

Crim Outline

Punishment

- **Necessity**

Actus Reus

- **Excuses**

Mens Rea

- **Duress**

Homicide

- **Insanity**

- **Intentional Homicide**
- **Unintentional Homicide**
- **Felony Murder**
- **Capital Murder (Policy)**

- **Infancy**

- **Intoxication**

Attempt

Accomplice Liability

Rape

Conspiracy

Defenses

Discretion

- **Justifications**
 - **Self-Defense**
 - **Person (self)**
 - **Others**
 - **Property**
 - **Habitation**

- **Police (Vagueness)**
- **Prosecutor**
 - **Charging**
 - **Plea Bargaining**
- **Judge**
 - **Sentencing**

General Stuff:

Nature of an offense depends on three elements:

1. Voluntary act (Actus Reus)
2. Δ's state of mind (Mens Rea)
3. Result Caused

Dual Sovereignty: One can be prosecuted simultaneously for the same behavior on the federal and state level.

Justification: Not morally wrong

Excuse: Morally wrong but acquittal granted (kind of, see insanity defense)

Punishment:

Retributivism: A wrong is done and punishment is deserved (Justice!)

Utilitarian: Maximize utility

- Deterrence (optimal not maximum)
 - General (Punish you to deter others)
 - Specific (Punish you to deter you)
 - Expressive (Littering)
- Rehabilitation
- Incapacitation (remove from society)

Actus Reus:

MPC § 2.01(1): liability is based on conduct that includes (not every act/element need be voluntary) a voluntary act.

Two types of duties considered in Omissions (MPC 2.01(3)):

1. Specific Statutory Duty (SSD)
2. General Legal Duty (GLD)
 - a. Statute (not SSD) (e.g. Good Samaritan law creates duty for use in other crimes)
 - b. Status (e.g. parents, de facto family, master to apprentice, etc.)
 - c. Contract (e.g. Daycares, schools, etc.)
 - d. Assumption of Care/Seclusion
 - e. Peril (when you put someone else in peril you have a duty to get them out)

Omission itself is not a crime, the crime is a breach of a legal (whether general or statute specific) duty.

Mens Rea:

Four Categories of Mens Rea (culpability):

1. Purpose (Intent)
 - a. Conduct, result: *conscious object* to engage in that conduct or to cause that result
 - b. Attendant circumstances: aware of the existence of such circumstances or believes/hopes that they exist
2. Knowledge (Aware in fact/High Probability)

- a. Conduct, attendant circumstance: aware that conduct is of that nature or that such circumstances exist
- b. Result: aware that it is practically certain that this conduct will cause the result
- 3. Recklessness: (Aware of risk – Conscious disregard regard of substantial risk)
 - a. Consciously disregards a *substantial* and *unjustified* risk that the material element exists or will result from the conduct
 - b. Risk of such a nature/degree that, under the circumstances known to the Δ, its disregard is a *gross deviation from the standard of conduct* of a law-abiding person
- 4. Negligence: (Should have been aware of risk – Gross deviation from a standard of care)
 - a. Should be aware of a substantial an unjustifiable risk that the material element exists or will result from the conduct
 - b. Risk of such a nature/degree that the failure to perceive it, under the circumstances know to the Δ, involves a gross deviation from the standard of care of a reasonable person

These are applied to:

The Three “Material Elements” of an Offense

1. Conduct (enters, breaks, kidnaps, kill)
2. Attendant Circumstances (at night, under 21, worth more that \$1000)
3. Result of Conduct (death)

Majority Rule – Knowledge and willful blindness (MPC § 2.02(7) – *Jewell*):

1. Δ must be subjectively aware of the a high probability of illegal conduct and
2. Δ purposefully contrived to avoid learning of illegal conduct

Strict Liability:

Applying Mens Rea to a statute:

- MPC:
 - If there is no Mens Rea, apply recklessness
 - If there is only a Mens Rea with regard to one element, apply it to all
- Real World:
 - If there is only a Mens Rea regarding one element, look to precedent
 - If there is no Mens Rea, perform “Public Welfare” Test
 - Public Welfare Test Factors:
 - Requiring mens rea will kill prosecutorial ability
 - Inherently wrong v. wrong as a matter of law
 - Degree of penalty – Misdemeanor v. felony? (*Staples*)
 - Usually an omission or negligence
 - Δ could avoid liability through ordinary care
 - Affecter in better position prevent than Effected to avoid
 - Risk of harm v. direct and immediate injury
 - Responsible relationship to the situation (CEO v. CFO?)
 - Impossibility defense is impossible: “I did everything I could possibly have done to prevent this.” (good luck)
 - If it comes out Common Law: Mens rea intact, look to precedent
 - If it comes out Public Welfare: Strict Liability

