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# THEORIES OF PUNISHMENT

## Major Questions

* 1. What should be illegal?
  2. What is just punishment?
  3. How much discretion should there be in the system and who should we give that discretion to?

## Utilitarian v. Retributive

* 1. Utilitarian
     1. Jeremy Bentham – society should try to maximize the net happiness of people (“the greatest good for the greatest number”). Pain inflicted by punishment is justifiable if, but only if, it is expected to result in a reduction in the pain of crime that would otherwise occur.
     2. Forward looking – don’t punish because people deserve it but because it is good for society.
     3. Objectives
        1. Deterrence – severity of penalty x probability of detection
           1. Types

General – Punish someone as example to convince general community to forgo criminal conduct in the future.

Specific – Make sure specific person does not offend again

Incapacitated

Intimidated

* + - * 1. Worry about over-deterrence – looking for optimal amount of deterrence
        2. Expressive – penalty expresses community values of what is right or wrong
      1. Rehabilitation
    1. E.g. in the Law – Necessity
  1. Retributive
     1. Punish the morally culpable. Punishment is about achieving moral justice.
     2. Backward looking – does not matter what the consequences are. Deterrence is not objective but happy surplus if it occurs. Proponents of rehabilitation demean offenders by treating them as sick, childlike, or otherwise unable to act as moralagents.
     3. Criticism
        1. Questionable Assumptions
           1. One size fits all – doesn’t take into account the circumstances of person
           2. Consequences don’t matter – could have negative effects on society (then who is culpable for that?)
           3. Assumes we agree on what deserves moral condemnation
        2. Utilitarian Arguments
           1. Cyclical – Assume punishment is wrong so where is punishment for punishment?
           2. Should care about societal good.
           3. Punishment is paying back for something you did wrong but what are you giving back to society for the cost of punishment?
           4. Punishing loved ones might be more of a punishment than punishing person themselves.
           5. Sometimes people do bad things for good reasons. E.g. self-defense, war, accident
           6. How do you punish victimless crimes?
           7. Do you punish people for moral reasons? E.g. lying, cheating on spouse
           8. Expensive on society

1. Mixed Theory - Retributivism is the ceiling but you don’t have to punish unless there is utilitarian outcome.

## Criminal Law and Morality

* 1. ***Regina v. Dudley and Stephens (1884)*** Tools: No defense of necessity in murder. Synopsis: Cannibalism
  2. Imperfect fit between criminal law and morality
  3. Three Major Questions
     1. Is the conduct worthy of moral condemnation
     2. Grading
     3. Is it excusable
  4. Placement of discretion within the system

## Principle of Proportionality

* 1. Upheld more by retributivists than utilitarians
  2. Eighth Amendment – prohibits “cruel and unusual punishment”
     1. Capital Punishment
        1. Murder cases: death penalty does not necessarily violate Eighth Amendment
        2. Non-murder cases: Violates Eighth Amendment unless it is a crime against the state (e.g. treason, espionage, terrorism)

## Elements of a Crime

* 1. Actus reus – a voluntary act
  2. Mens rea – a culpable intent
  3. Concurrence between actus reus and mens rea (i.e. a showing that the act was the result of the culpable intention)
  4. Causation of harm – will not cover in class

# CRIMINAL LIABILITY

1. General - Criminal Liability = Actus Reus + Mens Rea

## Actus Reus

* 1. A voluntary act (each element does not need to be voluntary) – a person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable. MPC 2.01(1)
  2. Involuntary acts not subject to liability – MPC § 2.01(2) lists acts which are involuntary:
     1. Reflex or convulsion
        1. Clarification – quick (D has time to make decision) but conscious decision is not a reflex. E.g. D is about to fall and reaches and grabs someone
     2. Unconsciousness or sleep
        1. Defendant who “blacks out”/automatism – need evidence
           1. ***People v. Newton* (CA District Court of Appeals 1970)** Tools: Unconsciousness is complete defense to criminal homicide because no voluntary action. Synopsis: Newton testified he went into reflex shock when he was shot and then shot cop. Jury should have been instructed on unconsciousness defense.
           2. Relation to insanity defense - Insanity defense usually requires that you be committed and the burden of proof by a preponderance of evidence is on D. Automatism defense just requires some evidence by D and then P has to prove beyond reasonable doubt that D was acting consciously.
        2. Exception – Self-induced state – acts prior to unconscious state may be enough to establish actus reus. E.g. intoxication before driving, tendency to get seizures and driving
        3. ***Martin v. State (1944)*** Tools: No voluntary action for being forced to appear in public. Synopsis: Martin was drunk when he was forced out of home by police and was indecent in public.
     3. Hypnosis
     4. Other acts (“bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual”)
  3. Omissions are not subject to liability unless (MPC 2.01(3)):
     1. Specific Statutory Duty – statute may explicitly provide for liability based upon an omission or
        1. ***Pope v. State (1979)*** Tools: Criminal liability for omission arises only when law imposes a duty to act – protects Good Samaritans. Synopsis: Pope watched Melissa beat her child, Demiko, and did not try to protect him.
        2. IRS – not filing taxes
        3. Good Samaritan Laws – criminal offense to not help someone in danger
           1. Pros

Prevent crimes. E.g. Kitty Genovese

Deter crimes

Identify criminal

Morally culpable for not acting

Worse harm could occur with inaction. E.g. ***Pope***

Expressivism – says its bad not to help

Statutes not usually burdensome (usually don’t require that someone put themselves in danger)

* + 1. General Legal Duty – Duty to perform the omitted act is otherwise imposed by law
       1. Statute– statute may impose a duty to care.
          1. Hit and run/Good Samaritan - many states have statutes requiring motorists in accident to call for aid for victim.
       2. Status
          1. Blood relationship or marriage
          2. Mutual dependence (e.g. two mountain climbers)
          3. Tort can establish relationship
       3. Contract (E.g. nanny, doctor, lifeguard)
       4. Assumption of Care (especially if victim is left worse off)
       5. Peril – danger caused by defendant
       6. ***Jones v. United States* (US Court of Appeals, DC Circuit 1962)** Tools: Criminal liability for omission arises only when law imposes a duty to act. Synopsis: Baby died because Jones (not parent) did not care for him. Baby left in Jones’ care so court confirmed verdict of involuntary manslaughter.
    2. Cons against omissions
       1. Vagueness doctrine – rules governing failure to act would necessarily be much vaguer than rules prohibiting affirmative conduct and would be likely to violate the principle that forbidden conduct must be carefully specified.
       2. Enforcement – the difficulties of deciding which of the various people who could have acted and did not should be prosecuted
       3. General feeling that there is an important causal difference between precipitating an event and merely failing to intervene to prevent it.
  1. Possession is an act if (MPC § 2.01(4)):
     1. Exception – e.g. narcotics
        1. D knows he has possession
        2. D had enough time to get rid of it.

## Mens Rea

* 1. Introduction
     1. Elements of Crime: Conduct, Circumstances, Result
     2. Ambiguity in statute
        1. Each material element may have different mens rea requirement
        2. Unclear statutes (MPC § 2.02(3)) – if no mens rea is mentioned, assume it is recklessly.
        3. Applies to all material elements (MPC § 2.02(4)) – if mens rea is mentioned for only one element, apply to all elements unless stated otherwise.
     3. Two step analysis: (1) determine material element and then (2) type of mens rea with respect to each element.
  2. Presumption of intent – Often difficult to prove beyond a reasonable doubt that D had certain mens rea. Jury is permitted to infer, beyond a reasonable doubt, the presumed facts. D can rebut presumption.
     1. Constitutional requirement – presumed fact must be “more likely than not.”
  3. Common Law Terms
     1. “Intentionally” – Most pre-MPC statutes do not use “purposely,” but rather, the word “intentionally.” Intentionally usually included both purposely and knowingly (awareness that the conduct or result is certain to follow).
     2. “Maliciously” – Pre-MPC statutes often use the word “malice” which always includes intentional (purposely and knowingly) but is usually interpreted to also include recklessly (conduct taken in disregard of a known high probability of risk). Most hold that neither negligence nor intentionally engaging in some other, unrelated, crime is enough to establish “maliciously.”
        1. ***Regina v. Cunningham* (1957)** Tools: “Maliciously” means intentional or reckless as to a foreseen harm that would likely occur. Synopsis: Cunningham wrenched gas meter from gas pipe to sell it and Wade was partially asphyxiated. Charged with larceny and endangerment via poisoning.
     3. “Willfully” – MPC § 2.02(8) – Not necessary that he acted purposefully; it is sufficient that he acted knowingly unless the statute indicates otherwise.
        1. ***Regina v. Faulkner (1877)*** Tools: To have culpable mental state, act must be done intentionally and willful***.*** Synopsis: Faulkner lit match to see better, rum set on fire, and ship burned.
  4. States of mind that give rise to culpability – MPC § 2.02(2)
     1. Purposely
        1. MPC § 2.02(2)(a) – A person acts purposely with respect to a material element of a crime when:
           1. If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
           2. If the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
        2. Motive
           1. Good motive is no defense- good motive will not normally negate a state of mind. E.g. mercy-killings
           2. Defenses of necessity, self-defense – motive is relevant in certain defenses.
     2. Knowingly
        1. MPC § 2.02(2)(b) – A person acts knowingly with respect to a material element of the crime when:
           1. The element involves the nature of his conduct or the attendant circumstances, and he is aware that his conduct is of that nature or that such circumstances exist
           2. The element involves the result of his conduct and he is aware that it is practically certain that his conduct will cause such a result.
        2. Subjective test – MPC imposes a subjective test for determining knowledge. That is, the test is whether D actually knew or believed something, not whether a reasonable person would have known.
           1. “Willful blindness” Exception

Majority Rule (Combines ***Jewell*** and MPC) – (1) D must be subjectively aware of a high probabilitty of illegal conduct and (2) D purposefully contrived to avoid learning of the illegal conduct.

***United States v. Jewell* (9th Cir. 1976)** Tools: Knowledge can be established in cases of willful blindness. Synopsis: Evidence that Jewell deliberately contrived lack of positive knowledge of marijuana in car.

MPC § 2.02(7) – When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

* + - 1. Presumption of knowledge
      2. D need not know of illegality – Knowingly does not change the traditional rule that ignorance that something is illegal is no defense.
    1. Recklessly
       1. MPC § 2.02(2)(c) – A person acts recklessly with respect to a material element of an offense when he **consciously disregards a substantial and unjustifiable risk** that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
          1. Subjective standard – when he “consciously”
          2. Objective standard – actual risk

***Commonwealth v. Welansky* (MA Supreme Judicial Court 1944)** Tool: Where there is a duty of care, reckless conduct may consist of intentional failure (omission) to take such care in disregard of the probable risk of harm to them. Reckless conduct can be established if D was aware of the risk (even if reasonable man would not have recognized risk) or if a reasonable man should have been aware of the risk (even if D was not aware of the risk). Synopsis: Fire killed people in Welansky’s nightclub, which was overcrowded and had no fire doors.

* + 1. Negligently
       1. MPC § 2.02(2)(d) - A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves **a gross deviation from the standard of care that a reasonable person would observe in the actor's situation**.
          1. Objective – “when he should be aware” and “a reasonable person”
          2. Criminal/gross negligence – requires “gross deviation” – higher standard than for civil negligence
          3. ***State v. Hazelwood (1997)*** Tools: Criminal negligence requires a greater risk than civil negligence because greater punishment. Synopsis: Captain of Exxon Valdez crashed causing a lot of oil to spill.
          4. ***Santillanes v. New Mexico (1993)*** Tools: Criminal negligence requires a greater risk than civil negligence.Synopsis: Santillanes cut 7-year old nephew’s neck during fight.
  1. Strict Liability
     1. General Rule: No mens rea is required for one of the elements although a mens rea may be required for other elements.
     2. Constitutionality: arguments that it violates Due Process clause of 5th and 14th Amendments have practically never succeeded.
        1. ***U.S. v. Balint* (SCOTUS 1922)** Tools: Strict liability – Knowledge not required under statutes in which the purpose would be obstructed by such requirement. Synopsis: D’s indicted for violating Narcotic Act but argued that the indictment was defective for failing to charge that they knew they were selling prohibited drugs in violation of due process rights. Statute silent as to mens rea.
     3. Interpretation – did the legislature intend to impose strict liability, or did it simply omit an intended mens rea (particularly old statutes) and then you would apply MPC § 2.02(3)?
        1. Public Welfare Offenses Factors
           1. Tend to be omissions –violation is in the nature of neglect or inaction, rather than positive aggression
           2. Not derived from common law/malum in se (history of it being a crime) vs. malum prohibitum (the statute has a regulatory flavor)
           3. Often risk of harm, not direct or immediate injury, and it is this danger that the statute seeks to curtail
           4. D can avoid liability through ordinary care
           5. D in a much better position than V to avoid the harm
           6. The penalty prescribed is small
           7. Low stigma – conviction does not do grave damage to the defendant’s reputation
           8. Requiring mens rea would frustrate enforcement significantly (***Balint***).
           9. Injury to the state/public at large/multiple victims
        2. Not likely applicable where statute codifies common law – When a statute is a codification of common-law crime, it is not likely to be a strict liability offense.
           1. ***Morissette v. United States* (SCOTUS 1952)** Tools: Omission of intent in statute is not sufficient to establish strict liability. Strict liability likely not applicable when statute codifies common law. Mens rea in statute often based on legislative intent. Synopsis: Morissette converted bomb casings (thought they were abandoned government property). Court found that statute requires proof that he knew he was converting property.
        3. Not likely applicable when statute is complex and easy to violate innocently – If the statute is complex, easy to violate innocently, and/or imposes a stiff penalty for its violation, the court is likely to read in a mens rea requirement.
           1. ***Staples v. United States* (SCOTUS 1994)** Tools: Mens rea assumed unless indicated otherwise, especially since punishment severe and the statute would be easy to violate innocently. Synopsis: Staples owned rifle that had metal piece that precluded automatic firing but it was filed down and gun was not registered. (Compare to ***Freed*** with unregistered grenade and court read mens rea requirement.)
        4. Can only be violation under MPC § 1.04(5) – If strict (“absolute”) liability is imposed as to any material element of an offense, the offense can only be a violation (a minor offense that does not constitute a crime and that may be punished only by fine or forfeiture).
     4. Example strict liability provisions
        1. Often federal regulatory crimes
        2. Mislabeling of drugs
        3. Pollution
        4. Anti-hijacking statute
     5. Vicarious liability
        1. If strict liability is interpreted, this usually gives way to vicarious liability.
        2. Examples
           1. Employer liability

***U.S. v. Dotterweich* (SCOTUS 1943)** Tools: Strict liability – Public welfare statutes do not require mens rea. Synopsis: Company CEO convicted for mislabeling drugs for using manufacturers’ descriptions that were wrong.

