## Criminal Law

## Theories of Punishment

1. One of the purposes of criminal law is determine moral blameworthiness and punish appropriately
   1. Is the criminal law aspirational, or descriptive? (*Regina v. Dudley & Stephens*)
   2. Should defendants committing crimes under temptation be sentenced harshly, or lightly?
2. Utilitarianism
   1. Three objectives are deterrence (specific and general), incapacitation and rehabilitation
      1. Punishment is justified because of the good consequences expected to result
      2. Punish innocent or punish disproportionately in order to generally deter?
3. Retributivism
   1. Under negative retributivism, guilt is a necessary but not sufficient condition for punishment. Under positive retributivism, guilt is both necessary and sufficient
      1. Usually equate degree of appropriate punishment with moral blameworthiness
      2. Is unforeseeable harm deserving of punishment (no moral culpability)?
   2. Morris’ equivalence principle sounds plausible, but incentives (with repeated crimes) require a return to utilitarianism
4. Is Hart’s mixed approach (aim of criminal law is utilitarian within retributive limits) workable?

## Criminal Elements

### Actus Reus

#### Voluntary Acts

1. Not guilt unless liability is based on conduct which includes a voluntary act (*MPC §2.01(1)*)
2. The following are not voluntary acts (*MPC §2.01(2)*)
   1. Reflex or convulsion
      1. A conscious choice disregarding potential consequences is culpable (*People v. Decina*)
   2. Movement during unconsciousness or sleep
      1. Unconsciousness is a complete defense to criminal activity (*People v. Newton*)
   3. Conduct during hypnosis
   4. Movement not the product of the actor’s effort or determination, either conscious or habitual
      1. Criminal acts must be voluntarily committed (*Martin v. State*, public drunkenness)
      2. Does *Martin* square with MPC §2.01(1)’s language of including a voluntary act?

#### Omission

1. Liability not based on omission unless omission is sufficient by law or duty imposed by law (*MPC §2.01(3)*)
   1. Five potential duties the law may impose: 1) statutorily imposed duty of care, 2) duty of care based on relationship, 3) contractual duty of care or 4) voluntary assumption of care that secludes the helpless person and prevents others from aiding
      1. If there is no duty to aid, there can be no criminal liability (*Pope v. State*)
         1. Can criminal liability extend to relatives, family friends, and live-in partners?
      2. Spouses being abused still have a duty to remove children from abusive situations
   2. Duty to rescue if person’s actions put another in peril?

#### Status Crimes

1. Defendant cannot be convicted without a voluntary criminal act (*Robinson v. California,* drug addict)
   1. Is status (illness), or voluntariness (irresistible impulse to commit a crime) the correct inquiry?
      1. Is treatment (hospitalization, commitment) fundamentally different than punishment?
   2. *Robinson* doesn’t ask if compulsive/involuntary conduct is punishable *(Powell v. Texas*, alcoholic)
      1. Fortas dissent: No criminal penalties for individuals in an unchangeable position

### Mens Rea

1. When culpability is not prescribed by law, it is established if a person acts purposely, knowingly, or recklessly. When the law requires a level of culpability for an offense without distinguishing the elements, that culpability is required for all elements, unlessa contrary purpose plainly appears (*MPC §§2.02(3)-(4)*)
   1. Culpability does not bleed from one action to the next (*Regina v. Faulkner*, steals rum burns ship)
2. **Purposely** – The actor’s conscious object is to engage in conduct of that nature or to cause such a result, and he is aware of attendant circumstances or he believes or hopes they exist (*MPC §2.02(2)(a)*)
3. **Knowingly** – The actor is aware that his conduct is of that nature or that attendant circumstances exist, and that it is practically certain that his conduct will cause such a result (*MPC §2.02(2)(b)*)
4. **Recklessly** – An actor is reckless when he consciously disregards a substantial and unjustifiable risk that a material element exists or will result. Disregarding said risk is a gross deviation from the standard of care that a law-abiding person in the actor’s situation would observe (*MPC §2.02(2)(c)*)
   1. If, due to self-induced intoxication, an actor is unaware of a risk he would otherwise have been aware of such unawareness is immaterial (*MPC §2.08(2)*)
5. **Negligently** – An actor is negligent when he should be aware of a substantial and unjustifiable risk that a material element exists or will result. The actor’s failure to perceive said risk is a gross deviation from the standard of care that a reasonable person in the actor’s situation would observe (*MPC §2.02(2)(d)*)
   1. Gross deviation from normal standard of care is usually criminal negligence (*State v. Hazelwood*)
6. If social opprobrium attaches, criminal negligence is needed (*Sanitillanes v. New Mexico*)
7. Ignorance or mistake is a defense if it negatives the mens rea required to establish an element of the offense (*MPC §2.04(1)*)