Strict Liability (excluding public welfare offenses):

- Canadian approach:
 - Unconstitutional to imprison based on strict liability
 - Δ can rebut public welfare offense by showing he took reasonable care
 - Strict liability only where legislature has made it clear
- NO strict liability in the MPC

Responsible Corporate Officer Doctrine (*U.S. v. Park*) – Vicarious liability extends to those corporate officers responsible for or with authority to prevent or correct the prohibited condition unless defendant was “powerless” to do so. (“[D]oes not require that which is objectively impossible.”)

Homicide:

Intentional Homicide:

Exam Analysis of Homicide:

- Is it 1st or 2d degree?
 - Premeditation?
 - *Carroll v Guthrie*; just intent v time to reflect
 - Then 1st Degree
 - No Premeditation? Was their provocation (reduced to Manslaughter)?
 - *Giouard v. Maher*; Set categories v. reasonable jury
 - Then Voluntary Manslaughter
 - E.E.D. Jurisdiction? (MPC)
 - *Casassa* – Actual distress and reasonable distress under circumstances
 - Then Voluntary Manslaughter
 - No Provocation? No E.E.D.? Then 2d degree.

First Degree Murder:

- Premeditation requirement
 - PA (*Carroll*) Approach: Premeditation just means conscious purpose to bring about death
 - WV, CA (*Guthrie, Anderson*) Approach: Premeditation requires time to reflect
 - Carroll-Guthrie form split in American Jurisdictions. Carroll says intent *is* premeditation, Guthrie says there must be a reflection time for premeditation. Intent *is not* equal.

Voluntary Manslaughter (Mitigated Intentional Homicide): Provocation (Common Law)

- Provocation:
 - Actual provocation (subjective) and;
 - Of the kind that might cause a reasonable person to lose control (objective)
- Requirements for Provocation
 - *Girouard v. Maher*
 - *Girouard*: provocation is restricted to a set list of categories
 - Serious assault or battery; mutual combat; illegal arrest; injury or abuse of a close relative; discovery of spouse’s adultery
 - *Maher*: If judge thinks jury could find provocation sufficient, jury decides

- No cooling time (diminishes the claim of killing in the “heat of passion”)
- Victim must be the provoker (some jurisdictions)
- Δ was not the source of the provoking circumstances (start the fight, etc.)

Unintentional Homicide:

Exam Analysis of Unintentional Homicide:

Involuntary Manslaughter UNLESS:

- Felony Murder?
 - Yes? Kicks up to 2d degree
- No? Extreme recklessness?
 - Yes? Depraved Heart Murder/MPC Extreme Indifference – 2d Degree
- No? MPC? Mens rea of Negligence?
 - Negligent Homicide
- No? Back to Involuntary Manslaughter

Depraved Heart Murder:

- Extreme recklessness satisfies “wickedness” (*Malone*)
- MPC 210.2(1)(b): Extreme indifference to the value of human life (*Fleming/MPC*)
- Come out the same way – Mens rea of extreme recklessness: risk of causing death very great, and justification for taking the risk is weak or nonexistent

Involuntary Manslaughter (Unintentional Homicide):

Requires recklessness or gross (criminal) negligence; negligence is not enough!

- Wanton and reckless conduct posing high degree of likelihood of injury to another (*Welansky*); or
- Gross deviation from the standard of care that a reasonable, law-abiding person would have observed
 - When determining whether one consciously disregarded a substantial risk, consider subjective qualities about the Δ. For example, trainer ski racer in *Hall* knew that skiing at high speed constituted a substantial risk.

~Misdemeanor Manslaughter~

In many states a misdemeanor resulting in death can provide a basis for an involuntary manslaughter conviction w/o proof of recklessness or negligence.

- Misdemeanor must proximately cause the death
- Some courts hold that the misdemeanor must not be a regulatory offense (i.e., not a *malum prohibitum* misdemeanor)
- Some courts restrict doctrine to misdemeanors that rise to the level of criminal negligence or to violations that “evinced a marked disregard for the safety of others.”

Negligent Homicide (*Williams*) (MPC only):

- Mens Rea of Negligence
- Failure to act (omission) is a sufficient actus reus

Felony Murder:

Exam Analysis of Felony Murder:

Does Felony Murder attach?