***United States v. Park* (SCOTUS 1975)** Tools: Responsible corporate officer doctrine applies in public welfare offense – Must be evidence that officer had the responsibility and authority to prevent violation of law or to promptly correct a violation. Impossibility Defense – produce evidence that defendant was powerless to prevent it (often impossible to prove). Synopsis: Acme CEO held liable for unsanitary conditions in warehouse after being informed and no change.Automobile owner

* + - * 1. Pollution
      1. Defendant must have had control over the offender
      2. Severity of punishment – if the punishment is light, court is likely to find strict and vicarious liability were both intended. If a prison sentence is authorized, a court will not likely find strict and vicarious liability were intended.
    1. Canadian Approach – unconstitutional to imprison based on strict liability; in public welfare offenses P need not prove mens rea, but D can avoid liability by proving he took reasonable care. Strict liability only permitted where legislature has made clear its intent to impose strict liability and the penalty does not include imprisonment.
       1. ***Regina v. City of Sault Ste. Marie (1978)*** Tools: There should be category between mens rea and strict liability. Synopsis: N/A

# HOMICIDE

|  |  |
| --- | --- |
| **Traditional**  **(CA (p. 421); PA (p. 423))** | **MPC §210.1-2.10.4**  **(NY Penal Code)** |
| First Degree   * Intentional/premeditated: specified devices and any other kind of willful, deliberate, and premeditated killing |  |
| First Degree   * Felony murder (sometimes 2d degree murder, as in Pa) | Murder   * Recklessly under circumstances manifesting extreme indifference to human life. Such recklessness is presumed if involves robbery, rape, rape, arson, burglary, kidnapping or felonious escape. * NY: called second Degree murder, and adds a category of 1st degree only in special circumstances—victim is cop, D. in custody, etc) |
| Second Degree   * Unintentional killing with depraved heart/abandoned and malignant heart (sometimes called 3d degree). |
| Second Degree   * Catch-all: intentional but unpremeditated (in states where premeditation req. has bite) | Murder   * Purposely/knowingly but no premeditation requirement |
| Voluntary Manslaughter   * Intentional murder mitigated by imperfect self-defense of heat of passion/provocation | Manslaughter   * Intentional murder mitigated by extreme emotional disturbance. * NY calls first degree manslaughter |
| Involuntary Manslaughter   * unintentional reckless killing * unintentional grossly negligent/negligent (sometimes separate crime of negligent homicide; vehicular homicide, etc). | Manslaughter   * Recklessly * NY calls second degree manslaughter and makes it first degree if causes death with intent to commit serious physical injury. |
|
| Involuntary Manslaughter (grossly negligent/negligent) | Negligent homicide (negligent) |

|  |  |  |
| --- | --- | --- |
|  | **Traditional**  **(CA (p. 421); PA (p. 423))** | **MPC §210.1-2.10.4**  **(NY Penal Code)** |
| **INTENTIONAL** | First Degree   * Intentional/premeditated: specified devices and any other kind of willful, deliberate, and premeditated killing |  |
| Second Degree   * Catch-all: intentional but unpremeditated (in states where premeditation req. has bite) | Murder   * Purposely/knowingly but no premeditation requirement |
| Voluntary Manslaughter   * Intentional murder mitigated by imperfect self-defense of heat of passion/provocation | Manslaughter   * Intentional murder mitigated by extreme emotional disturbance. * NY calls first degree manslaughter |
|  | First Degree   * Felony murder (sometimes 2d degree murder, as in Pa): don’t need to prove intent | Murder   * Recklessly under circumstances manifesting extreme indifference to human life. Recklessness is presumed (can be argued in trial) if involves robbery, rape, rape, arson, burglary, kidnapping or felonious escape. * NY: called second Degree murder, and adds a category of 1st degree only in special circumstances—victim is cop, D. in custody, etc) |
| **UNINTENTIONAL** | Second Degree   * Unintentional killing with depraved heart/abandoned and malignant heart (sometimes called 3d degree). |
| Involuntary Manslaughter   * unintentional reckless killing * unintentional grossly negligent/negligent (sometimes separate crime of negligent homicide; vehicular homicide, etc). | Manslaughter   * Recklessly * NY calls second degree manslaughter and makes it first degree if causes death with intent to commit serious physical injury. |
| Involuntary Manslaughter (grossly negligent/negligent) | Negligent homicide (negligent) |

## Intentional Homicide

* 1. First Degree Murder v. Second Degree v. Murder
     1. **First Degree** (Traditional) – Intentional and Premeditation
        1. Premeditation
           1. Very Brief – ***Commonwealth v. Carroll* (Supreme Court of PA 1963)** Tool: The time between the decision to kill and the act of killing can be very brief to classify a homicide as intentional and premeditated. Premeditation just means conscious purpose to bring about death.Synopsis: Carroll killed his wife after argument and put her in the dumpster. His psychiatrist said it was an “automatic reflex type of homicide” out of rage and desperation.
           2. Some period of time – ***State v. Guthrie* (Supreme Court of Appeals of West Virginia 1995** Tool: Premeditation requires some period of time between decision to kill and act of killing. Synopsis: Guthrie killed co-worker with knife in reaction to co-worker making fun of him. Properly instructed jury could find Guthrie guilty of 1st degree murder.
           3. Formula – ***People v. Anderson* (Cal. 1968)** Tool: Premeditation required evidence of (1) facts regarding the defendant’s behavior prior to the killing which might indicate a design to take life (planning activity) OR (2) facts about the defendant’s prior relationship with the victim which might indicate a reason to kill (motive) AND (3) evidence that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to preconceived design. Synopsis: D brutally murders young girl stabbing her multiple times. No evidence of premeditation – no planning, nothing in prior relationship and manner of killing suggested explosion of violence.
           4. Pros/Cons of Premeditation Requirement

Pros

Measure of culpability

Cons

Hard to measure

Other ways to measure culpability – E.g. cruelty, affirmative defenses (no premeditation), motive, personalgain/financial gain, leave distinction and sentencing to jury, youth/vulnerability of the victim, whether it’s stranger, NY has1st degree in special circumstances (e.g. cop killed, D in custody)

* + 1. **Second Degree** (Traditional) – Intentional but no Premeditation
    2. **Murder** (MPC) – Purposely/knowingly but no premeditation
    3. Sweden Penal Code (p. 426) – Murder – 10 years; Manslaughter (if considered less grave) – 6-10 years; Careless causing of death - < 2 years; Gross crime – 6mo. – 4 years; less crime – fine
       1. Criticism – bias, prejudice, inconsistencies, vague
    4. Not related to death penalty anymore, now have capital statutes
  1. Voluntary Manslaughter (Provocation) vs. Manslaughter (EED)
     1. **Voluntary Manslaughter** – Common Law Provocation: (1) actual provocation (subjective) and (2) of the kind that might cause a reasonable person to lose control (objective)
        1. Legally sufficient provocation
           1. Require traditional categories as a matter of law: extreme assault or battery upon D; mutual combat; D’s illegal arrest; injury or serious abuse of a close relative of D’s; or the sudden discovery of a spouse’s adultery.

***Girouard v. State* (Court of Appeals of MD 1991)** Tool: Word alone are not adequate provocation - “For provocation to be adequate, it must be calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason. Provocation must fit into traditional categories as a matter of law. Synopsis: Girouard stabbed his wife to death for taunting and provoking him.

Pros/Cons of Adultery as provocation

Pros – most men kill anyway

Cons – Usually men kill in response to adultery; men more able to kill

* + - * 1. Allow jury to determine if there is provocation

***Maher v. People* (Supreme Court of Michigan 1862)** Tool: Provoking circumstances need not conform to any pre-established categories and it is normally a question for the jury whether the facts as a whole demonstrate sufficient provocation. Synopsis: Maher shot Hunt, whom he believed slept with his wife. Court found there was enough evidence for jury to decide whether there was provocation. Dissent: provocation should be in front of D.

* + - * 1. Verbal insults are not enough (See ***Girouard***)

What about hate speech?

* + - 1. No cooling time
      2. Victim must be the provoker (some jurisdictions)
      3. D cannot be the source of provoking circumstances
    1. **Manslaughter** – MPC Extreme Emotional Disturbance (EED)
       1. ***People v. Casassa* (NY Court of Appeals 1980)** Tool: Defense of extreme emotional disturbance requires: (1) the particular defendant must have acted under the influence of extreme emotional disturbance (subjective) and (2) there must have been a reasonable explanation or excuse for such emotional disturbance (objective). Synopsis: Casassa became obsessed with Consolo, broke into her apartment, and killed her when she refused his gift. Appeals court confirmed that this did not pass objective test so was not EED.
          1. Reasonable person (objective) in D’s place (subjective) - “the reasonableness of which is to be determined from the viewpoint of a person in the D’s situation under the circumstances as the defendant believed them to be.”
          2. Close to but not entirely like MPC §210.3(1)(b).
       2. Broad – left up to jury
       3. Pros/Cons of MPC EED Approach
          1. Pros

Subjectivity/Individualization allowed

Gets rid of categories that may be too limiting

* + - * 1. Cons

Subjectivity – how do you determine mental state/unclear

Prejudice/bias

Very broad compared to provocation

It’s impossible to imagine it from D’s situation as a reasonable person because they are not reasonable by definition of EED.

Case by case basis complicated – reasonable teenager, reasonable insane person, reasonable etc.

* + - 1. Most states with MPC modified it to require provocative act.

## Unintentional Homicide

* 1. Mens rea is for result, not action
  2. Depraved heart murder (traditional approach)/Murder committed recklessly (MPC 210.2(1)(b)) – not very different
     1. Depraved heart murder – usually 2d degree (sometimes 3rd). Extreme recklessness. Generally when recklessness extreme, risk of causing death very great, and justification for taking the risk is weak or nonexistent.
     2. Murder under MPC 210.2 (1)(b) – recklessly under circumstances manifesting extreme indifference to human life.
     3. ***Commonwealth v. Malone*** Tool: Unintended killings are murder when they are committed recklessly and under circumstances manifesting extreme indifference to the value of human life. Malice established by gross recklessness.Synopsis: Malone killed Long playing Russian Roulette. Calculated percentage likelihood of being shot as calculation risk for recklessness.
     4. MPC 2.08(2)
        1. Some courts find that drunk driving is sufficient to establish recklessness as opposed to negligence because lack of awareness is attributable to voluntary drunkenness.
        2. ***United States v. Fleming* (U.S. Court of Appeals, 4th Circuit 1984)** Tool: Recklessness establishes “malice aforethought” which establishes murder rather than manslaughter. Synopsis: Fleming was drunk, driving recklessly and killed someone.
  3. Involuntary Manslaughter and Negligent homicide
     1. Involuntary Manslaughter (traditional approach) – generally requires recklessness or gross negligence, depending on the statute
     2. MPC
        1. Manslaughter – homicide committed recklessly
        2. Negligent homicide
     3. Actus Reus – Omission and Mens Rea - Recklessness
        1. ***Commonwealth v. Welansky* (MA Supreme Judicial Court 1944)** Tool: Where there is a duty of care, reckless conduct may consist of intentional failure to take such care in disregard of the probable risk of harm to them. Reckless conduct can be established if D was aware of the risk (even if reasonable man would not have recognized risk) or if a reasonable man should have been aware of the risk (objective/even if D was not aware of the risk). Synopsis: Fire killed people in Welansky’s nightclub, which was overcrowded and had no fire doors.
     4. Actus Reus – Voluntary Act and Mens Rea - Recklessness
        1. ***People v. Hall* (Supreme Court of Colorado 2000)** Tool: Reckless manslaughter can be established if the actor consciously disregarded a substantial and unjustifiable risk that death could result from his actions.Synopsis: Hall killed Cobb by colliding with him while skiing. Hall was seasoned skier so was likely aware of risk.
     5. Actus Reus – Omission and Mens Rea – Negligence
        1. ***State v. Williams* (Washington Court of Appeals 1971)** Tool: Ordinary negligence was sufficient to support a manslaughter conviction at the time of the case. Synopsis: Williams’ (Native Americans) son died because they did not seek medical help when he was ill.
           1. At the time was ordinary negligence but now usually require gross negligence