#### Strict Liability

1. For public policy reasons, some activities are done at the actor’s peril regardless of good faith or ignorance (*U.S. v. Balint*, drug smuggling)
   1. Strict liability can be imposed on individuals standing in responsible relation to a public danger (*U.S. v. Dotterweich*, drug mislabeling)
      1. What if defendant is taking maximum care? Can an entire activity be deterred (SL increases deterrence factor)?
2. The omission of statutory language of mens rea does not mean intent is irrelevant (*Morissette v. U.S.*)
   1. Mens rea should be read into statutes where it does not explicitly appear
3. No SL if imposition will criminalize a broad range of apparently innocent conduct (*Staples v. U.S.*)
   1. Public welfare rationale (*Dotterweich*) does not apply to felonies

### Causation

1. Foreseeability is an adequate measuring stick for proximate cause (*People v. Acosta,* helicopter crash)
   1. Criminal liability if an actor’s conduct is a *sufficiently direct* cause, and ultimate harm should have been foreseen as reasonably related to actions (*People v. Arzon*, burning building)
2. Prosecution must prove *beyond a reasonable doubt* that but for defendant’s actions, harm does not result
3. Liability is not limited to foreseeable harms; the criminal takes his victim as he finds him (*People v. Stamp*)
4. Medical negligence is foreseeable; gross negligence is not (*State v. Shabazz*)
5. If different people or property are injured than intended, guilt remains (transferred intent) (*MPC §2.03(2)*)

## Homicide

#### Premeditation

1. Criminal homicide is murder when a) it is committed purposely or knowingly or b) it is committed recklessly under circumstances manifesting extreme indifference to life. Such indifference is presumed if actor commits or is an accomplice in a list of enumerated felonies (*MPC §210.2*)
   1. No time is too short for the necessary premeditation to occur (*Commonwealth v. Carrol*)
      1. Challenged in *State v. Guthrie* (dishwashing rag); there must be some period for reflection on the intent to kill between the formation said intent and the actual killing
      2. Too difficult to prove premeditation beyond a reasonable doubt?
   2. Does premeditation help to determine the most morally blameworthy homicides?
      1. *People v. Anderson* (brutal rape and stabbing of 10-year-old) vs. *State v. Forrest* (mercy killing of terminally ill father)
      2. MPC rejects premeditation, opting for four given standards of mens rea

#### Provocation

1. Criminal homicide is manslaughter if a homicide that is otherwise murder is committed under extreme mental or emotional disturbance with reasonable explanation or excuse (mostly objective) (*MPC §210.3*)
   1. The excuse’s reasonableness is determined as a person in the actor’s situation (subjective)
   2. Words are provocation for murder only if accompanied by indication of intent and ability to cause bodily harm (*Girouard v. State*, army couple)
      1. Provocation defense requires a reasonable man standard; not focused on defendant’s particular frailties
      2. How to determine which aspects of a defendant comprise the actor’s situation?
   3. If a reasonable man would have been enraged enough to commit murder, mitigation is appropriate (*Maher v. People*, man sees wife in woods)
      1. Is provocation an acceptable defense if provoking act was not actually witnessed?
2. Three rationales for the provocation defense are: 1) defendant is less morally blameworthy, 2) victim is partially blameworthy (not to be used in court) and 3) defendant is less deterrable
   1. Is it true that there is *no* way to exhibit self-control in the face of provocation?
3. Common law argues that time between provocation and killing renders provocation defense inadequate
   1. Does the MPC’s extreme emotional disturbance test no longer require a single provocative event and eliminate cooling-off period as a way for prosecutors to get around provocation?