- Was the conduct that caused the killing in furtherance of the felony?
 - No? Felony murder does not attach
- Yes? Is the felony enumerated?
 - Yes? Go to merger
- No? Was the felony inherently dangerous?
 - *Hines* – Dangerous as committed
 - *Phillips* – Dangerous in the abstract
 - No? Felony murder does not attach
 - Yes? Is the killing subsumed (merge with) by the felony?
 - *Burton* – Independent felonious purpose
 - *Chun/Farley* – Non-enumerated and assaultive in nature
 - No? Don't Merge.
 - Yes? Merge!

Killing not the result of conduct “in Furtherance of the Felony”

1. Lethal acts after the commission of the felony
2. Lethal acts unrelated to the felony
3. Lethal acts by persons resisting the felony/against felons
 - a. Agency Theory (who did the killing?) (*Canola*)
 - b. Proximate Cause (was death reasonably foreseeable given the nature of the crime?)
 - c. Identity of the Victim (Proximate Cause but doesn't attach if victim is felon)

Inherently Dangerous Felony Limitation (Most Jurisdictions)

- Use for felonies not enumerated (If enumerated felony murder automatically attaches)
- Majority View (*Hines* rule)
 - Is the felony dangerous as committed (per se)?
 - Yes: Felony Murder attaches
 - No: Felony Murder does not attach
- Minority View (*Phillips* Rule)
 - Is there anyway to commit this felony in a non-dangerous way (dangerous in the abstract)?
 - Yes: Not inherently dangerous, felony murder does not attach
 - No: Inherently dangerous, felony murder attaches

The Merger Doctrine (Merge DEATH into FELONY *not* the other way around)

- Majority View (*Burton*) – Enumerated and non-enumerated felonies
 - Independent felonious purpose? (Was the felony NOT an integral part of the homicide? Was the felony NOT nested – included in fact - within the murder?)
 - Yes: No merging
 - No: Merge!
- Minority View (*Chun/Farley*)
 - Enumerated Felony?
 - Yes: No merging

- No: Is it “assaultive” (felony threatens of immediate violent injury) in nature?
 - Is *any* element assaultive (child abuse – assault/neglect)
 - Yes: Merge!
 - No: No merging

*Felony murder can bump up depraved heart murder to 1st degree and manslaughter to 2d degree

Capital Murder:

- I. Death penalty struck down as “arbitrary and capricious” (*Furman*)
 - a. Backlash from states creates a slew of new capital punishment laws
- II. Channeled Discretion (*Gregg*): Bifurcated Sentencing and Guilt determination
- III. Individualized sentencing (*Woodson/Lockett*): Mandatory sentence struck down
 - a. Any mitigating factors can be considered, and of them can commute sentence.
 - b. Seems to be indirect conflict with arbitrary and capricious (from *Furman*)
 - i. Scalia: Mandatory sentencing
 - ii. Blackmun: No more death penalty
- IV. Race defense claimed on equal protection and 8th amendment grounds is rejected (*McCleskey*)
- V. Limits for specific Offenses and Offenders:
 - a. Offenses: Rape (*Coker*); Rape of a child (*Kennedy*); Felony Murder – Permitted only if Δ was “major participation in the felony” and showed “reckless indifference to human life” (*Tison*)
 - b. Mental Handicapped Offenders (*Atkins*)
 - c. Juvenile Offenders (*Roper*)
 - i. 8th Amendment Standard:
 1. Objective indicia of society’s standards
 2. Exercise own independent judgment on disproportionance
 3. Practices of other countries – instructive only

Rape:

Actus Reus	Mens Rea
Force/physical resistance required (Rusk)	Knowledge (ICTY) or recklessness (AK, UK)
Lack of consent, no physical resistance required (e.g. Mass)	Negligence: reasonable mistake of fact defense permitted
Affirmative consent (MTS)	Strict liability (i.e., no reasonable mistake of fact permitted)

Actus Reus:

Rape:

1. Penetration
2. Force or threat of force
3. Without consent

Force Requirement:

- *Rusk* Rule (Traditional Approach): Reasonable physical resistance or reasonable fear of physical harm that prevents resistance is required to show use of force.