## Felony Murder

* 1. Basic Doctrine
     1. Elements
        1. No mens rea
           1. ***People v. Stamp* (Cal. App. 1969)** Tool: Felony-murder rule imposes strict liability for killings that result from the commission of a felony.Synopsis: Stamp robs Honeyman. After Stamp leave, Honeyman dies of heart attack.
        2. Actus Reus – felony
        3. Actual Cause – “but for” the felony, the death would not have occurred
        4. “Proximate Cause” – Result must be natural and probable consequence of D’s action or must have been foreseeable
           1. ***King v. Commonwealth* (Va. Ct. App. 1988)** Tool: Felony has to be proximate cause of death. Synopsis: King and copilot transporting drugs on place. Plane crashed and copilot died. King convicted of felony murder but appellate court reversed. But for requirement met but crash not foreseeable result of felony.
     2. Felony murder is not a charge, it is a theory on which you are charged for murder
     3. Some states have misdemeanor manslaughter (misdemeanor needs to be very dangerous)
  2. Policy Pros/Cons of felony murder rule
     1. Pros
        1. Deterrence to commit felony and incentive to commit felony carefully (including keeping accomplices in check)
        2. Take more criminals off the street
        3. Justice for the victim
        4. Creating dangerous situation so should require higher standard of care
     2. Cons
        1. Evidence is now more easily available so don’t need easier way to prosecute
        2. Excuse for not having to prove intent
        3. Over-deterrence
        4. Not necessarily morally culpable for both crimes (E.g. don’t have control over accomplices)
        5. People may not know about rule for it to be deterrence
        6. If felony is dangerous, then increase punishment for felony itself
        7. Could be convicted for murder
        8. Felons already deterred from killing because elevates police interest
        9. Does not let you mitigate based on provocation/EED
  3. Court-made Limitations
     1. Inherently dangerous felony limitation – felony has to be inherently dangerous for felony murder
        1. Abstract Approach - If enumerated, inherently dangerous. If not, do inherently dangerous analysis – can it be committed in way that is not dangerous?
           1. Enumerated felonies (CA): perpetration or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, forcible sexual acts, sexual acts with minors.
           2. Enumerated felonies: robbery, burglary, rape, arson, if not one of these say if…
           3. ***People v. Phillips* (Supreme Court of CA 1966)** Tool: Abstract approach – can this be committed in way that is not inherently dangerous? If yes, then not inherently dangerous. Enumerated felonies are automatically considered inherently dangerous so don’t have to do analysis.Synopsis: Phillips suggested treatment without surgery. Child died. Phillips guilty of second and not first degree because felony is not one listed as inherently dangerous.
        2. Abstract or as Committed approach (particularized)
           1. ***Hines v. State* (Supreme Court of GA 2003)** Tool: “Inherently dangerous” can be determined based on how felony was committed. If he hadn’t been a felon, than would not have been felony murder. Synopsis: Hines accidentally shot and killed friend while turkey hunting and committed felony of possession of a firearm by a convicted felon. Court found that way it was committed was inherently dangerous – drinking, fired gun, knew other were around, took unsafe shot.

Criticism: essentially getting rid of felony-murder

* + 1. Merger – if felony is integral part of homicide, merges with homicide so you don’t have felony murder
       1. Two approaches
          1. Majority Rule (although ultimately rejected in CA)/Independent felonious purpose – if independent felonious purpose than don’t merge (applies to enumerated and non-enumerated felonies).

***People v. Burton* (Supreme Court of CA 1971)** Tool: Merger doctrine needed in order to insure that the felony murder rule does not obliterate grading distinctions the legislature desired. Synopsis: Burton killed a man in the course of committing armed robbery. Burton argues that armed robbery includes assault which is integral part of homicide so it should merge. Court disagreed.

Creates perverse results – person who commits dangerous felony is in better position than person who commits not so dangerous felony.

* + - * 1. Minority Approach: Enumerated felonies (e.g. robbery, burglary, rape, arson, if not one of these say if…) never merge, only non-enumerated felonies that are “assaultive in nature” (i.e., felony that involves threat of immediate violent injury) will merge. ***People v. Chun* (Supreme Court of CA 2009)** Tool: Felony merges with homicide when underlying felony is assaultive in nature. Look at elements of underlying felony, not the facts of the case (not as committed – partly for simplicity’s sake). Synopsis: Chan shoots rival gang members in car, killing one. Shooting at occupied car is felony. Shooting at occupied vehicle not enumerated. Shooting at occupied vehicle is assaultive in nature so it merges.
    1. Act (doesn’t have to be killing) “not in furtherance” of the felony – no felony murder
       1. Lethal acts after commission of the felony – courts often stretch getaway attempt
       2. Lethal acts unrelated to the felony – usually when accomplice does something completely unrelated
       3. Lethal acts by persons resisting the felony/against perpetrators of the felony
          1. Three Approaches to when felony murder rule applies even if not in furtherance felony

Proximate Cause – any time it is reasonable or foreseeable (applies almost all the times)

Agency – defendant or accomplice is perpetrator

***State v. Canola* (Supreme Court of NJ 1977)** Tool: Felony-murder rule should not apply to lethal acts of third persons not in furtherance of the felonious scheme (agency theory) because criminal liability should be proportional to moral culpability. Synopsis: Robbers get in gunfight with store owner. Store owner kills a robber. Robber kills store owner. Court rejected proximate cause approach but took up agency theory. D not convicted of murder of accomplice but did not have effect on sentence because convicted of murder store owner.

Identity of Victim – victim is not co-felon

* + - * 1. Approaches under which felony murder rule applies given situation

Victim kills felon

Proximate Cause

Felon kills felon

Proximate Cause

Agency

Cop kills bystander

Proximate Cause

Identity of Victim

* + 1. MPC 210.2(1)(b) – only NH has adopted so won’t study much
       1. Felony murder only if involves robbery, rape, rape, arson, burglary, kidnapping or felonious escape.
       2. This will get you to jury to decide.
       3. Limits felony murder but doesn’t fully abolish it.

## Capital Murder

* 1. History
     1. First degree murder meant capital murder.
     2. Shift to make death penalty discretionary.
     3. ***Furman* (1972)**Tool: Struck down death penalty (nine different opinions) because it is capricious, cruel and unusual, unequal treatment across cases, racial discrimination.
     4. States trying to create statutes that won’t be struck down. 35 states write new statutes. Two approaches in new statutes:
        1. Automatic death penalty – struck down
        2. Guidelines requiring channeled discretion
           1. ***Gregg v. Georgia* (SCOTUS 1976)**

GA death penalty is constitutional because it prevents arbitrariness and capriciousness by limiting the circumstances in which it can be imposed. Narrowed categories of murder – aggravating factors – have to find at least one beyond a reasonable doubt to be eligible for death penalty. Jury can also look at other aggravating factors and jury can agree just on one mitigating factor to not impose death penalty.

Automatic appeal

Jury sentencing maintains link between community values and the penal system.

Bifurcating sentencing procedure- first decide conviction and then sentencing – many aggravating factors that you wouldn’t want considered in conviction so need to keep separate (e.g. previous offenses)

Mandatory sentence not likely constitutional – need to let jury look at individual factors

Three factor test: First, it does not violate contemporary standards of decency insomuch as much of the country seems to have accepted it (35 states have death penalty statues); second, it serves the traditional penological justifications of both retribution and deterrence; third, it is not a disproportionate sentence to the crime of murder, but rather an extreme punishment for the most extreme of crimes.

Criticism of ***Gregg***

Still a lot of discretion

People don’t agree on what is mitigating

Prosecutor can decide whether to seek death penalty or not

Governor has discretion to pardon or commute

Aggravating factors are not very limited

* + 1. 1980’s and 90’s – Death sentence boom.
  1. Sentencing
     1. In non-capital cases, judge typically decides sentence. In capital cases, jury decides sentencing. In three override states – judge can override jury decision to not impose death penalty as long as jury has established what capital statute requires.
     2. Individualized sentencing – Woodson-Lockette line of cases
        1. ***Woodson*** – Rejected mandatory capital sentencing, need individualized sentencing
        2. ***Lockett*** – Young girl is getaway driver for robbery, had statutory aggravators where death penalty had to be imposed unless they found three specific mitigators. Judge found many other mitigators but not one of the three. Court found that court should be able to consider ANY mitigating evidence.
     3. Debate
        1. J. Blackmun – he will never support death penalty because twin requirements of non-arbitrary sentencing and individualized sentencing are impossible to reconcile
        2. J. Scalia – The let’s make death penalty mandatory to get rid of arbitrary and capricious problem
     4. Discrimination
        1. ***McCleskey v. Kemp* (SCOTUS 1987)** Tool: D challenging his sentence on the grounds of discrimination must demonstrate actual/purposeful discrimination in his own case; general study is not sufficient to show an Equal Protection violation. Neither is the mere fact that racial discrimination may potentially inform a juror’s decision as to D’s sentence enough to make the entire concept of discretion in the criminal justice system “cruel and unusual” punishment under the Eighth Amendment.Synopsis: McClesky sentenced to death. Pointed to Baldus Study as proof of discrimination.
           1. Howell Dissent – Court requiring more proof than for non-death penalty cases.
           2. Brennan Dissent – Study provides evidence that there is arbitrary/capriciousness in the system, which is what we worried about in ***Furman***.
           3. Majority – Does potential for discrimination mean impossible to have death penalty? What is the remedy for discrimination? How far should this go (e.g. gender, physical attractiveness, etc.)? Discrimination is just pretext to get rid of death penalty.
        2. Potential solutions to discrimination:
           1. Narrow factors to really aggravating
           2. Anonymous victims
           3. Independent review panels
           4. Jury has to be representative of victim
           5. Higher burden of proof – no doubt of guilt
           6. Can’t impose death penalty based on one eyewitness case
  2. Categorical Limits
     1. Offenses
        1. ***Coker v. Georgia*** – cannot impose death penalty for rape of adult women
        2. ***Kennedy v. La*** – can impose death penalty for rape of a child.
        3. ***Tison v. Arizona*** – death penalty for felony murder only if D exhibited “major participation in the felony” and “reckless indifference to human life.”
     2. Offenders
        1. ***Atkins* (2002)** – Can’t impose death penalty on someone with mental retardation.
        2. ***Roper v. Simmons*** – unconstitutional to impose death penalty on juvenile that is 16-17 years old considering the following factors on the evolving standards of decency (8th Amendment standard):
           1. Objective indicia of society’s standards

Majority: 30 states prohibit death penalty for juveniles. 18 of those states have death penalty for adults. 12 of those don’t have death penalty. Even in states that do have death penalty for juveniles, not common.

Dissent: Scalia says relevant question is - is it okay if you have it for juveniles, not is it okay to have death penalty.

* + - * 1. Exercise own independent judgment of whether death penalty is disproportionate

Majority – (1) juveniles lack maturity and understanding of responsibility; (2) juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; (3) “that the character of a juvenile is not as well formed as that of an adult.”

Dissent – Don’t need hard and fast line because we should look at it by a case by case basis in sentencing. Courts give discretion when allowing some minors to bypass parental permission for getting an abortion dependent on their level of maturity. Why can’t this level of discretion be applied for death sentence?

* + - * 1. Practice of other countries (instructive only)

Majority: We are the only country that legally allows for death penalty on juveniles.

Dissent: Long tradition of American exceptionalism.

* 1. Modern Trend
     1. Atkins and then Roper shifted focus on whether death penalty statutes are arbitrary or capricious to whether death penalty is constitutional at all.
     2. Some states have gotten rid of the death penalty.
     3. Declining rates in death penalty.

# RAPE

## General

* 1. MPC not adopted in rape law much so will not discuss MPC
  2. Historical development of rape law
     1. Gender Specific vs. Gender Neutral
        1. Rape law was at first created to protect female chastity and property of husband.
        2. Now, rape is gender neutral
     2. Marital immunity/treating rape within marriage differently
        1. At first, no rape between husband and wife
        2. Then, rape had to have violence to be rape in marriage
     3. Evidentiary requirements (corroboration; prompt report)
        1. Corroboration was required at first - Distrust of victims has stuck around (women trying to give excuse for no chastity)
     4. Putting victim’s sexual history/reputation on trial vs. modern rape shied statutes
  3. Actus Reus v. Mens Rea
     1. Actus Reus – focus on victim
     2. Mens Rea – focus on defendant

## Actus Reus

* 1. Force and Resistance (Rusk v. MTS approaches)
     1. Traditional Approach/Force Requirement
        1. ***State v. Rusk* (Court of Appeal of MD 1981)** Tool: Lack of consent must be shown by physical resistance or **reasonable** fear of physical harm that prevents resistance. Synopsis: Rusk took Pat’s keys, told to come in, slightly chocked her, and had sex. Court found insufficient evidence to prove lack of consent. Court of App. reversed holding that this is question of fact that should go to jury.
           1. D’s argument – a mere look does not create a reasonable fear; P had opportunities to run away; no response to P’s question of whether he would let her go if they had sex
           2. P’s argument – Choking; D took her key away; P asked if I have sex will you let me go shows fear
        2. Elements of Rape: intercourse, force or threat of force, lack of consent, no mens rea mentioned.
           1. Resistance not explicitly required to show lack of consent.
        3. Fear has to be reasonable – fear of death or risk of bodily harm as opposed to just fear of rape.
        4. Physical Resistance Requirement Pros/Cons
           1. Pros

Evidentiary requirement – notice to the defendant that there is lack of consent

Rape is crime of violence (this is contested now) and punished at level of violent crime, then there should be resistance.

Old-fashioned view that no means yes

Proud female should resist (dissent)

* + - * 1. Cons

Encouraging people to resist – some people might go overboard or victims might put themselves in danger.