#### Recklessness & Negligence

1. Three elements should be considered in determining culpability of an unintentional killing: 1) magnitude of risk, 2) lack of justification and 3) awareness of risk
2. Criminal homicide is manslaughter when committed recklessly (*MPC §210.3*)
   1. When an individual commits an act of gross recklessness for which death is reasonably anticipated, malice aforethought is imputed (*Commonwealth v. Malone*, Russian roulette)
      1. Egregiously dangerous driving (even while drunk) is murder (*U.S. v. Fleming*)
         1. The difference between malice and gross negligence is one of degree, not kind
      2. MPC argues that inadvertent risk creation (negligence) can never be punished as murder
      3. Common law equates intent to inflict grievous bodily harm with intent to kill
   2. Reckless conduct is imputed if a reasonable man would have recognized the danger (*Commonwealth v. Welanksy*, nightclub fire)
3. Criminal homicide is negligent homicide when committed negligently (*MPC §210.4*)
   1. Jury must be convinced that negligence is conduct deserving of punishment, not just a mere matter of compensation for victims
   2. Negligent homicide if defendant’s conduct is not that of a reasonably prudent man (*State v. Williams*, baby toothache)

#### Felony Murder

1. Felony murder doctrine is not limited to foreseeable deaths; if homicide is a direct causal result, rule applies whether or not death was a natural or probably consequence (*People v. Stamp*, heart attack)
   1. Felony murder imposes strict liability for killings resulting from a felony’s commission
      1. Dispenses with mens rea, but state still required to prove actus reus and causation
         1. Felony murder swallows up provocation by eliminating mens rea
2. Purpose is deterring felons from negligent or accidental killing while committing crimes
   1. Imposes punishment more severe than moral blameworthiness implies (utilitarian)?
3. Limitations
   1. Inherently dangerous felony
      1. Felony murder only invoked when each element is inherently dangerous to life (dangerous in the abstract) (*People v. Phillips*, eye cancer) (followed by few)
      2. A felony is inherently dangerous when it creates a foreseeable risk of death (*Hines v. State*, felon possesses firearm) (followed by most)
   2. Merger doctrine
      1. Felony murder inappropriate if felony committed is integral to homicide (included-in-fact) (*People v. Ireland*, assault w/deadly weapon doesn’t support felony murder)
      2. If an independent felonious purpose exists, felony murder is appropriate (*People v. Burton*, armed robbery supports felony murder)
   3. Killings not in furtherance of the felony
      1. Felony murder inappropriate when homicide results from lethal acts of third persons not in furtherance of the felony (agency theory) (*State v. Canola*)
         1. Is a proximate cause theory more appropriate (if felony is proximate cause of homicide, felony murder is applicable)?
         2. MPC’s extreme indifference to life test may allow implied malice without resort to felony murder doctrine
         3. Some felony murder jurisdictions limit application to deaths of non-felons
            1. Felon cannot be punished for justifiable homicide (self-defense, police homicide)?