- *MTS Rule* (Major Revised Approach): Lack of affirmative consent by words or actions (that a reasonable person would understand) is required to show force.
 - Force is just penetration; without affirmative consent any penetration is rape
- Other Opions:
 - Only verbal resistance is required (No means no)
 - Affirmative *verbal* consent (Antioch Rule)

Non-Physical Threat Approaches:

- Majority View (*Thompson/Mlinarich*): No rape (force requirement not met) for non-physical threats
- MPC (unimportant): Force requirement met if threat would prevent resistance from woman of ordinary resolution
- Minority View: Crime where consent obtained through duress, coercion, extortion, or using position of authority

Threat v. Offer: (MPC)

- Threat: A right will be taken if one does not do X (High school girl?)
- Offer: A non-right will be taken if one does not do X (Widow)
 - Right here means entitlement

Mens Rea:

Mens Rea doesn't come up in forcible rape; mens rea is obvious. The bottom line for mens rea is, is there a mistake of fact defense?

Rape Mens Rea:

- Majority Approach: Equivalent to negligence, M of F based on reasonableness standard.
- Minority Approach: No M of F – Strict liability-ish (“ish” because reasonableness may be inherent in Actus Reus)
- Other Approaches:
 - England/Alaska: Recklessness
 - ICTY (*Bulgaria*): Knowledge

Rape Shield:

Normally evidence is permissible if it is relevant (probative) – Low bar.

Balance prejudicial and probative aspect of evidence: if more prejudicial than probative, exclude.

FRE 412: Evidence of other sexual acts/predisposition is inadmissible except:

- Evidence of sexual behavior offered to show alternative source of semen, injury, or other physical evidence
- Evidence of past sexual activity with Δ to prove consent
- Evidence the exclusion of which violates Δ 's constitutional rights (i.e. confrontation clause, due process)

Defenses – Justifications and Excuses:

Self-Defense:

Defense of Person

Imminent danger requirement: Inevitable harm is not the same as imminent harm.

Imperfect self-defense: Honest but not reasonable belief of danger reduces sentence, no acquittal.

Self-Defense Basic Requirements:

Δ honestly and reasonably believes...

- Imminent Threat
- Seriousness of Threat: (For deadly force – death, SBI, Kidnapping, Rape, (NY) robbery)
 - *Just* Proportionality (*Peterson*)
 - Proportionality + DF for Death, SBI, Kidnapping, and Rape (**Majority View**)
- Necessity (Including extent of response)

Alternative Standard of Imminence Requirement:

1. MPC 3.04(1): Use of force “immediately necessary”
2. Other’s have suggested: just “necessary” or just “justified”

Duty to Retreat and Protection of Property:

Justified self-defense shields Δ from liability if deadly force kills a bystander (*Adams*)

- MPC: Δ can be liable if she defended herself recklessly (reckless endanger/manslaughter)

Retreat:

- Majority View:
 - No Retreat
- Minority View (*Abbott*/ MPC 3.04(2)(b)):
 - No duty to retreat unless deadly force is or will be used
 - And then only if Δ knows that she can retreat with complete safety
 - Castle Exception:
 - No retreat requirement in home
 - If Δ can brandish w/o killing, DF not justified, necessity still required

Defense of Others:

- Traditional rule:
 - Force permitted to protect third party when and to the extent that the third party could have used SD (If you protect and aggressor mistakenly you are on the hook)
- Modern Majority Rule:
 - Force permitted to the extent that such force reasonably appears to the intervenor to be justified in defense of a third party

Non-Aggressor Rule:

- Majority View (*Peterson* Rule):
 - Deadly force in SD is not available to aggressor unless he withdraws from conflict in good faith and informs other party by words and acts
- MPC 3.04(2)(b)(i): Only deadly aggressor loses right of SD w/ deadly force

Defense of Property:

- Can use force to prevent being dispossessed of property if reasonably believe such force is necessary to prevent imminent, unlawful dispossession.
- Never deadly force.

Defense of Habitation:

- Narrow Rule (*Ceballos*):
 - DF permitted only if one is threatened with death or SBI
- Intermediate Rule (CO):
 - DF permitted 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*
- Florida Stand Your Ground:
 - Presumed to have held a reasonable fear justifying deadly force if person is in process of or has unlawfully and forcefully entering your house or car

Police use of DF:

- Constitutional Limits: Only in effectuating an arrest
- *Tennessee v. Garner*:
 - DF 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 SBI to her or others
- *Scott v. Harris* (reasonable use of deadly force in high-speed chase):
 - Must balance interests of Δ against society's interests in effectuating the arrest.
- State Statutes (may be further limited by law enforcement policies):
 - Deadly force never used to prevent commission of a misdemeanor or to arrest someone suspected of a misdemeanor.
- Crime prevention:
 - Majority Rule: use of deadly force only where necessary to prevent felonies involving threat of physical force or violence