Implies that consent is default – non-consent should be enough

Old-fashioned view that no means yes

Resistance requirement put victim on trial as opposed to defendant

* + 1. Major Reform Approach (MTS)
       1. Lack of consent shown by lack of affirmative consent by words or actions that would indicate to a reasonable person consent.
       2. ***State in the Interest of MTS* (NJ Supreme Court 1992)** Tool: Rape does not require physical force beyond act of penetration and victim is not required to resist. Synopsis: Trial Court found that kissing/petting was consensual, MTS having sex with CG was not consensual even though CG did not resist and MTS did not use physical force, because CG did not consent. MTS found guilty. App. reversed. Sup. Ct. reversed finding MTS guilty. No evidence of force or fear required.
          1. Elements: penetration, physical force/coercion, lack of consent (same as Rusk)
          2. Holding: penetration is force. Require affirmative consent. Permission to sexual penetration can be given by words or actions that reasonable person would see there was affirmative consent (top of p. 367) – this is a bit of a mens rea.
       3. ***M.C. v. Bulgaria* (European Court of Human Rights 2003)** Tool: Even in the absence of physical force, coercive circumstances can make sexual intercourse non-consensual as required in prosecutions for rape. Synopsis: MC taken to lake despite objections, she pushed back when kissed but then did not resist.
       4. Pros/Cons
          1. Pros

Puts burden on D

* + - * 1. Cons

Doesn’t change much – could say reasonable person interpreted consent (customary norms, etc)

How much does public know

Circumstances still involve what victim did

Patronizing that women can’t say no

Ambiguous

* + 1. Other Options (not currently in criminal statutes)
       1. Only Verbal Resistance (no means no) Required
          1. Pros/Cons

Pros

Need to change norms of what no means

Shifts burden

Cons

No doesn’t always mean no

Puts onus on victim to say no but the standard should be non-consent if absence of affirmative consent (doesn’t go far enough).

* + - 1. Affirmative verbal assent (Antioch rules)
         1. Pros/Cons

Pros

Change norms

No concerns about victims freezing

Cons

Doesn’t make sense with long term relationships

He said/she said cases

* 1. Non-Physical Threats Cases (Thompson, Mlinarich, MPC)
     1. Reject non-physical threats (Thompson, Mlinarich)
        1. If it’s not something you have a right to, it’s not a threat.
        2. Thompson – principal threatens high school student with not graduating if she doesn’t have sex with him
        3. Mlinarich – caretaker threatens to send girl back to detention home if she did not have sex with him.
     2. MPC
        1. Threats that would prevent resistance by woman of ordinary resolution
        2. Threat v. offer - Has to be a threat and not an offer (E.g. of offer – man tells widow she can’t live with him, unless she has sex with him). Question of threat or offer turns on entitlement
     3. Small Minority of states – crime where consent obtained through duress, coercion, extortion, or using a position of authority

## Mens Rea

* 1. No mens rea typically specified. Question of whether there is a mistake of fact defense becomes equivalent of mens rea requirement.
  2. Majority Approach – Reasonable mistake of fact defense (equivalent of requiring negligence – should have known but didn’t. Thus, only recognize mistake if honest and reasonable)
     1. **Commonwealth v. Sherry (Supreme Judicial Court of Mass. 1982)** Tool: Mistake of fact as a defense to rape must take into account reasonableness (negligence and not knowledge). Synopsis: Doctors contend that actual knowledge of lack of consent had to be proved.
     2. Pros/Cons
        1. Pros
           1. Shouldn’t punish someone who is not culpable
           2. Traditional norms
        2. Cons
           1. Encourages traditional norms
  3. Minority Approach – No reasonable mistake of fact defense permitted (equivalent of strict liability, but note that some form of reasonableness/negligence may be inherent in actus reus requirements). This stems from the fact that courts require the prosecution to prove only that D voluntarily committed an act of sexual intercourse.
     1. Some statutes say guilty of rape even if there is mistake because there has to be affirmative consent so strict liability.
     2. ***Commonwealth v. Fischer* (Superior Court of PA 1998)** Tool: Mistake of fact is not defense for rape. Synopsis: D was convicted of raping a fellow college student with whom, hours before the alleged rape, he had had a consensual sexual encounter. D appeals on the basis that the trial counsel provided ineffective assistance in failing to request that the jury be instructed on a mistake of fact defense.
     3. Pros/Cons
        1. Pros – encourages people to be clear about consent
        2. Cons – D may not be culpable
  4. Other Approaches
     1. Small Minority (England, Alaska) – Recklessness
     2. ICTY – Knowledge
     3. Pros/Cons
        1. Pros
           1. Comparable to other criminal liability standards
           2. Retributivist
        2. Con
           1. Does not incentivize people to be get affirmative consent
           2. Victim shock

## Rape Shield Laws

* 1. Federal Rules of Evidence (FRE) for non-rape statutes
     1. Evidence admissible as long as it is relevant (very low bar) – any evidence that makes existence of any fact more probable than it would have been without evidence.
     2. Relevant evidence can be inadmissible if prejudicial nature outweighs probative nature
  2. FRE 412
     1. Apply to prosecutor and defense.
     2. Evidence of other sexual acts or sexual predisposition generally inadmissible, except:
        1. Evidence of sexual behavior offered to show alternative source of semen, injury, or other physical evidence;
        2. Evidence of past sexual activity with the defendant to prove consent; or
        3. Evidence the exclusion of which would violate D’s constitutional rights (i.e. confrontation clause, due process)
     3. ***Commonwealth v. Harris* (Mass. 2005)** – prostitution was central to defense so evidence of prostitution was admissible.
     4. ***State v. DeLawder* (MD Court of Special Appeals 1975)** Tool: Where the evidence is with regard to a witness’s reliability, an accused person’s Constitutional right to confront a witness and seek out the truth takes weight over the claimant’s desirability to testify free from embarrassment and preservation of her reputation. Synopsis: At trial, testimony of the girl’s prior sexual history was excluded. D sought post-conviction relief based on the argument that his rights under the Confrontation Clause of the Sixth Amendment had been violated.

# SELF DEFENSE

## Basic Requirements

* 1. Elements of Self-Defense (non-proportional); See ***Goetz***
     1. When to use physical force: (1) reasonably believes necessary to defend himself or a third person and (2) imminent threat.
     2. When to use deadly force: (3) threat of death, serious bodily injury or (in many states) kidnapping, rape or (in just a few states like NY) robbery.
  2. Alternatives to standard imminence requirements:
     1. MPC 3.04(1): use of force “immediately necessary”
     2. Other suggested options: “necessary”; “justified” but not imminent
  3. Reasonableness and Individualization
     1. Any use of force for self-defense justified only when D honestly and reasonably believed it was necessary to protect against imminent threat of unlawful force
     2. Deadly force may only be justified where D honestly and reasonably believed it was necessary to repel imminent threat of death, serious bodily injury, or certain specified felonies (e.g. rape, kidnapping, robbery depending on jurisdiction)
     3. NB: there are additional complications for next time (retreat, etc)
     4. Some jurisdictions: imperfect self-defense: where D has an honest but unreasonable belief that requirements of self-defense met, will mitigate from murder to manslaughter
     5. ***People v. Goetz* (NY Court of App. 1986)** Synopsis: Four victims surrounded D on subway and asked for money. D shot all of them, paralyzing one. D said he knew they did not have weapons. Tool: Reasonableness in self-defense is objective standard (not sufficient that it is reasonable to actor). A determination of reasonableness must be based on circumstances facing actor: physical movements of assailants; knowledge actor had of assailant; prior experiences; age; disability, number of people, etc. (Somewhat individualized).
     6. ***United States v. Peterson* (US Court of Appeals, DC Cir. 1973)** Tool: Self-defense is available when the actor reasonably believes defensive force is necessary. Use of force does not need to be truly necessary. Synopsis: N/A
  4. Pros/Cons of Non-Proportional Treatment
     1. Pros
        1. Assailant gives up right to proportionality (moral forfeiture)
        2. Victims more likely to react in these types of cases
        3. Right to stand your ground
        4. Victims might not have capacity to resist ordinary force with ordinary force.
     2. Cons
        1. Allowing victims to kill doesn’t allow for justice system to take effect
        2. Danger to bystanders
  5. Battered Women’s Syndrome (BWS)
     1. In BWS, if the beating is not currently happening, courts tend to say not imminent.
     2. ***State v. Norman* (Sup. Ct. of NC 1989)** Tool: D’s subjective belief that her husband will inevitably kill her is not the equivalent of a belief that her husband was going to kill her imminently. Synopsis: D suffered from battered women’s syndrome and killed her husband while he was sleeping. She pled self-defense. Court ruled against D because no imminence.
     3. ***Commonwealth v. Sands* (VA 2001)** Tool: Self-defense requires necessity and needs to be in response to imminent danger of death or serious bodily harm. Synopsis: D abused and beaten by husband. Her life and lives of family were threatened. She shot husband while he was watching TV.

## Additional Self-defense Rules

* 1. Retreat rule
     1. Majority view – no duty to retreat
     2. Minority View: MPC 3.04(2)(b) – Actor cannot use deadly force if he knows (subjective) he can avoid the necessity of using force with complete safety be retreating.
        1. ***State v. Abbott* (Sup. Ct. NJ 1961)** Tool: Retreat Rule only applies when D uses deadly force and if D knows he can avoid the necessity of using deadly force with complete safety by retreating. Synopsis: Abbott got into fight with neighbors injuring them. Question of whether trial court properly instructed on retreat.
     3. Castle Exception – no duty to retreat from your home but still need to show elements of self-defense.
  2. Defense of others
     1. Traditional rule – can use force to protect third party when and to the extent that the third party could have used self-D.
     2. Modern majority rule – you can use force to the extent that such force reasonably appears to the intervenor to be justified in defense of a third party.
  3. Non-Aggressor Rule
     1. Majority rule – right to use deadly force in self-defense not available to one who provokes the conflict, unless aggressor withdraws from conflict in good faith and informs the other party by words or acts.
        1. Violent assaults don’t usually fit paradigm of who is aggressor and non-aggressor.
        2. ***United States v. Peterson* (DC Cir. 1973)** Tool: Aggressor has no right to self-defense killing unless D expresses intent to withdraw and in good faith attempts to. Synopsis: After argument, D goes into home and goes back outside. Victim in car when D points gun and tells victim not to move closer. Victim comes out with wrench. Moves closer. D shoots and kills.
     2. MPC 3.04 (2)(b)(i) – only deprives deadly aggressor of right of self-defense

## Trayvon Martin case and Stand-Your Ground laws

* 1. Jury Instructions
     1. Individualization – take into account the relative physical abilities and capacities
     2. No instruction on who is aggressor
  2. Stand your ground
     1. No duty to retreat inside or outside your home (not that different because no duty to retreat is majority rule)
     2. Procedure – immune from arrest or prosecution except for probable cause (which is same everywhere) but what is different is that you can ask for stand your ground immunity hearing.
        1. Has practical effects although standard not different – police more hesitant to investigate
     3. Right to use force extended to prevent forcible felony
        1. “A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.”
           1. Definition of forcible felony (on p. 82 in course pack) very broad

## Defense of Property

* 1. Rule – can use non-deadly force to prevent someone from dispossessing you of property if reasonably believe such force is necessary to prevent imminent, unlawful dispossession of property. Can never use deadly force.

## Defense of Habitation

* 1. Narrow rule (Ceballos): use of deadly force only if threatens death or serious bodily harm.
     1. ***People v. Ceballos* (Sup. Ct. of CA 1974)** Tool: Defense of habitation justification for killing or serious injury is not applicable when defendant is not present. Even if it was applicable, killing would not have been justified under self-defense because circumstances of burglary were not violent. Synopsis: D convicted of assault with a deadly weapon for setting up a gun trap in his garage that fired a bullet at the face of an intruder.
  2. Intermediate rule (Colorado statute): can use deadly force if person makes an unlawful entry and you reasonably believe they have committed or intend to commit a crime, and reasonably believes they might use force, however slight.
  3. Florida Stand your ground statute: Presumed to have held a reasonable fear justifying deadly force if person is in process of unlawfully and forcefully entering your house or car
     1. Pros: property rights; question about necessity or danger give homeowner benefit of the doubt

## Use of deadly force in law enforcement

* 1. Constitutional limits: Effectuating an arrest
  2. ***Tennessee v. Garner* (SCOTUS 1985)** Synopsis: The officers in question shot an unarmed suspected felon. This case was instituted by the victim’s family alleging that the victim’s constitutional rights were violated by the officers. Law at the time was that if you give felony suspect warning to stop, then you can use all necessary force to make arrest. Tool: Deadly force can only be used if necessary to prevent the escape and the officer has probable cause to believe the felony suspect poses a significant threat of death or serious bodily injury to police or others.
  3. ***Scott v. Harris***: upholds as reasonable use of deadly force (ramming car) in high-speed chase of motorist fleeing speeding ticket. Found must balance interests of defendant against society’s interests in effectuating the arrest.
     1. Does not overturn ***Tennessee v. Garner***.
     2. People shocked that it was extended to speeding ticket.
  4. State statutes (NB: may be further limited by law enforcement policies):
     1. Deadly force never used to prevent commission of a misdemeanor or to arrest someone suspected of a misdemeanor.
     2. Crime prevention: majority rule: use of deadly force only where necessary to prevent felonies involving threat of physical force or violence to others

# NECESSITY AND DURESS DEFENSES

## Necessity Defense: Common Law v. MPC

* 1. General Rule: when D has been compelled to commit a criminal act, not by coercion from another human, but by non-human events.
  2. Requirements

|  |  |
| --- | --- |
| **Common Law** | **MPC** |
| Emergency; imminent necessity | No emergency requirement |
| No prior fault in creating harm | Generally, does not include no prior fault requirement (but see 3.02(2)) |
| Relative balance of evils: objective; must clearly outweigh | Conduct the actor believes to be necessary to avoid a greater harm (but see 3.02(2)); subjective |
| May not rest of advisability of the statute/overrule legislature’s policy choice | Statute cannot deal with specific situation/justification may not be contrary to legislative intent |
| Not available for homicide | Available for homicide (has not been adopted) |
| Additional factors often used in political necessity cases: direct causal relationship between conduct and harm; no legal alternatives |  |

* 1. MPC 3.02(2) – “When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.” (objective balancing?)
  2. ***People v. Unger* (Sup. Ct. IL 1977)** Tool: Conduct which would otherwise be an offense is justifiable by necessity if the accused was without blame in creating the situation and reasonably believed such conduct was necessary to avoid an injury greater than the injury which might reasonably result from his own conduct.Synopsis: Unger escapes jail because his life had been threatened, he had been forced into homosexual activities, and did not report incidents for fear of retaliation. Unger appealed no jury instructions on necessity. Court ruled in favor of Unger that jury instructions on necessity should have been given (don’t need to meet all of the ***Lovercamp*** factors in contrast with the Dissent’s position).
     1. ***Lovercamp* –** only applied where the prisoner is (i) faced with a specific threat of death; (ii) forcible attack or substantial bodily injury in the imminent future; (iii) there is no time to file a complaint to the authorities and no time to resort to the courts; (iv) there is no evidence of violence used towards prison personnel or other persons in the escape and (v) the prisoner turns himself in to the authorities when he is no longer in immediate danger.
     2. Some courts rule that by virtue of being in prison, you are at fault in creating “harm” (more like circumstances) so don’t accept necessity defense.