### Rape

1. A man who has sex with a woman not his wife is guilty of rape if: 1) he compels submission by force or serious threat to anyone or 2) he has substantially impaired her by employing without her knowledge some intoxicant for the purpose of preventing resistance or 3) she is unconscious or 4) younger than 10 (*MPC §213.1(1)*)
2. A man who has sex with a woman not his wife is guilty of gross sexual imposition if he compels submission by any threat that would prevent resistance by a woman of ordinary resolution (*MPC §213.1(2)*)
3. Classically, rape consists of two elements: force (in excess to penetration), and lack of consent
   1. A victim’s fear resulting from the threat of force must be reasonably grounded to waive a showing of resistance (which implies no-consent) (*State v. Rusk,* light choking)
      1. What if rapist exploits knowledge that his victim is, in fact, afraid?
      2. Should resistance be necessary to demonstrate application of force?
         1. Without resistance, evidentiary concerns for no-consent
         2. No requirement to resist in any other crime (burglary, etc.)
   2. Physical force – not merely psychological – is necessary (*State v. DiPetrillo*, boss digitally penetrates employee)
      1. Where is the line between seduction and psychological force
      2. Is rape a violent (physical) crime, or a denial of sexual freedom (psychological)?
      3. Submission must result from coercion rather than bargain
         1. Force doesn’t include intimidation (*State v. Thompson*, student won’t graduate)
   3. Some courts eliminate the force requirement. The only force necessary that required for penetration. The critical inquiry is whether sex is authorized, not if there was resistance (*State in the Interest of MTS*)
      1. Does this create a strict liability regime for sex?
         1. Criminalizes a wide range of apparently innocent conduct à la *Stephens*?
      2. How can consent be given when one (or both) parties is under the influence of alcohol?
      3. Absence of proof mandates an assessment of parties’ credibility. Undue emphasis on direct proof elevates resistance to the defining element of the offense (*MC v. Bulgaria*)
   4. If deception causes a misunderstanding as to the fact itself (fraud in the factum), there is no consent. Consent induced by fraud is as effective as any other consent (*Boro v. Superior Court*, sex to cure disease) (*People v. Evans*, psychological tactics to induce sex)
      1. Doesn’t fraudulent inducement establish mens rea to commit a crime by inducing sex from an otherwise unwilling party?
4. Mistake of fact, without consideration of reasonableness, is not a defense (*Commonwealth v. Sherry*)
   1. Most courts permit mistake when the defendant’s error as to consent is honest and reasonable
   2. Appropriate balance between loosening of resistance requirement and permitting mistake?
5. May circumstantial evidence help determine if rape occurred? If so, what circumstances are admissible?
6. Can the law lead the way in changing cultural norms about how to determine when consent has been given (utilitarian punishment to generally deter)?

### Justifications

1. An action is justified if it is the right thing to do. An action may be excused if it was reasonable

#### Self-Defense

1. The use of force is justifiable when the actor believes that such force is immediately necessary to protect himself against the use of unlawful force by another person at that time (*MPC §3.04(1)*)
   1. There must be an objective element to an actor’s reasonable belief of the necessity of self-defense (*People v. Goetz*, subway shooting spree)
      1. Can typical beliefs (crime rates of certain races) impact a belief’s reasonableness?
   2. Self-defense succeeds only when both the defendant’s fear and use of force were reasonable
      1. Rational to require a reasonable response when defendant is threatened (actually or in their own mind) with death or serious harm?
      2. What aspects of a defendant’s situation may influence a reasonableness determination?
2. The use of deadly force is not justifiable unless the actor believes that it is necessary to protect himself against death, serious bodily harm, kidnapping or forcible sex, or if 1) the actor provoked his attacker at that time or 2) the actor **knows** he can, with **complete safety**, avoid use of force by retreating
   1. The actor is not obliged to retreat from his home or workplace, unless he is the initial aggressor or is assailed at work by someone with the same workplace (*MPC §3.04(2)(b)*)
   2. If a person acts in self-defense and injures a bystander criminal liability usually does not attach