Necessity and Duress:

Necessity Defense:

Common Law: Utilitarian analysis but stops short of permitting homicide	MPC § 3.02: Utilitarian analysis <u>all</u> the way through
Emergency situation, imminent necessity	No emergency/imminence requirement
No prior fault in causing the harm	May have prior fault <ul style="list-style-type: none"> ▪ If reckless/neg in creating necessity situation Δ is liable for that but not for intentional acts taken to correct or in response to necessity ▪ If response (or any part of it) is reckless/neg, also liable for this
Balancing of the evils is objective; must clearly outweigh the alternatives	Balancing of the evils is subjective; believed to be necessary to avoid greater harm
Has to be a situation that Congress has not spoken to directly	Has to be a situation that Congress has not spoken to directly
Political Necessity: <ul style="list-style-type: none"> ▪ Direct causal relationship between conduct and harm ▪ No legal alternatives 	??Assume Common Law Approach for Political Necessity??

Duress Defense: Imminence is the most litigated element in most jurisdictions.

Common Law: Δ commits crime b/c coerced by threat of imminent death/SBI to which a person of reasonable fortitude may have yielded	MPC § 2.09:
Threatened harm must be imminent	Imminence a factor in deciding whether a reasonable person would have been unable to resist, but not required
Threat must be of death or serious bodily harm to person (sometimes also allowed for threat toward others – family)	Any use of, or a threat to use, unlawful force against person or another (family)
Duty to escape or seek law enforcement if you have the chance	
Person of ordinary fortitude might justly yield to the threat	
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

Insanity, Etc.:

McNaghten:

- Because of a disease of the mind, Δ did not know either (1) nature and quality of the act OR (2) he did not know what he was doing was wrong

Irresistible Impulse (Davis):

- Because of a disease of the mind Δ was (1) incapable of distinguishing between right and wrong OR (2) beyond control

MPC 4.01:

- Result of mental disease or defect lacks substantial capacity either (1) to appreciate the criminality (wrongfulness) of his conduct OR (2) to conform his conduct to the requirements of the law

Overall we are moving from the broader MPC standard back to *McNaghten* (**Know the trend!**)
 Δ now has the burden of proof to prove insanity and Δ gets to choose to plead insanity or not.

Civil Commitment standard: State has burden of showing by clear and convincing evidence that D is presently mentally ill and dangerous

Jurisdiction #1: If NGRI walk free but face immediate civil hearing at a lower standard.

Jurisdiction #2 (*Jones*): If NGRI then automatically committed, your doctors now have incredible control at periodic hearings, Δ has burden to show that no longer dangerous.

- Can be held indefinitely, beyond max sentence of underlying crime

GBMI (Guilty but Mentally Ill): Sentencing is the same as normal but treatment while in (and perhaps after) prison.

Competency to Stand Trial:

- Δ must be capable of understanding the nature of proceedings and assist in the defense
- Can use drugs to make Δ competent
- Civil commitment if not competent after a certain amount of time

Infancy:

- Excuse – lack of responsibility
- Under 7 conclusively not responsible
- 7-14 rebuttable presumption that Δ not responsible
- 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).
- Often statutory provisions for prosecuting some serious youthful offenders as adults.

Intoxication:

- False mens rea really at issue but they call it an excuse?
- Involuntary intoxication is a defense due to lack of requisite mens rea
- Involuntary isn't just "I was forced to get drunk/high" but rather deals with reasonably unforeseeable consequences (reactions with my prescription and the alcohol)
- Voluntary intoxication that prevents Δ from having the requisite mens rea:
 - General trend is away from permitting defense at all.
 - MPC: permits it for crimes with mens rea of purpose/knowledge, not recklessness

Attempt, Complicity and Conspiracy:

	Attempt	Complicity	Conspiracy
Conduct	Purpose	Purpose	Purpose
Result	Specific Intent or (For MPC) Knowledge	Mens rea of the underlying crime	Purpose
Attendant Circumstances	Mens rea of the underlying crime	??	??