## Economic Necessity

* 1. ***People v. Fontes* (Colo. App. 2003)** Synopsis: Father cashed forged check to buy food for children who were starving. Tool: Economic necessity alone cannot support a choice of crime.

## Political Necessity

* 1. Requirements - (1) balancing of harms; (2) imminent; (3) direct relationship; and (4) no legal alternatives.
  2. ***United States v. Schoon* (US Court of App. 9th Cir. 1992)** Tool: The necessity defense is inapplicable to cases involving indirect civil disobedience because it could satisfy one of the four elements (balance of harm) but not the other three (imminent, direct causal relationship, no legal alternatives). Synopsis: Protestors of US involvement in El Salvador disrupt IRS office.
  3. Blocking Coal **–** boat blocked delivery of coal in order to reduce emissions. Using necessity defense. Government dropped charges saying lack of serious government response justifies civil disobedience.

## Necessity: Comparative Approaches

* 1. ***Public Committee Against Torture v. State of Israel* (Sup. Ct. of Israel 1999)** Tool: Utilizing torture during interrogations is not permitted. However, if an interrogator faces criminal charges regarding torture, he may assert the defense of necessity in those circumstances where gaining information quickly during interrogation is necessary to save lives.Synopsis: GSS interrogators were authorized to use physical means after weighing the urgency of the attack, seeking alternative means of averting the attack and evaluating the suspect’s health to ensure no harm comes to him.

## Duress Defense

* 1. General rule – when a person commits a crime because coerced into doing so by threats of imminent death or serious bodily injury to which a person of reasonable fortitude may have yielded
  2. Requirements

|  |  |
| --- | --- |
| **Common Law** | **MPC** |
| Threatened harm must be imminent | Imminence a factor in deciding whether a reasonable person would have been unable to resist; but not required |
| Person of ordinary fortitude might just yield to the threat | Whether a reasonable person would have been unable to resist. |
| Threat must be of death or serious bodily harm to person (sometimes also allowed for threat toward others) | Any unlawful (likely has to be physical) force against person or another. |
| No defense to homicide | Available as a defense to homicide |
| Can’t recklessly place yourself in a position where duress is likely (e.g. in a gang/criminal enterprise) | No defense if recklessly placed himself in situation where probable he would be subject to duress. |
| Duty to escape or seek law enforcement if you have the chance |  |

* 1. MPC (except for murder) – ***State v. Toscano* (Sup. Ct. of NJ 1977)** Tool: Defense of duress is available for crimes other than murder if D engaged in conduct because he was coerced to do so by the use of, or threat to use, unlawful force against him or someone else, which a person of 'reasonable firmness' in his situation would have been unable to resist.Synopsis: D convicted of conspiring to obtain money by false pretenses. D argued he was under duress. Trial and Appellate court ruled threat not imminent.
  2. Imminence
     1. ***U.S. v. Fleming*** – have to be close to death for it to be imminent. Court martialed for collaborating and communicating with the enemy why prisoner of war.
     2. ***U.S. v. Contento-Pachon*** – threat is imminent enough, unrealistic to expect D to runaway with family and to trust Columbian authorities. D induced to smuggle cocaine via threats to him and his family.

## International Approaches

* 1. Duress defense to homicide in civil law countries
  2. ***Prosecutor v. Drazen Erdemovic* (ICTY 1997)** Facts: Drazen told he had to massacre Muslims or he would be killed. Issue: Should there be defense of duress in international homicide crimes?Holding: Duress should be incomplete defense in international homicide crimes – mitigate punishment. Dissent: Duress should be complete defense.

# INSANITY DEFENSE

## **Tests**: McNagten v. Irresistible Impulse (Davis) v. MPC/ALI

* 1. McNagten (Cognitive Test) – To establish insanity defense, must show that because of (1) disease of the mind, D did not know either (2) nature and quality of the act OR he did not know what he was doing was wrong.
     1. ***M’Naghten’s Case* (House of Lords 1843)** Tool: M’Naghten Rule – Jurors should be instructed that ‘every man is presumed sane and to possess a sufficient degree of reason to be responsible for his crimes. Therefore, in order to establish an insanity defense, it must be clearly proven that at the time of the act, the accused was under such a defect of reason from disease of the mind that he did not know the nature and quality of the act he was committing; or if he did know, he did not know what he was doing was wrong.’Synopsis: D used insanity defense at trial. The jury reached a verdict of not guilty and a meeting at the House of Lords ensued in order to determine what the standards for the insanity defense would be.
  2. Irresistible impulse test (Cognitive or Volition Test – Davis in ***Blake***) – (1) incapable of distinguishing between right and wrong or (2) beyond control
     1. ***Blake v. United States* (5th Cir. 1969)** Tool: Following the trend among the United States Circuit Courts of Appeal, the Fifth Circuit adopted the Model Penal Code test for insanity - “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.” Substantial, not complete lack of capacity is sufficient. Synopsis: D was convicted of robbery after his defense of insanity was rejected. He appeals the conviction on the ground that the definition of insanity is outdated and prejudicial.
  3. MPC/ALI (Cognitive or Volition Test) – as result of mental disease or defect, lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law. [pretty much same as irresistible impulse test but a bit broader]
  4. Trend back to M’Nagten
     1. ***United States v. Lyons* (5th Cir. 1984)** Tool: Insanity defense applies if at the time of criminal conduct, as a result of mental disease or defect, he is unable to appreciate the wrongfulness of that conduct.Synopsis: D claimed his drug addiction was a mental disease within the definition proscribed in the insanity defense. The trial court excluded evidence pertaining to this issue and D was convicted.
        1. After ***Blake***, got rid of volition prong because – difficult for psychiatrists to discern; most people who fail volition test will fail cognitive test; volition expert testimony will confuse jury; difficult to prove beyond a reasonable doubt
     2. General Trend of going back to M’Naghten after Hinckley got off on insanity defense
     3. Other Reforms: Changing standard of proof. Prosecutor had to prove beyond a reasonable doubt but now, defendant has to prove by either preponderance of evidence or clear evidence; Federal Law – severe mental defect and just cognitive prong (essential M’Naghten).
     4. Although juries don’t distinguish between tests much, where they make a difference is getting to the jury.

## Procedural Issues

* 1. Burdens of proof (current majority rule gives D burden of proof, different standards)
  2. Decision to plead insanity – it is up to the defendant.
     1. Why would someone rather guilty?
        1. D doesn’t know they are insane
        2. Not guilty by reason of insanity can have a longer “sentence” and/or want to avoid stigma
  3. Verdict and aftermath: NGRI v. guilty but mentally ill v. civil commitment standard
     1. Not Guilty by Reason of Insanity
        1. Insanity Acquittees can be subject to mandatory civil commitment (Jones – charged with misdemeanor for shoplifting), with periodic hearings where D has the burden of showing no longer dangerous
           1. Insanity Acquittees may be held indefinitely, beyond maximum sentence for underlying charge (Jones).
        2. Civil Commitment standard: State has burden of showing by clear and convincing evidence that D is presently mentally ill and dangerous
     2. Guilty but Mentally Ill – normal guilty verdict but receive treatment in prison
  4. Competence to stand trial – whether D capable of understanding the nature of the proceedings and assist in the defense.
     1. Not a defense, but a procedural right
     2. Can force D to take drugs so that they become competent if: (1) strong interest in prosecution and (2) drugs will likely work. If drugs don’t work, can commit them. Decision attorney can make contrary to D’s wishes.
  5. Competence to be executed – 8th Amendment bars execution of insane: Those who lack mental capacity to understand the nature of the death penalty and why it was imposed.

# INFANCY DEFENSE

## Common Law

* 1. Under 7: conclusively not responsible
  2. 7-14: rebuttable presumption that D not responsible

1. Juvenile court systems**:** jurisdiction over youthful offenders up to a particular age (often 16, 17, or 18); if adjudged a delinquent, under state supervision potentially up until they reach a certain age (often 18).
   1. Liberals say not enough protection, Conservatives say too lenient
2. **Often statutory provisions for prosecuting some** serious youthful offenders **as adults.**

# INTOXICATION DEFENSE

1. Technically not a defense **–** more a failure of proof of mens rea
2. Involuntary intoxication**:**
   1. Defense if D does not have the requisite mens rea due to involuntary intoxication.
   2. E.g. spiked punch, strange reaction to medication
3. Voluntary intoxication **that prevents D from having the requisite mens rea:**
   1. General trend is away from permitting defense at all.
   2. MPC: permits it for crimes with mens rea of purpose of knowledge, but not recklessness
   3. Pros/Cons
      1. Pros: should be aware of the risks of getting drunk, deterrence
      2. Cons: some situations in which you took precautions to risk, society assumes risk for legalizing alcohol

# MENS REA OVERVIEW FOR ATTEMPT, COMPLICITY, AND CONSIPRACY

|  |  |  |  |
| --- | --- | --- | --- |
| **Element** | **Attempt** | **Accomplice Liability** | **Conspiracy** |
| **Conduct** | Purpose/Intent | Purpose | Purpose |
| **Results** | Purpose/Intent; under MPC purpose or Knowledge | Mens rea of underlying crime | Purpose |
| **Attendant Circumstances** | Mens rea of attendant circumstances of underlying crime | ? – MPC says it depends | ? |

# ATTEMPT

## Punishment of Attempt

* 1. Some states grade to less serious felony
  2. MPC moves more toward equalization between attempt and actual crime.
     1. Even when statute suggests this, usually not the case
  3. Usually only completed attempts are prosecuted unless it’s a very serious crime.
  4. Argument for attempts being punished less severely
     1. No deterrence because already attempted (utilitarian)
     2. Less harm (retributivist)
     3. Someone could have changed their minds
     4. People who can’t complete crime, are less dangerous (sub conscious holding back)

## Mens Rea

* 1. Result Elements (Smallwood, MPC 5.01(1)(b))
     1. General Rule (common law) – intent (purpose) required, even where underlying crime does not require intent for the result element.
        1. ***Smallwood v. State* (Ct. App. MD 1996)** Tool: Attempted murder requires intent/purpose to kill. A trier of fact may determine the presence of an intent to kill from circumstantial evidence, conduct and words (subjective). That evidence must demonstrate that death was a probable result of D’s conduct. Synopsis: D, a knowingly HIV-positive individual, was convicted of attempted murder of three rape victims for sexually assaulting them without using a condom. Court said not enough evidence to show intent (purpose).
     2. MPC 5.01(1)(b): purpose or something like knowledge required – D must act with the purpose of causing or with the belief that his conduct will cause the prohibited result
  2. Conduct Elements: purpose/intent – usually not an issue
  3. Attendant Circumstances Elements: Same mens rea as required for attendant circumstances for the completed crime

## Actus Reus

* 1. Traditional Rule (don’t need to know) – need to complete last possible step (e.g. pull trigger but miss)
     1. No longer the rule. Now it is somewhere in between first and last step.
        1. ***King v. Barker* (1924)** Tool: To constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient and the final step is not necessarily required. Synopsis: N/A
  2. Physical Proximity Test (Rizzo) v. MPC Substantial Step Test (Jackson)
     1. Physical/Dangerous Proximity Test (Rizzo)
        1. ***People v. Rizzio* (Ct. of App. NY 1927)** Tool: Dangerous Proximity Approach – Criminal attempt can only be established when acts are tended toward the commission of a crime, which means acts are so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference. Synopsis: D’s had guns and were searching for victim but had not found him when they were arrested. Never found target so no dangerous proximity. Court said this was false arrest.
        2. Pros/Cons
           1. Pros – don’t want over-policing
           2. Cons – makes law enforcement more difficult; could lead to public safety issues
     2. MPC Substantial Step Test (MPC 5.01(c))
        1. ***United States v. Jackson* (2d Cir. 1977)** Tool: Substantial step test from criminal attempt – First, D must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. Second, D must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of D’s criminal intent.” Synopsis: Ds planned to rob bank. Showed up with guns, masks and handcuffs. Arrested in car in front on bank. Court rules that D committed attempted robbery because of substantial steps taken.
        2. Under MPC, ***Rizzio*** would probably be found to have attempted crime.
  3. Other aspects
     1. Abandonment: complete and voluntary renunciation. E.g. MPC 5.01(4)
        1. E.g. Man who tries to rob gas station, but only $50, so says nevermind. Court said no abandonment.
     2. Separate Substantive Crimes of Preparation
        1. E.g. burglary is when you unlawfully enter; possession of burglar tools; carrying concealed weapon
     3. Sliding Scale
        1. Should there be sliding scale for attempt (and also search and seizure?) so that more serious crimes be considered attempt earlier? E.g. terrorism

# ACCOMPLICE LIABILITY

## Introduction

* 1. Accomplice – one who assists/encourages the carrying out of a crime, but does not commit the actus reus
  2. Principal – one who commits the actus reus (with or without assistance)
  3. Aiding after the fact – no longer accomplice (used to be)
  4. Why is complicity a crime? – deterrence; moral culpability, catching the “big fish” via “little fish”
  5. General Rule
     1. Actus Reus: actual aid or encouragement
     2. Mens Rea: Intent to aid in commission of the crime (subject to elaboration/qualification)
  6. Principle: one who aids, abets, encourages or assists another to perform a crime will be liable for that crime