#### Battered Women’s Syndrome

1. The appropriate test BWS-related test is what a reasonable person would believe *if* that person accepts testimony that past abuse would make one believe that a threat is imminent
   1. BWS-related evidence is relevant to imminence only – the relevant question is whether a reasonable person (not a reasonable battered person) would believe in the need to kill
   2. A defendant’s belief of inevitability at some future time does not equate to an imminent threat (*State v. Norman*, shoots sleeping husband)
   3. An overt act indicating imminent danger is necessary for self-defense (*Commonwealth v. Sands*)
2. How can BWS be justified?
   1. Self-defense extends to other intimate relationships (student-teacher, bully-victim, cohabitants)
   2. Should provocation defense limits apply to BWS defenses?
   3. Should BWS defense be aspirational or descriptive, given BWS victims will likely kill their abusers?

#### Necessity & Duress

1. Conduct which the actor believes necessary to avoid a harm to himself or another is justified if the harm to be avoided is greater than that to be prevented by the law defining the offense (*MPC §3.02*)
   1. When the actor was reckless or negligent in bringing about the situation requiring a choice of evils or in appraising the necessity of his conduct, the justification is unavailable for any crime for which recklessness or negligence establishes culpability
      1. MPC begins subjectively (actor’s belief) but moves to a totally objective inquiry (harm avoided is greater than harm caused)
   2. A natural threat (fire, etc.) may provide justification for a necessity defense; economic necessity is not usually accepted
2. It is an affirmative defense if an actor engaged in conduct because he was coerced to do so by force (or threat of force) against himself or another, which a person of reasonable firmness in his situation would have been unable to resist (*MPC §2.09*)
   1. Duress is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. If he did so negligently, the defense is unavailable for crimes with a negligent mens rea
   2. Duress exists because it is argued that the actor is not blameworthy for his actions
3. The MPC defines duress as an excuse; a defendant is also allowed to plead necessity (justification) if the lesser-of-two-evils test is met

#### Insanity

1. A person is not responsible for criminal conduct if at the time, he lacked substantial capacity either to appreciate his conduct’s wrongfulness (cognitive test) or to conform his conduct to the law’s requirements (irresistible impulse, volitional test) (*MPC §4.01*)
   1. Evidence that the defendant suffered from a mental disease is admissible when relevant to prove that the defendant did not have a state of mind which is an element of the offense (*see also U.S. v. Brawner*)
      1. But see *Clark v. Arizona*, holding that a state is not required to admit evidence of mental illness that rebuts mens rea
   2. *M’naghten’s Case* uses only the cognitive test
   3. Volitional test is eliminated in *U.S. v. Lyons* due to inability to accurately assess a person’s capacity for self-control, and because individuals failing a volitional test will likely also fail a cognitive test
2. Rationales for not punishing the insane include ineffectiveness of deterrence, lack of moral blameworthiness, and difficulty of proving mens rea

### Criminal Liability

#### Attempt

1. A person is guilty of criminal attempt if, acting with the culpability otherwise required for the crime, he:
   1. purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be
   2. does or does not do anything with the purpose of causing (or belief he will cause) a result or
   3. purposely does or does not do anything which, under the circumstances as he believes them constitutes a substantial step to conduct planned to culminate in crime (*MPC §5.01(1)*)
      1. A substantial step must be strongly corroborative of the actor’s criminal purpose
      2. Acts so near a crime that in all reasonable probability the crime would have been committed but for timely interference are substantial steps (dangerous proximity test)
         1. Perverse incentives for police not to interfere until criminal is “close enough”?
      3. Equivocality test looks to how clearly defendant’s actions indicate his intent
   4. It is an affirmative defense that he abandoned his effort to commit the crime under circumstances manifesting a complete and voluntary renunciation of his purpose (*MPC §5.01(4)*)
      1. Fundamentally different than other affirmative defenses; abandonment undoes a crime (attempt) after commission, but others assert that no crime has ever been committed
2. Rationales for punishing attempts include deterrence and moral blameworthiness
   1. Is deterrence rationale plausible, since threat of punishment for crime is clearly insufficient?
3. A minority of states use parity (mens rea necessary for crime is sufficient to convict for attempt)
   1. MPC follows parity with regard to attendant circumstances (i.e., attempted statutory rape)
4. An actor is guilty of attempt if he aids, agrees, or attempts to aid another in committing a crime, even if the crime is not committed or attempted by the other person (*MPC §5.01(3)*)