Attempt:

Actus Reus

- Majority:
 - Dangerous Proximity Test (*Rizzo*): Was the Δ dangerously close to completing the crime or so near to the result that the danger of success is very high?
- MPC § 5.01
 - Substantial Step Test (§ 5.01(1)(c), *Jackson*): Actor’s conduct must be strongly corroborative of the actor’s criminal purpose

Mens Rea

- Majority:
 - Conduct: “Specific intent,” a standard greater than knowledge but less than purpose.
 - A high probability does not suffice! *Jones v. State* (shooting into house, killing one and injuring others: no attempted murder for injured but murder for death because high probability suffices for murder).
 - Results: “Specific intent,” a standard greater than knowledge but less than purpose.
 - So, if you are driving drunk and hit someone but they don’t die, you cannot be guilty of attempted negligent homicide even if you were negligent because intent is required.
 - Attendant Circumstances: Mens rea of the underlying crime.
- MPC:
 - Conduct: Purpose
 - Results: Knowledge (so purpose still suffices).
 - Attendant Circumstances: Mens rea of the underlying crime.
 - REMEMBER! The MPC is subjective: allows actor to be guilty of attempt for shooting a dead person or having sex with an 18-year-old the actor believes is 15

Abandonment Defense: Some states and the MPC have abandonment defenses. The state requirements are typically similar to MPC § 5.01(4): Affirmative defense to either abandon the crime or prevent its commission “under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.”

EXAMPLE ATTEMPT APPLICATION:

Did the actor attempt to commit burglary? Look @ burglary statute:

- (1) Are there any conduct elements? For each conduct element, did the actor have the mens rea of “specific intent” (purpose)?

- (2) Are there any result elements? For each result element, did the actor have the mens rea of “specific intent” (purpose)?
 - a. For MPC, did the actor have the mens rea of knowledge?
- (3) Are there any attendant circumstances? For each attendant circumstance, did the actor have the mens rea stated in the statute?

Separate Substantive Crimes or Preparation:

- (1) **Burglary** – At common law, burglary was the breaking and entering of a dwelling of another at night with the intent to commit some felony inside. A person apprehended *while* breaking into a dwelling with intent to commit a felony would not be guilty of attempt because he would not have arrived at the scene of his projected felony. Modern burglary statutes, however, enlarge the offense to cover instances in which the law of attempt would otherwise apply.
- (2) **Assault** – In the criminal law, an assault is an attempt to commit a battery (compare w/ torts; not the same). Therefore, assault covers the areas of battery where the alleged wrongdoer would likely be tried under the law of attempt.
- (3) **Modern Statutes** – many statutes criminalize preparation, for example making an explosive intending to use it to adversely affect commerce.
- (4) **Policing Measures** – Making loitering a crime because loitering tends to be associated with criminal activity
- (5) **Stalking** – Anti-stalking statutes serve to criminalize conduct that may serve as a prelude to violence.
 - a. Virtually every state has an anti-stalking statute. Crafting these statutes to comport with the Constitution is difficult (excessive vagueness, etc.)

Accomplice Liability

- (1) Is Δ an accomplice under the traditional approach?
 - a. **Actus Reus:** actual aid or encouragement
 - i. Not very stringent (attending concert–*Wilcox*); aid neither needs to be crucial nor necessary (not “but-for”) (*Talley*)
 - ii. MPC § 2.06(3)(a)(ii): Actor is liable as an accomplice if they attempt to aid (but do not aid in fact) the planning or commission of a committed crime.
 1. In this case, liable for the committed crime.
 - iii. MPC § 5.01(3): If engaged in conduct design to aid that would be complicit under § 2.06, then guilty of attempt even if the principal neither commits nor attempts the crime.
 1. In this case, guilty of attempt to commit Crime X.
 - b. **Mens Rea:**
 - i. Conduct:
 1. Majority: Purpose
 2. Minority “Knowledge+” Approaches:
 - a. MPC: knowledge + substantial facilitation
 - b. *Fountain*: knowledge + serious crime (CB 669)
 - c. Non-complicity solutions by creating a separate crime: general and targeted facilitation statutes
 - ii. Results: mens rea of the underlying substantive offense (*Roebuck*)

iii. Attendant Circumstances: ???

- (2) Is Δ an accomplice under *Luparello* “natural, probable and foreseeable consequences” Rule?
(Use this approach when you can’t get Acc Liability for big crime on traditional approach)
- a. If Δ is an accomplice (under traditional view) with regard to crime A and
 - b. If crime B is the “natural, probable, and foreseeable” consequence of crime A;
 - i. If you get the ball rolling then your are on the hook
 - c. Then tack on crime B
 - i. Example: While accomplice assists in commission of armed robbery, the principal murders the storekeeper. The accomplice can be liable for murder.
 - d. MPC rejects this approach.