## Mens Rea Toward Conduct of Principal

* 1. Majority Rule: Purpose
     1. MPC 2.06(3)(a) – need purpose to further crime
        1. Pro: anything lower would be too heavy of a burden on society in terms of having to go after criminals and interfere with crimes
     2. ***Hicks v. United States* (SCOTUS 1983)** Tool: Acts or words of encouragement and abetting must have been used with the intention/purpose of encouraging and abetting. It is not enough that D intended to act or speak as he did. The presence of another person at the scene of a murder who does not assist in carrying out the murder is not sufficient to implicate that person as an accomplice in the absence of evidence of a prior agreement to render assistance in the crime. (If no prior agreement, no actual aid so also no actus reus.) Synopsis: D present while P shot and killed a man. Both rode off after shooting and jointly convicted of murder. D’s statement to victim prior to the shooting was too ambiguous to infer a prior conspiracy between co-defendants to kill the victim.
     3. ***State v. Gladstone* (Sup. Ct. of Washington 1970)** Tool: In order to be convicted of having aided and abetted a criminal offense, it must be shown that defendant did something in association or connection with the principal offender to accomplish the crime. AKA need to have purpose of attitude toward the crime/stake in the venture. Synopsis: D, who offered the name and address of local drug dealer to a prospective buyer, was convicted of aiding and abetting another individual in the unlawful sale of marijuana. Court found D did not have purpose of attitude toward the crime (sale of drugs).
  2. Minority Rule: Knowledge+ Approaches
     1. Pros: incentivize people to report; if you don’t do/say anything than facilitating crime; difficult to draw line between knowledge and purpose
     2. Knowledge is not rule anywhere – it’s knowledge + (in supplier cases see under conspiracy)
     3. MPC draft: knowledge plus substantial facilitation – later added purpose for final draft
     4. ***U.S. v. Fountain***: Posner (p. 669) – Should change the rule based on the seriousness of the underlying offense. Knowledge suffices if serious crime but need purpose if minor crime.
  3. Non-Complicity solutions by creating a separate crime: general and targeted facilitation statutes
     1. NY Penal Code – “believing it probable” (lower threshold than knowledge)
     2. E.g. selling handguns to juveniles, material support of terrorism, money laundering
     3. Let us focus on particularly serious crimes BUT it doesn’t distinguish between types of aid.

## **Mens Rea for Results**: Mens Rea for Result of Underlying Crime

* 1. ***Commonwealth v. Roebuck* (Sup. Ct. of PA 2011)** Tool: For accomplice liability, the accomplice must have specific intent (purpose) to further the underlying conduct committed by the principal, but for the result, he need only have the mens rea required for the result element of the substantive offense (underlying crime). Synopsis: D assisted in luring the victim to an apartment complex where the victim was shot and killed by another person. D appealed the ruling which found him guilty on the ground that accomplice liability required an intent element, and since third-degree murder is defined as an unintentional killing, accomplice liability could not attach to the crime.
  2. ***State v. McVay* (Sup. Ct. RI 1926)** Tool: A defendant may be charged as accessory before the fact even in manslaughter crimes where the resulting harm is not intentional.Synopsis: D counseled the captain and engineer of a steamer to continue transporting passengers even though he knew that the boiler was unsafe. Boiler exploded and several passengers were killed as a result. D charged as accomplice for involuntary manslaughter. D appealed saying he didn’t have purpose of boiler exploding. Court found that you just need mens rea of underlying crime for result.
  3. MPC 2.06(4) – Mens rea for result in accomplice liability is mens rea for result of underlying crime.

## Mens Rea for Attendant Circumstances

* 1. MPC doesn’t say anything. Courts are split.

1. Minority Expanded Liability Approach**: Luparello natural and probable consequences theory** 
   1. Natural and Probable Consequences Theory – accomplice is liable for all resulting crimes, not just ones they intended to occur if (1) the additional offenses are the natural and probable consequences of the conduct that D did intend to assist and (2) the principal committed the additional crimes in furtherance of the original criminal objective that D was trying to assist. Have to have mens rea for all elements for intended crime which is transferred to actual crimes. Don’t need mens rea for actual crimes.
   2. ***People v. Luparello* (CA Ct. of App. 4th Dis. 1987)** Tool: Foreseeable consequences doctrine – Pursuant to the policy that aiders and abettors should bear responsibility for the criminal offenses they have foreseeably put in motion, accomplice liability includes liability for all crimes committed by a co-conspirator rather than just the intended crimes.Synopsis: A friend who D sent to victim’s house to elicit information as to his former lover’s whereabouts shot and killed the victim when he refused to divulge the requested information. D was charged with murder as an accomplice, though he was not present at the murder scene. Court rules that D was guilty of murder as an accomplice.
   3. ***Roy v. United States* (DC Ct. App. 1995)** Tool: Foreseeable consequence doctrine – An accessory is liable for any criminal act which in the ordinary course of things was the natural and probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him. “Ordinary course of things” means what may reasonably ensue from planned events, not to what might conceivably happen, and in particular suggests the absence of intervening factors.Synopsis: D referred victim to illegally buy handgun from someone else who ended up committing armed robbery against victim. Court found that evidence was not sufficient to show that armed robbery was foreseeable consequence.
   4. MPC rejects this approach.
2. Actus Reus**: No But-For Cause Required** 
   1. Words may be enough, mere presence not sufficient (Hicks) or required
   2. Failure to intervene or speak out not sufficient but can be evidence
   3. Spectators as Accomplices/Mere encouragement is sufficient (encouragement requires principal to know by definition)
      1. ***Wilcox v. Jeffery* (Kings Bench Division 1951)** Tool: Aiding and abetting can be found through the mere encouragement of criminal activity. The encouragement does not have to be directly communicated to the person committing the criminal offense. (Note: Had mens rea – purpose of attitude – profited from it)Synopsis: The proprietor of Jazz Illustrated, was charged with aiding and abetting Hawkins in contravention of the Aliens Order of 1920, by failing to comply with a condition stating that Hawkins shall take no employment, paid or unpaid, while in the United Kingdom and shall not land in the country without the leave of an immigration officer.
      2. Pros/Cons
         1. Pros: deterrence
         2. Cons: not as morally culpable; difficult to get evidence
   4. Materiality of the Aid
      1. Traditional Approach **–** need actual aid, but not but-for cause (doesn’t need to be necessary), principal has to have actually committed offense (complete or attempted).
         1. ***State ex. Rel Attorney General v. Tally, Judge* (AL 1894)** Tool: In order to be found guilty of aiding and abetting, D’s acts must have been in preconcert or at least known by perpetrators in order for them to be incited, OR have aided or contributed to crime (does not need to pass but-for test). Synopsis: D prevented message from being sent that would have warned victim of perpetrators trying to kill him. Court found D guilty because he rendered it easier for the principle actors to accomplish their ends.
      2. MPC 2.06(3) – attempted aid is sufficient to establish accomplice liability if the principal committed an offense (completed or attempted). If the principal does not commit an offense (completed or attempted), actor is not liable for accomplice liability because he did not aid in commission of a crime. However, he can be liable for attempting to commit a crime (MPC 5.01(3)) or criminal conspiracy (MPC 5.03(1)(b)).

## Special Problems in the relationship between the liability of the parties

* 1. Feigning Accomplice – When P is innocent agent/non-culpable principal as agent (Hayes)
     1. ***State v. Hayes* (Sup. Ct. of MO 1891)** Tool: Acts of a feigned principal may not be imputed to the targeted D for the purpose of convicting him as an accomplice. Synopsis: D proposed to principal that they rob store. Principal knew owner and pretended to agree. D helped principal enter store but never entered himself.
        1. Is D (Hayes) guilty of burglary as a Principal? No – didn’t enter
        2. Is he guilty of burglary as an accomplice to Hill’s burglary? – No, Hill didn’t commit crime.
        3. Is D guilty of an attempt as an accomplice to Hill’s attempt?
           1. Traditional: no; Hill is not guilty of attempt, so no crime
           2. MPC: Yes – under MPC 5.01(3) can be guilty of attempt as an accomplice whether or not principle attempts or actually does commit crime with you.
        4. Is D himself guilty of attempted burglary based on his own acts?
           1. No – had actus reus (opened window), but no mens rea since no intent to go in himself and steal
  2. When P is acquitted on basis of defense.
     + 1. If P is acquitted on basis of justification defense in joint trial, no accomplice liability (but cf. Vaden)
          1. ***Vaden v. State* (Alaska 1989)** Tool: Acts of a feigned principal may be imputed to the targeted D for the purpose of convicting him as an accomplice in certain circumstances. (Seem to be treating public defense more as an excuse since they didn’t seem to approve of principal’s actions). Synopsis: D helped undercover agent illegally hunt. Agent illegally shot and killed animals but D did not do so directly. D says he can’t be accomplice because there was no crime (cf. ***Hayes***). Court says ***Hayes*** doesn’t apply because policy doesn’t transfer to accomplice and principal actually committed the crime. Dissent – not fair because undercover agent has complete control of what crimes committed.
       2. If P is acquitted on basis of excuse, accomplice liability unless D has the excuse as well.
  3. When P and A have different mental states
     1. Where P and A have different mens rea with regard to the same element, modern approach allows them to be convicted of different crimes (e.g. murder v. manslaughter). Still need to have necessary result.
  4. Cannot be accomplice if you are victim of offense (parent who pays ransom, people buying drugs not accomplice of drug sale, underage child having sex with adult) or conduct is inevitable incident to offense/logically requires second person.

## Withdrawal

* 1. Under MPC 2.06(6)(c), a person avoids accomplice liability if he stops participating before the underlying crime occurs and the either (1) wholly undoes the effect of his prior actions or else (2) makes an effort to thwart the crime, typically by warning the authorities.

# CONSPIRACY

## Substantive Offense of Conspiracy

* 1. Actus Reus (Interstate Circuit)
     1. Traditional – Agreement to commit a crime
     2. Non-Traditional (most jurisdictions now) – Agreement to commit a crime + overt act (by one co-conspirator is sufficient)
     3. Tacit Agreement
        1. ***Interstate Circuit, Inc. v. United States* (SCOTUS 1939)** Tool: Conspiracy may exist if there is no communication and no express agreement, provided that there is a tacit (implicit) agreement reached without communication. Synopsis: Film distributors were convicted of conspiring together with two movie theater chains to artificially control admission prices in violation of the Sherman Anti-Trust Act. All eight distributors received the same letter from movie theater chains that proposed business contracts that included conditions respecting the theaters in which the distributors would release their films. Although the eight distributors only communicated with the movie theaters and not each other, evidence of a conspiracy among the distributors could be inferred from the unanimity of the agreements with the theaters and the distributors’ knowledge that an absence of unanimity would result in potential profit-loss.
        2. Grey area and court specific, usually decided as a matter of law whether it could be an agreement.
  2. Mens Rea as to Conduct (commit crime): Purpose
     1. Need two or more persons who each intend to commit the crime (e.g. conspiracy with undercover agent is not sufficient)
     2. Don’t need to know each co-conspirator
     3. Only liable for substantive crime of conspiracy for what you agree to do (not for something your co-conspirator does that is different)
     4. Supplier
        1. Misdemeanor: Purpose – ***People v. Lauria* (CA Dis. Ct. of App. 1967)** Synopsis: D operated an answering service and knew that some of his customers were prostitutes who used the service to pick up calls from potential clients. Tool: A supplier becomes part of a criminal conspiracy when, knowing that his goods are being used for unlawful purposes, there is
           1. Direct evidence that he intends to participate in the furtherance of the crime, or
           2. Where an inference of intent can be drawn through either

His special interest in the activity/Stake in the venture or

Inflates prices or

No legitimate use of goods or services exist or

The volume of business with the buyer is grossly disproportionate to any legitimate demand, or when the greatest proportion of the supplier’s business comes from the unlawful use of his services.

* + - 1. Felony – knowledge has been sufficient
    1. Generally, there can be no conspiracy to commit a crime that is defined in terms of recklessly or negligently causing a particular result.
  1. Mens Rea as to Results (objective of crime): Purpose
  2. Mens Rea as Attendant Circumstances: ?