#### Complicity

1. A person is an accomplice if, with the purpose of promoting or facilitating a crime, he 1) solicits another to commit it or 2) aids, agrees, or attempts to aid another in planning or committing it (*MPC §2.06(3)*)
   1. A person is not an accomplice if he terminates his complicity prior to the commission of the crime and either deprives his complicity of effectiveness in the crime’s commission or timely warns authorities or makes other proper effort to prevent the crime (*MPC §2.06(6)*)
   2. Knowledge is insufficient to establish complicit liability
      1. *U.S. v. Fountain* argues that purpose was required to convict on lesser offenses, but knowledge sufficed for major crimes
2. A vital element is a connection (nexus) between the complicit defendant and the principal (*State v. Gladstone*, where to buy marijuana)
   1. Is the nexus test influenced by a temporal or spatial connection, or a tool of legal realism?
3. When causing a result is an element of a crime, accomplice liability attaches if an actor acts with the culpability, if any, with respect to that result that is sufficient for the offense (*MPC §2.06(4)*)
   1. MPC takes no position on what mens rea is sufficient for attendant circumstance elements
4. Liability extends to the crime actually committed, not merely the intended crime (*People v. Luparello*)
   1. Foreseeable consequence doctrine shares its use of a stepped-up intent imputation with the felony-murder rule. MPC rejects *Luparello*
5. Should liability only attach if significant or substantial aid is provided?
   1. If the aid merely makes it easier for the principal to commit the crime, liability may attach

#### Conspiracy

1. Conspiratorial liability attaches if, with the purpose of promoting or facilitating a crime, an actor:
   1. agrees with others that they will commit, attempt or solicit others to commit a crime or
   2. agrees to aid another in planning, committing, attempting, or soliciting a crime (*MPC §5.03(1)*)
      1. Conspiracy can be formed without simultaneous action or agreement. A tacit agreement may suffice (*Interstate v. U.S.*, movie theatre collusion)
   3. No conspiracy conviction unless an overt act in pursuance of the conspiracy is proven
      1. Act does not have to approach criminal attempt, because an agreement to commit a crime doesn’t present gradient concerns of attempt and combining with another increases the likelihood that the substantive crime will be committed
   4. It is an affirmative defense that after conspiring to commit a crime, an actor thwarted the conspiracy, manifesting a complete and voluntary renunciation of the criminal purpose
2. Both knowledge and intent to further the criminal activity is required for conspiratorial liability to attach. Intent may be inferred through 1) seller of legal goods for illegal use has a stake in the venture, 2) no legitimate use for the goods or services exists, or 3) disproportionately high volume (*People v. Lauria*)
3. The *Powell* doctrine holds that a conspiracy must be animated by a corrupt motive. MPC rejects *Powell*
4. If substantive offense furthers conspiracy and is reasonably foreseeable, there is liability for all co-conspirators (*Pinkerton v. U.S.*)
   1. Co-conspirator may be liable for substantive crimes not within the scope of the conspiracy if reasonably foreseeable as a consequence of the conspiracy (*State v. Bridges*)
   2. MPC rejects *Pinkerton* and only imposes liability for substantive offenses if accomplice liability conditions are met
   3. Traditional accomplice liability is narrow, *Pinkerton* is broader, and *Luparello* is broadest, because *Luparello* does not require a conspiratorial agreement
      1. *Luparello* and *Pinkerton* should produce identical results for accomplice liability
5. Attempt, solicitation and conspiracy are crimes of the same grade as the most serious offense contemplated (*MPC §5.05(1)*)