Feigning Accomplice (*Hayes, Vaden*)

Traditional: No crime by principal, no accomplice liability

MPC: Still probably guilty even if principle doesn’t commit a crime.

Entrapment can only be done by law enforcement agent.

Innocent agent doctrine: Actions of innocent agents (children, mentally handicapped, etc.) imputed to the controlling person.

If tried separately possible that principal gets off and accomplice doesn’t but if tried together that can’t happen AMOL. **Victims CANNOT be accomplices (statutory rape).**

Traditionally A can’t get a longer/more serious sentence than P but now (modern view) A can get more if mens rea is different. If result and conduct are the same then the mens rea can make a big difference for A and P (sometime $P > A$, sometimes $A > P$).

Conspiracy

Basic Rule:

- Actus: Agreement + (overt act in some jurisdictions – agreement *can* be the overt act)
 - Parallel action can imply a tacit agreement and a tacit agreement can be enough
- Mens: Two or more persons intend... (PURPOSE) (Knowledge is the minority rule)

Pinkerton: If *in furtherance* and reasonably foreseeable as natural and probable consequences of the conspiracy (THE WHOLE CONSPIRACY) then vicariously liable for the underlying crime.

Pinkerton and *Luparello* are the same in simple conspiracies but different in the complex ones.

- Some jurisdiction limit liability for minor conspirators
- MPC ditches *Pinkerton* completely

Abandonment or Withdrawal:

- Communicate abandonment to those with whom Δ conspired; or
- Inform police of the conspiracy and of her participation (Cuts liability going forward)
- **Affirmative defense** (cuts off ALL conspiracy liability) if Δ thwarted the success of the conspiracy – MPC 5.03(6)

Police Discretion

Criminal statutes violate the Due Process Clause of the Fourteenth Amendment for being **unconstitutionally vague** if either (*See Kolender v. Lawson*):

- (1) Fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; or
- (2) It may authorize and even encourage arbitrary and discriminatory enforcement.
 - a. Fails this prong if ordinance violates “ ‘the requirement that a legislature establish minimal guidelines to govern law enforcement.’ “

Morales: Chicago loitering/police dispersal order statute unconstitutionally vague.

- O’Connor and Breyer, concurring in the judgment: Illinois Supreme Court could have construed the ordinance more narrowly.
- Thomas, dissenting: “By focusing exclusively on the imagined ‘rights’ of the two percent, the Court today has denied our most vulnerable citizens the very things that Justice Stevens elevates above all else—the ‘freedom of movement..’ And that is a shame.”

Community Prosecution: Partnership between prosecutor and community, created by soliciting information and advice from citizens in formulating prosecution strategies.

Community Courts: A non-adversarial court procedure, emphasizing community service projects to restore the community. Ironically, community courts have been used to target activities that previously had no significant sanctions.

Charging and Plea Bargaining

Types of discretion:

- (1) police discretion: whether to investigate or arrest
- (2) prosecutorial discretion: charging, plea bargaining
- (3) sentencing discretion (judge)
- (4) executive discretion: to parole, pardon, or grant clemency

Prosecutorial Discretion

Prosecutors require “probable cause” to charge and generally charge only if they have evidence sufficient to prove guilt beyond a reasonable doubt. However,

- (1) Prosecutors do not have to charge (*Inmates of Attica Correctional Facility v. Rockefeller*)
 - a. Writ of mandamus inappropriate because judicial department cannot force executive action here. *Inmates of Attica v. Rockefeller*
 - b. Judicial review could endanger the secrecy of the prosecutor’s office.

Checks on Prosecutorial Discretion:

(a) Selective Prosecution (*Armstrong*): Equal protection violation to base charging decision on race, sex, religion, or other arbitrary classification. Very difficult to prove; the prosecutorial policy:

- (1) had a discriminatory effect; and
 - a. Must show that similarly situated individuals of a different race were not prosecuted.
- (2) was motivated by a discriminatory purpose.

(b) Vindictive Prosecution (*Bordenkircher*): Prosecutor can neither threaten to lodge an unfounded charge nor punish a Δ for a successful appeal. However, prosecutors may threaten with the full force of the law.

(c) Other checks: Grand jury must indict (requires probable cause); sufficiency of the evidence to reach trial (judge); burden of proof: beyond a reasonable doubt (jury); political controls (elections, political appointments); administrative controls (internal guidelines, internal review).