## Conspiracy as a theory of liability

* 1. Pinkerton: co-conspirator is liable for offenses committed by co-conspirators in furtherance of the conspiracy and reasonably foreseeable as a natural and probable consequence of the conspiracy even though they do not commit offense.
     1. ***Pinkerton v. United States* (SCOTUS 1946)** Tool: The criminal intent to do the unlawful act is established in the formation of the conspiracy itself. Unless D takes affirmative action to renounce his participation in the conspiracy, the conspiracy is continuous and covers the substantive offenses committed by the co-conspirator alone. Synopsis: Two brothers were convicted of violations of the IRC. D challenged his conviction for the substantive offenses on the basis that the evidence only showed he had been a party to a criminal conspiracy and only his brother committed the substantive offense. Court found D guilty because no evidence that D renounced himself
        1. Probably not accomplice under MPC but probably accomplice under Luparello.
        2. More extensive than accomplice liability and Luparello because liable for crimes by all co-conspirators and not just those crimes you helped out with.
        3. Luparello may be broader than Pinkerton – both require foreseeability but Pinkerton requires that it be in furtherance of conspiracy while Luparello doesn’t.
     2. Applications: Bridges, Alvarez
        1. ***State v. Bridges* (NJ 1993)** Tool: A co-conspirator may be liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy. Synopsis: D left party to get backup to fight someone. Friends brought guns. Someone hit friend. Friends started firing and killed onlooker. D convicted of conspiracy and murder even though D did not have mens rea for murder. Court found that it was reasonably foreseeably that someone would have been hurt or killed by bringing guns to party. (Probably could have also been found guilty under Luparello accomplice liability.)
        2. ***United States v. Alvarez* (11th Cir. 1985)** Tool: D is liable for reasonably foreseeable consequences of conspiracy if D had knowledge of circumstances that led to consequences and played more than a minor role in the conspiracy. Synopsis: Drug buy shootout occurred with agents resulting in a death. Ds held liable for death even though Ds were not involved in shooting. Court found that this was reasonable extension of Pinkerton because Ds were likely aware that (1) at least some would be carrying weapons and (2) deadly force would be used to protect their interests. All D’s had significant roles in the conspiracy and were aware of some circumstances leading to shootout.
     3. Limits on Pinkerton liability accepted by some jurisdictions: no liability if minor participant in the conspiracy or not aware of the circumstances that led to the specific offense (developed from footnote in ***Alvarez***).
  2. MPC – no Pinkerton, only accomplice liability

## Scope of the Conspiracy and Abandonment

* 1. Conspiracy remains in effect until its objectives have been achieved or abandoned. Statute of limitations begins to run when conspiracy terminates (not when agreement made).
  2. Abandonment/Withdrawal as a defense to the substantive charge of conspiracy
     1. Withdrawal: MPC 5.03(6) – thwarts the success of conspiracy
     2. Abandonment: MPC 5.03(7)(c) – individual abandons if he communicates abandonment to those with whom D conspired or informs police.
  3. Party who comes late – likely only liable for previous offenses if told about them and accepts them.
  4. Party who leaves early – likely liable for later acts if they are fairly within the confines of the conspiracy as existed at the time D was still presen.

## **Single or Multiple Conspiracies** (Kotteakos, Bruno, McDermott)

* 1. Drawing boundaries factors:
     1. Don’t need to know every member
     2. Don’t need to participate in every activity
     3. Have to have an awareness of the scope of the enterprise.
     4. Has to be community of interest among the parties (have to know that enterprise won’t be successful unless other people are out there)
  2. “Wheel” conspiracies
     1. ***Kotteakos v. United States* (SCOTUS 1946)** Tool: Need a common purpose to establish a common conspiracy. The mere use of the same agent in pursuing an unlawful enterprise is not sufficient. Synopsis: Government charged D’s as part of a single general conspiracy to obtain loans on false pretenses, even though they had no contact or knowledge of co-conspirators and were only connected to them through their use of a common individual to secure the fraudulently-induced loans. SCOTUS found this was not sufficient connection to establish on single conspiracy.
     2. ***Anderson v. Superior Court* (Cal. App. 2d 1947)** Tool: Need common purpose to be part of same conspiracy. Synopsis: D indicted for conspiracy to perform abortions because she was one of several people who in exchange for a fee, referred women to a doctor for abortions. The indictment alleged a conspiracy between D and not only the doctor but all the other referrers. D was also indicted for substantive offenses of abortions performed. Court ruled against D finding that D knew about abortions and that there was common purpose because needed everyone else to keep business alive.
  3. “Chain” conspiracies: Bruno, Borelli, McDermott
     1. General Rule: parties to a direct chain of distribution generally held to be part of one conspiracy; where there are multiple parties on one or other end (e.g. multiple retailers in a drug operation), courts are split on whether the retailers are included in one conspiracy or separate changes
     2. E.g. common purpose – U***nited States v. Bruno* (2d Cir. 1939)** Tool: Insomuch as each group could foresee the role the other would necessarily play in completing the illegal transaction, a single common conspiracy can be shown to have existed – even in the absence of evidence that all co-conspirators had had contact with each other at some point. Synopsis: Defendants contested the charge of a single common conspiracy since the smugglers had no contact with the retailers and the retailers had no contact with the smugglers. Court rules that there was one conspiracy because all had a common purpose, they are dependent on each other for the enterprise to work.
     3. E.g. no common purpose – ***United States v. Borelli* (2d Cir. 1964)** Tool: “Extreme links of the chain conspiracy may have elements of the spoke conspiracy.” May not make sense to consider a conspiracy a single one if it’s a long chain in which extreme ends of the chain have no idea what the other end is doing and when co-conspirators change over the course of years. Synopsis: Elaborate heroin importing and distributing operation. Court finds that not one conspiracy because actors in long chain may not have common purpose, and may actually be competing with one another.
     4. E.g. non common purpose – ***United States v. McDermott* (2d Cir. 2001)** Tool: An agreement to pass insider knowledge to others even if unknown is a basic element of a single conspiracy because need to have mutual purpose with members of the chain. Synopsis: Stock recommendations from an investment bank CEO were passed by his mistress to another man, Pompano, she was having an affair with. Court found that Government failed to show the most basic element of a single conspiracy – an agreement to pass insider information to mistress and possibly to another person, even if unknown. Therefore, D did have conspiracy with mistress but not with Gannon.

## Consequences of a Conspiracy Charge

* 1. Under Pinkerton, potential liability for substantive offenses of co-conspirators well beyond accomplice liability
  2. Hearsay exception for co-conspirators – admissions of co-conspirators can be used against other co-conspirators
  3. Joinder of trials – co-conspirators generally tried together; this can be complicated for the jury (hard for jury to not lump them all together)
  4. Punishment: substantive charge of conspiracy generally does not merge with underlying offense, and can get consecutive punishment for it
     1. MPC: if the conspiracy agreement and object offense the same (e.g. conspiracy to rob a bank and rob a bank), then they merge
     2. Federal Sentencing Guideline – can’t impose separate punishments for both the conspiracy and the completed object offense).
  5. Statute of Limitations: runs from when conspiracy terminates, not when any individual offense committed

## Rationale for Conspiracy Offense

* 1. Criminal and complex conspiracies hard to prosecute
  2. The more complex it is, harder to connect the dots to prosecute the kingpin.
  3. Group criminality is much more dangerous, need increased deterrence.
  4. Can prevent actual crime for occurring by getting criminals for conspiring

# LAW AND DISCRETION

## Substantive v. Procedural Criminal Law

* 1. Stuntz v. Carmen’s Theories
     1. Decisions can be less effective if public backlash
     2. Courts get ahead of popular opinion and spurn a lot of backlash
     3. If court hadn’t short circuited democratic process, might have had better example.
     4. Carmen – talks about this with death penalty
     5. Reinterpretation of Warren Court
     6. How much power do courts have as opposed to political processes
     7. Court usually follows popular sentiment
  2. Sentencing – discretion in the system, can move where it is in the system but can’t get rid of it completely
  3. Democracy – what is role of democracy? What is role of expertise?

## Police Discretion

* 1. Morales and Vagueness doctrine
     1. Vagueness doctrine – vagueness can invalidate law for two reasons (1) fails to provide notice and (2) leaves too much discretion (encourages arbitrary and discriminatory enforcement).
     2. ***City of Chicago v. Morales* (SCOTUS 1999)** Tool: A law that directly prohibited gangs from loitering would not violate the due process clause, however, where an ordinance either fails to provide notice as to what behavior is prohibited or authorizes arbitrary and discriminatory enforcement, it may be invalidated as unconstitutionally vague. Synopsis: The Illinois Supreme Court held that Chicago’s Gang Congregation Ordinance was unconstitutionally vague and the Supreme Court of the United States affirmed. Concurrence suggested language that would help (bottom p. 177) which was eventually adopted by city. Dissent – ordinance does not punish loitering but punished for not listening to police.
        1. Loitering defined vaguely – remaining in any one place with no apparent purpose
        2. Possible solutions? Require that it be danger to the peace; get rid of police discretion (have to arrest everyone)
        3. Should it matter if statute is popular? Maybe not if just constitutional issue; maybe if it is evidence that it is not discriminatory in enforcement.
  2. Localism
     1. Problem –Solving Approaches
        1. Community Courts
        2. Community Prosecution
        3. Restorative Justice: Victim-Offender Mediation; Sentencing Circles
  3. Race and Drug Enforcement
     1. Data on disparate impact
        1. Incarceration rates much higher for blacks and Hispanics although rates of drug use not that different with whites.
        2. Crack v. powder punishment disparity
        3. Stuntz – not conscious bias. Minorities tend to have more street drug transactions so easier to go after that. Also, cities tend to have more focus by police.
     2. Potential Reforms
        1. DOJ has been less aggressive about prosecuting low level crimes
        2. Drug crime sentencing levels have been dropped by two levels
        3. Focus on drug treatment courts
        4. Fair sentencing act of 2010 reduced the disparity between federal penalties for crack cocaine and powder cocaine from a 100:1 ratio to an 18:1 ratio. It also eliminated the mandatory 5-year minimum for simple possession.
        5. Stuntz argues for reverse stings – prosecute buyers as opposed to sellers (this has not been taken up)
        6. Implicit bias training for judges and juries
        7. Stuntz – let high crime communities make their own decisions on enforcement since crime affects them and many people pulled out of communities

## Charging and Plea Bargaining

* 1. The Decision not to charge (Attica)
     1. Federal charges have greater penalties.
     2. Decision not to charge a particular D is essentially protected from judicial review.
     3. ***Inmates of Attica Correctional Facility v. Rockefeller* (2d Cir. 1973)** Tool: Prosecutors cannot be compelled by the courts to investigate and initiate criminal prosecutions. Rationale – no precedent; separation of powers; no statutory standards to base review on; no records to review (often decision based on lack of evidence); judiciary not in position to prioritize cases and determine availability of resources to prosecute. Synopsis: A civil suit was filed against New York State officials and the local U.S. Attorney by a mother of a deceased former inmate and several other inmates of the New York’s Attica Correctional Facility, after the inmate uprising at the prison in 1971. Officials accused of unnecessarily killing some inmates, beating inmates and refusing them medical assistance. P’s wanted mandamus to force government to prosecute officials.
  2. The Decision to Charge
     1. Selective Prosecution (Armstrong)
        1. ***United States v. Armstrong* (SCOTUS 1996)** Tool: Requirements of a selective-prosecution claim: Demonstrate that federal prosecutorial strategy had a discriminatory effect AND that it was motivated by a discriminatory purpose (***McClesky***). To establish discriminatory effect in race case, must show that similarly situated individuals of a different race were not prosecuted. Synopsis: D indicted on charges of conspiring to possess with intent to distribute more than 50 grams of crack and federal firearms offenses. D filed motion to dismiss or to discover alleging they were selected for prosecution because they are black while white defendants are being pushed to state courts. Court said D needs to show white defendants similarly situated that were not prosecuted. But this is what D wants discovery for. (In civil case, D would have had enough to establish PF.)
           1. Court harps on prosecutorial discretion.
     2. Exercising Discretion (Pretextual prosecution; ABA factors)
        1. The existence of discretion – prosecutors can only file criminal charges when they can establish probable cause and usually the prosecutor will file charges only when there is legally admissible evidence sufficient to prove guilt beyond a reasonable doubt. Even when there is evidence that prosecutors believe shows guilt beyond a reasonable doubt, they still often choose not to pursue all legally sustainable charges: (1) limited available enforcement resources; (2) the need to individualize justice; (3) overcriminalization.
        2. Pretextual prosecution E.g. Al Capone – federal prosecutors got Al Capone for tax evasion and gave him long sentence for it.
        3. ABA Guidelines – strength of the evidence, the harm caused, the possible disproportion between the authorized punishment and the gravity of a particular crime, the defendant’s willingness to cooperate in the prosecution of others, and the likelihood of prosecution in another jurisdiction.
        4. Proposed revisions to ABA standards are collateral impact to third parties, offenders’ character, offenders’ situation, and changes in the larger cultural context including whether statute has fallen into desuetude.
        5. Cases we’ve discussed where prosecutors may have gone too far. E.g. ***Williams*** (native American); ***Martin*** (drunk and forced outside his home by police); ***Wilcox*** (jazz magazine)
     3. Actual and Potential forms of accountability for prosecutors
        1. U.S. Attorneys Manual
        2. Keep a record
        3. Review by supervisor
        4. Internal/External Committee Review
        5. Outside Judicial Review
        6. Juries can nullify – serves as a check
        7. Grand jury – prosecutor presents evidence and determines whether there is probable cause to go forward
        8. Use recidivism data
        9. Community prosecution
        10. Europe – “mandatory” prosecution (have lower sentences)
        11. “Private” prosecution – have victims have a say in prosecution
     4. Vindictive Prosecution (Bordenkircher)
        1. ***Bordenkircher v. Hayes* (SCOTUS 1978)** Tool: It is not vindictive to threaten a stiffer sentence in trying to negotiate plea deal. Plea bargaining has an important role in the judicial system and has been accepted by all courts. You can’t discriminate or threaten with an unfounded charge. However, you can increase charge as part of plea bargaining process. Synopsis: Hayes was indicted on charges of forgery (2-10 years in prison). He and his counsel met with the prosecutor who offered a lesser sentence (5 years) if he pled guilty. Hayes decided not to plead guilty and the prosecutor asked that he be tried under the Kentucky Habitual Criminal Act. Hayes was found guilty and sentenced to life as a habitual offender. He appealed from this judgment.
        2. What is baseline?
           1. Plea deal – increased sentence for going to trial is seen as vindictive.
           2. Minimum sentence – D gets big windfall.
  3. Limits on Prosecutorial Discretion
     1. Decision not to charge a particular D: essentially protected from judicial review (Attica)
     2. Selective Prosecution: equal protection violation to base charging decision on race, sex, religion, or other arbitrary classification. Very difficult to prove. (Armstrong)
     3. Vindictive prosecution (Bordenkircher): can’t threaten to lodge an unfounded charge; can’t punish a defendant for a successful appeal but CAN increase charge as part of plea bargaining process
     4. Other checks: grand jury/prelim. hearing (probable cause); trial: sufficiency of the evidence for judge; BRD for jury; political controls (election, political appointments); administrative controls (internal guidelines, internal review)
  4. Plea Bargaining (Brady; policy debate)
     1. Data: trial penalty 2-3 times longer than plea deals
     2. Requirements: plea has to be voluntary (does not result from threats or promises other than those involved in any plea agreement) and agreed to knowingly and intelligently (have to be advised by counsel; need to be told of general sentencing range; don’t need to know precise guidelines).
     3. Brady: promise of lower sentence, including avoidance of death penalty for plea bargain not coercive
        1. ***Brady v. United States* (SCOTUS 1970)** Tool: Waivers of constitutional rights (in this case the right to a trial before a jury) must be (1) voluntary and (2) intelligently made with sufficient awareness of the relevant circumstances and likely consequences. A guilty plea to be valid, must be the product of a knowing and intelligent choice, and it must be voluntary. It is not involuntary and invalid just because it was motivated by D’s desire to accept a lesser penalty rather than face a wider range of possible penalties. It is involuntary if induced by threats (other than those involved in plea agreement) or misrepresentation or improper promises. It is intelligently made if advised by proper counsel, made aware of the nature of the charge (must know maximum sentence exposure and direct consequences) and no evidence indicates D was incompetent. Synopsis: D pleaded guilty to kidnapping to avoid jury trial that could impose death penalty. D wants to retract plea agreement saying he agreed to it involuntarily.
     4. Bargaining Theory – plea bargaining is advantageous to both parties
        1. Pros of plea bargaining for D
           1. Avoid potentially much worse sentence
           2. Can negotiate for things that are particularly important to you (can request leniency for family members)
           3. Trial can be burdensome for D (cost and embarrassment)
           4. Faster, more conducive to rehabilitation
        2. Pros of plea bargaining for prosecutor
           1. Cost/Time effective and can prosecute more people because opens up more resources
           2. Good conviction rate
           3. Get cooperation
           4. Shows remorse
     5. Cons of Plea Bargaining
        1. Prosecutor could be motivated for wrong reasons (less work, good conviction rate)
        2. Prosecutors might be too lenient/harsh
        3. Unequal bargaining power
        4. Unequal information
        5. Prosecutors’ interest may not line up with society’s interests
        6. Defense attorneys interests aren’t always lined up with client’s interests
        7. Process seems under the table and corrupt
        8. It really wouldn’t take that much more resources and society would not say no to a new hospital or school because it was too burdensome
        9. How is it fair that one D gets lower sentence than D in similar situation just because he pleaded guilty while the other was found guilty in trial? Pleading guilty when lighter sentence is incentive is not show of remorse.
        10. Bigger fish in a criminal negotiation are in position to benefit from this the most because they know of lots of other criminal activity.
     6. Potential Reforms
        1. Requiring it on the record in front of a judge
        2. Grand juries should have to approve pleas
        3. Statistical Analysis review
        4. Similar with charging decisions
        5. Prosecutor has to do some investigation
        6. Philadelphia – promise lower sentence if you go to judge instead of jury

