s “situation,” a term that should here be given the same scope it is accorded in appraising recklessness and negligence. Stark, tangible factors that differentiate the actor from another, like his size, strength, age or health would be considered in making the exculpatory judgments. Matters of temperament would not.”

	Objective	Attributes	Experiences	Attitudes	Subjective
Williams	What reasonable person would do	Poor Native American	Uneducated, etc.	Fearful, paranoid	What they sincerely believe
Rusk		Male Young	Upbringing? Past Dates?	Macho?	
Goetz		Skinny Glasses White?	Mugged before, upbringing.	f/p, race	
White		Black, From South	Family’s experience with Klan	F/p race	
Norma		Female, Smaller	Battered No help	f/p gender	

How far to the right do we want to go? MPC **clearly wants to not allow attitudes**, but our attributes + experiences determine much of what our attitude is.

In contrast, the Pennsylvania Supreme Court (**Commonwealth v. DeMarco, 2002**), held that mental retardation should be considered as part of the actor’s situation, for the purposes of a duress provision which was derived from the model penal code. (p. 839)

Major question is whether EED is based on subjective standard or reasonable-man standard. MPC says **“from the viewpoint of a person in the actor’s situation,”** but how much is to be included within that situation? **Situation** is ambiguous in the MPC for both **Provocation** and **Negligent Homicide**.

407-08: What about **battered woman syndrome**?

408: What about depression? Post-traumatic stress disorder? Youth? UK accepted youth and sex, then went further and

further, then pulled back; **MPC approach is “In the end, the question is whether the actor’s self-control can be understood in terms that arouse sympathy in the ordinary citizen.”**

405: What about EED in absence of any provocation? Could it mean manslaughter?