Plea Bargaining: Guilty pleas must be

(1) voluntary; and

(2) be the product of a knowing and intelligent choice.

a. Requires that Δ have (a) “sufficient awareness of any relevant circumstances” and (2) of any “direct consequences” of the plea.

Guilty pleas not coercive even if they provide a single rational choice. *See Brady* (promise of lower sentence, including no death penalty, for plea bargain not coercive)

Jury Trial

Sixth Amendment guarantees the right to a jury trial for serious offenses. This has been interpreted as offenses for which one may be imprisoned for more than six months.

Number of jurors: Six is the minimum, however most states require 12.

Unanimous decision by jury not required for some states; 11-1 and 10-2 are okay.

However, unanimity is required in the federal system.

Policy Questions Underlying Jury Trials:

1. Should we have a jury trial at all?

- a. Encourage discussion, introspection of views and biases
- b. More heads are better than fewer
- c. Judges get jaded over time
- d. Public becomes invested – improves legitimacy
- e. Bias...any better with a judge?
- f. Juries ignore the finer points of the law, go with their gut
- g. Lack of accountability of juries
- h. Decrease in productivity by pulling juries from their jobs

2. How should the jurors be chosen:

a. Preemptory Challenges (PC): *Batson*: PCs based on race or sex prohibited.

i. PC not needed when there is cause; judge will remove from the venire.

ii. If PC appears discriminatory, *McDonnell-Douglas* burden shifting applies.

b. Petit jury's representation requirements

i. No requirement that Δ be tried by jury of her peers or that the jury reflect the locality's demographic character.

1. However, the panel of potential jurors must be a “fair cross section of the community.”

Nullification: Jury nullification instruction need not be given. *Dougherty*

- Lawyers also cannot instruct them on it, either. Can't say, “You have the power to nullify!”

Three reasons for nullification:

- (1) Good law, however inapplicable to the case before the jury;
- (2) Bad law, that is, the offense should not be illegal (Fugitive Slave Laws, for example);
- (3) Good law, but the jury feels that the sentence is disproportionate to the crime.

Race-Based Nullification (Paul Butler's 1995 YLJ article):

- (a) Never for violent *malum in se* crimes.
- (b) For nonviolent *malum in se* crimes, nullification should be an option but not presumption in favor of it.
 - a. Nullify when poor black woman steals from Tiffany's, but not when from her neighbor.
- (c) Jury should nullify when African-Americans are on trial for nonviolent, *malum prohibitum* offenses.

R. Kennedy's response: Race-based nullification is a poor means for advancing the goal of a racially fair administration of the law. CB 67

Sentencing

Procedure: Discretionary v. Determined Sentencing:

- Should we look at the act in isolation or the offender as a whole?

Federal Guidelines were created to standardize sentences.

- When calculating sentence, Guidelines allow using "relevant conduct" to increase or decrease the sentence.
 - Provides judge a tool for overcoming the prosecutor's discretion.
- *Apprendi*: Any fact that increases the sentence beyond the maximum has to be found by a jury.
- *Booker*: Guidelines unconstitutional if they are mandatory; judges consider the Guidelines and sentences may be appealed for unreasonableness.

Substantive Limits:

- *Ewing*: Upheld California's Three-Strikes Law. Three factors relevant to disproportionality (Term of Years Test) (*Solemn*):
 1. The gravity of the offense and the harshness of the penalty;
 - a. Plurality: Grossly disproportionate for a shoplifter with x history
 - b. Breyer (Dissent): Grossly disproportionate for a shoplifter
 2. The sentences imposed on other criminals in the same jurisdiction;
 3. The sentences imposed for commission of the same crime in other jurisdictions.
 - Breyer's dissent advanced the following framework: (1) threshold comparison of the crime committed and sentence imposed. If a claim crosses that threshold, which should be RARE, then (2) court should compare the sentence at issues to other sentences in the same or in other jurisdictions. The comparative analysis looks at (a) the length of the prison term; (b) the sentence-triggering criminal conduct; and (c) the offender's criminal history.
- *Graham*: LWOP for juvenile non-homicide offenses is unconstitutional.

- Two kinds of 8th Amendment tests:
 - *Roper*: Categorical Approach
 - (1) Objective indicia of society's standards;
 - (2) Independent judgment.
 - *Ewing* (Term of Years Test)
 - *Miller*: Mandatory LWOP for juveniles violates the 8th Amendment. Grafted *Graham*'s reasoning onto *Miller* opinion.
- Gementera*: Sandwich-board punishment for stealing mail not violative of the 8th Amendment.