## Juries and Alternative Inquisitorial Systems

* 1. Basic Doctrine
     1. Right to jury trial (6th am): Duncan/Baldwin: right to jury trial for “serious” offenses, i.e. offenses where imprisonment for more than 6months authorized.
        1. Need individualized charge for more than 6 months
        2. Jurisdictions differ on right to waive jury trial by D, sometimes prosecutor has to agree or judge can require it against both parties will
     2. Size: jury as small as 6 people upheld (Williams); 5 people too small (Ballew).
        1. Only 6 states allow less than 12 for felony trials
     3. Unanimity: Apodeca: upholds convictions of 11-1 and 10-2. But federal system and most states do require unanimity.
  2. Three Questions:
     1. Is jury trial preferable to judge trials?
        1. Pros
           1. Representativeness
           2. More heads better than one – promotes deliberations which will more likely lead to the right answer.
           3. Easier for society to accept decision by 12 people rather than 1.
           4. Society feels more invested in criminal justice system
           5. Competence: jury as a group had wisdom and strength; makes up in common sense and common experience what it may lack in professional training; inexperience provides fresh perception.
           6. Will not follow law: jury ensures that we are governed by spirit of the law and not letter of the law.
        2. Cons
           1. Evidence of bias/discrimination in jury decisions
           2. Expertise – Cases can be too complex and long for juries e.g. white collar crime
           3. Collateral Damage: Expensive; Unfair tax and social cost on those forced to serve; Exposure to jury duty disenchants the citizen and causes him to lose confidence in the administration of justice.
           4. Jurors not typically representative
           5. Jurors may be swayed by emotional factors
           6. Will not follow the law: doesn’t understand the law and/or doesn’t like the law which will result in unequal administration of justice.
     2. How should jurors be chosen?
        1. Can get rid of jurors for cause
        2. Preemptory challenges
           1. Batson: prohibits using preemptories based on race, sex but anything else goes
        3. Requirements of representation at the petit jury level? Panel has to be representative but the petit jury does not.
           1. Pros

Community sense of what is reasonable taken into account.

Increases legitimacy of system

* + - * 1. Cons

How specific do you need to get?

Assumes sense of racial kinship.

* + 1. Nullification (Dougherty; race-based nullification?)
       1. Juries have power but not right to nullify.
       2. Lawyers/judges can’t tell them they have power to nullify.
          1. ***United States v. Dougherty* (US Court of Appeals, DC 1972)** Tool: A judge presiding in a criminal case is not required to instruct the jury on the issue of jury nullification or allow defense counsel to argue the issue in front of the jury. Synopsis: The Appellants argued that the judge improperly refused to instruct the jury on the issue of jury nullification and barred defense counsel from arguing that issue to the jury.
       3. Pros/Cons
          1. Pros

Don’t want to sacrifice individual

Law may be good but sentence is not proportionate

Can send signal to legislator to change the law

* + - * 1. Cons

Will change the law going forward

Gives legislators a “pass” by putting it on jury to overrule bad laws

Assumes jury represents community values

Mock juries more prone to discuss characteristics of defendant when given nullification instructions.

What if jury nullification instructions result in jury convicting D? Courts generally reject challenges to instructions in these circumstances because judges retain power to enter a judgment of acquittal in situations where a jury nullifies by convicting in the absence of evidence sufficient to establish a violation of preexisting criminal law.

* + - 1. Racial nullification
         1. Butler

Black jurors should take the following steps:

In violent crimes, take evidence as presented.

For non-violent crimes, consider nullification but with no presumption in favor of it.

For victimless crimes, have presumption in favor of nullification.

Black jurors should take the above steps because taking blacks out of their communities is hurting them. More law enforcement is not always better.

* + - * 1. Randall

Jury nullification is a poor means of advancing the goal of a racially fair administration of criminal law.

Low visibility and highly ambiguous so won’t focus public on need for reform.

Proclivity of blacks to nullify may give rises to measures to exclude blacks from juries.

Law-abiding blacks want to be safe in their communities

Butler is calling for more racism by promoting that blacks only help blacks

* 1. Comparison to Inquisitorial system
     1. Competing goals of criminal justice systems [how they play out in French trial]:
        1. Accuracy in deciding guilt
           1. [re-enactment; require trial for serious offense]
        2. Efficiency
           1. [Require trial for serious offense even when clear D not guilty; not guilty plea allowed; one day trial, do a lot of prep work beforehand]
        3. Fairness to Defendant/due process/respect for defendant autonomy
           1. [investigate D without lawyer present; lawyers don’t ask a lot of questions, take back seat]
        4. Fairness to Victims
           1. [Civil claims tried right after for damages to victim]
        5. Legitimacy
           1. [Judges go into room with jurors to make decision; judges call expert witnesses]
        6. Determination of just penalty based on retributive and utilitarian concerns

## **Sentencing**: Discretionary v. Determinate Sentencing Schemes; 8th Amendment substantive limits

* 1. Issues
     1. Discretionary v. Determinative
     2. Focusing on punishing offense v. offender
     3. Who should make decisions – legislators, judges, sentencing commissions prosecutors, parole/probation officials
     4. Is it matter of scientific expertise v. democratic popular decision making
  2. Procedures (Guidelines, Apprendi, Booker)
     1. History
        1. Determinate sentences for many crimes (automatic punishments for offense)
        2. Progressive era of rise of discretionary schemes – focus on rehabilitation and person. Statutes had broad ranges. Up to judge to decide sentence within broad range.
        3. 80’s/90’s – concerns about discrimination so move to determinate sentences (sentencing guidelines and narrow ranges of penalties so that judge had less discretion.
     2. Sentencing Guidelines
        1. Goal: Getting rid of inconsistency and not necessarily utilizing expertise. Looked at what sentences were and tried to regularize them.
           1. Exception: believed white collar crime had been under-punished so they increased penalties
           2. Reduced racial disparities somewhat but not much (e.g. crack v. cocaine)
        2. Pros/Cons of determinative scheme
           1. Pros

Visibility/transparency

D is given information on which to decide whether he should accept plea bargain or not.

Legislators best to decide sentencing because democratically elected.

* + - * 1. Cons

Discretion shifts to prosecutors which means it’s behind closed door

Visibility/transparency can be dangerous because there may be political pressure to increase minimums taking into account budgetary constraints.

No system can take into account all factors. Hard factors – drug quantities, money stolen – are easy to quantify. Soft factors – previous community involvement, temper, etc.

* + - 1. Judge is supposed to consider relevant conduct – acquitted conduct (jury found beyond reasonable doubt not guilty but doesn’t mean your innocent – very controversial) and previous offenses.
         1. Using relevant conduct was attempt by sentencing commission to counter prosecutions discretion in just charging for some offenses and not all. Problem was that prosecutor would charge for one thing, and judge would add all these “relevant” factors and give much greater sentence (tail wagging the dog phenomenon).
    1. Apprendi Revolution
       1. Apprendi: Held that any fact that increases the penalty beyond the statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt.
       2. Facts in Apprendi: Statutory sentence of 5-10 years. But sentenced to 12 years based on a hate crime enhancement.
       3. Blakely: overturned Wash. State guidelines
       4. After Booker, sentencing court “shall consider” certain factors, including the guidelines range. Final sentence can be reviewed on appeal for unreasonableness.
       5. Many judges today still follow guidelines. Judges have departed a lot in certain types of cases. E.g. drug cases.
  1. Substantive Limits (Ewing, Graham, Miller)
     1. **Case-by-Case Approach** – Ewing: upholds California 3-strikes law.
        1. ***Ewing v. California* (SCOTUS 2003)** Tool: California’s three strikes law does not violate the Eighth Amendment’s ban on cruel and unusual punishments, which prohibits sentences that are disproportionate to the crime committed. Synopsis: A defendant with an extensive criminal past was sentenced 25 years to life after stealing golf clubs.
        2. Term of years test for non-capital cases (ad-hoc/case-by-case approach): 1. Threshold--gross disproportionality between gravity of offense and harshness of penalty. 2. Compare challenged sentence with sentences for similar crimes in same state, for same crime in other states
        3. Dissent: In #1, shouldn’t consider past history of offender as majority does.
     2. **Categorical Approach** – Graham: Life without Parole (LWOP) for juvenile for non-homicide offense unconstitutional
        1. ***Graham v. Florida* (SCOTUS 2010)** Tool: A sentence of life imprisonment without parole, meted out on a minor for a non-homicidal offense is unconstitutional Synopsis: Graham (D), a 17 years old was arrested for a home invasion and attempted robbery while he was on probation for attempted robbery. He was sentenced to life imprison without the possibility of parole after he was found guilty.
        2. Categorical approach: 1. objective indicia of society’s standards 2. independent judgment
           1. #1 – Although there are jurisdictions with statutes that allow LWOP, they are not usually imposed
           2. #2 – Rely heavily on Roper how juveniles are different from adults – juveniles more likely to change and less culpable because less mature.
        3. Concurrence: adopt case by case approach just like Ewing. If you apply case by case approach, it is disproportionate.
        4. Dissent: This is big expansion of 8th amendment into non capital offense. Should be up to legislature.
     3. Miller: mandatory LWOP for juveniles, even for homicide offenses, unconstitutional
        1. ***Miller v. Alabama* (SCOTUS 2012)** Tool: Mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on cruel and unusual punishments (even if homicide). Synopsis: 14-year-old sentenced to life without parole for murder.
        2. LWOP isn’t death but it’s close to death
        3. Dissent: Not following categorical approach – what happened to non objective indicia? Just using independent judgment because a life sentence for murder is not unusual.
        4. Narrow reading – as long as LWOP not mandatory, it’s okay.
        5. Broad reading – LWOP is like death so suggests not okay even if not mandatory
        6. Very broad reading – LWOP is like death penalty even for non-youth offenders.
     4. **Broad Discretion**
        1. ***United States v. Gementera* (9th Cir. 2004)** Tool: District Courts have broad discretion in sentencing conditions. Conditions allowed when reasonably related to legitimate statutory purposes of deterrence, protection of the public and rehabilitation. Synopsis: Gementera (D) pleaded that the Government had violated the Sentencing Reform Act by requiring him to wear a sign specifying his crime in a public place for 8 hours as part of the required 100 hours of public service. D argued this was humiliation. P argued it served legitimate statutory purpose of deterrence.
        2. ***U.S. v. Bernard Madoff* (SDNY District Court 2009)** Tool: Symbolism is factor considered in sentencing. Synopsis: Judge sentenced Madoff to 150 years although life expectancy was only another 12 years due to symbolism, which is important in this case for retribution, deterrence, and the victims.

# REASONABLENESS AND INDIVIDUALIZATION

1. **Possible Cases:** Williams (Native American’s baby), Casassa (creepy guy that got dumped), Rusk (took guy home and was raped), Goetz (subway), White (killed boy going after son), Norman (sleeping batterer)
2. **Potential ways to individualize:** objective reasonable person; physical attributes; intelligence and education; past experiences; attitudes and beliefs; temperament and psychological profile (including syndrome)