Taylor-Thompson, Criminal Law, Fall 2011

INTRODUCTION

* Formula: (Actus reus + mens rea + circumstance + causation + result) – defenses
  + Every element not actually necessary for every crime, but is a good broad framework
* Purposes of crim law:
  + Maintain order and prevent future wrongs
  + Indulge retributive impulses for past wrongs
  + Address the problem that led to the crime
  + Proscribe conduct according to and convey society’s notions of morality
  + Prevent arbitrariness by giving notice of what people can and can’t do
* Crim law directed at:
  + The criminal
  + The public – creates deterrence and educates on society’s values
  + The government – shows the extent and limits of its power, and guides legislation
    - ***Lawrence v. Texas***: Gov’t can’t punish private acts that don’t harm society and that punish a particular group
* Tension btwn protecting individual’s liberty and society’s liberty to be free from certain acts
* Why do we punish?
  + **Deterrence** – prevent future crime
    - General (keep others from committing the same crime)
      * –ve:
        + Assumes potential offenders will engage in C/B analysis – in reality, studies show Ds don’t think they’ll get caught
        + Assumes people know the law they’re breaking
        + Subject to abuse – punishing groups more likely to commit a crime
        + Some crimes are undeterrable, like crimes of passion
    - Specific (keep the individual from doing it again)
      * –ve:
        + Won’t work if people go back to same structure that led them to crime
        + Imprisoning doesn’t improve D’s ability not to commit a crime
        + Punish D more severely if fits into demographic w/ higher crime rate
  + **Incapacitation** – take offender out of circulation
    - +ve:
      * Makes no assumptions about human nature: commit crime 🡪 go to jail
      * Best solution for repeat offenders (unless are repeat b/c of structural issues)
    - –ve:
      * Above isn’t true – we ARE assuming the criminal would commit more crime if didn’t go to jail
      * Also implies the assumption that those we imprison for longer are the most likely to commit future crimes
      * Doesn’t address the cause of crime
      * Another person might just take the criminal’s place
      * Prisoner might learn how to be more effective criminal while in jail
      * Problems w/ the prison system generally
      * Expensive
      * Doesn’t rehabilitate
      * Severity of the crime not reflected in severity of the punishment
      * Evidence suggests that the swiftness and certainty of punishment is what deters crime, not the length of the sentence
  + **Rehabilitation** – isolate 🡪 conform conduct to what we want 🡪 return to society
    - +ve:
      * Focus on individual rather than offense – make his see wrongness of his action
      * Prevents future crime by correcting past behavior
      * Leads to measuring the success of imprisonment by reduction in recidivism rates rather than impacts on aggregate crime rates – more effective measure
    - –ve:
      * Length of sentence could be indefinite, depending on pace of rehabilitation
      * Give judge too much discretion to determine if D has been rehabilitated
      * Enables expmts on people to see how Ds respond to different conditions
      * Assumes cause of crime is character deficiency rather than social or economic
      * Gives prisoners access to free services that many “normal” people don’t have
      * Doesn’t take moral blameworthiness into account
      * Requires large amounts of continuous funding
      * Not judiciary’s job to fix society – just to enforce the law, whatever it may be
  + **Retribution** – punish blameworthy conduct and do so proportionately
    - +ve:
      * Simple – end in and of itself
      * Satisfying
      * Morally culpable people get punished
      * Upholds rule of law b/c discourages people from taking law into own hands
      * Erases unfair advantage criminal gained through the crime
      * Can be a check on gov’t power – only punish in proportion to the crime
    - -ve:
      * Punishment tied to emotion/vengeance – less rational
      * Not forward thinking so doesn’t necessarily make society safer
      * Won’t necessarily make the victim of the crime whole (e.g. may live in fear)
      * Focus in on the offense rather than the surrounding circumstances
      * Society may not agree on the punishment that is deserved
      * Questionable religious basis
  + None of these is justified on its own. Combine them b/c of limited resources and to incapacitate those we’re most nervous about while rehabilitating those most amenable to it
  + Criminal justice may not always be the answer, like in the *Johnson* crack baby case.
* Mechanisms to protect individuals:
  + State bears burden of proof that the individual is guilty
  + Standard of proof is “beyond a reasonable doubt”
  + Entitled to a judgment by a jury of one’s peers
    - Prevents a single person with a bias from dominating the judgment
    - Lay jury likelier to sympathize w/ offender than are experts b/c more similar to him
    - Buffer btwn determiner of admissibility of evidence and deciders of the case
    - Jury has no stake in the decision, while a judge may
    - Jury not jaded by the workings of the system
    - Jury has the possibility of deciding that the law doesn’t make sense
  + Requirement of unanimity except in Louisiana and Oregon
  + Individual entitled to counsel
  + Individual not required to incriminate himself
  + Built-in discretion:
    - Prosecutor – whom, whether, and what to charge, and offer plea bargain
    - Judge – sentencing (unless limited by law), what evidence to allow
    - Police – who to arrest, what evidence to collect, how and where to police
    - Attorneys – can exclude jurors
    - Jury – can choose whether to convict, acquit, or nullify
  + Rule of Lenity: If statute can be construed 2 ways, should be construed in favor of the accused

DEFINING CULPABILITY

**Actus Reus**

* Why require that an act be committed?
  + Should confine punishment to failure to control oneself. Concerned about punishing those who would have reconsidered – preserve individual choice.
  + Focus of crim law is to keep society safe. Mere intent doesn’t create unsafety.
  + Thinking about something is a poor predictor of future behavior.
  + Problematic to prove intent so we mandate that there be a corresponding act.
  + Punishing mere intent would incentivize Ds to go through w/ crime once already had intent
  + Much easier to regulate society by saying “if you do this, you’re a criminal” rather than “if you think this you’re a criminal”.
  + Not requiring an act would enable profiling and arbitrariness
* Definition: (1) **Past** (2) **voluntary** (3) **wrongful conduct** that is (4) **specified** (5) **by statute** (6) **in advance** of the crime, and is committed (7) **in the forum with jurisdiction**
  + **Wrongful conduct:** (must cause or risk harm & not be protected by the Const., like assembling)
  + ***Proctor v. State***: Act requirement not met b/c keeping a place is **not illegal conduct**, even if the intent to serve alcohol is established. Act itself must be morally culpable. The *Chicago v. Morales* definition of loitering – standing w/ no apparent purpose – isn’t illegal.
  + ***U.S. v. Maldonado***: Act requirement met through **constructive possession** of drugs – illegal possession unlike legal possession of a house in *Proctor*. The act still only fuzzily indicates intent to distribute, though – **fuzzy act can be sufficient**.
  + ***Jones v. U.S.***: Babysitter neglects baby, who dies. **Omission counts** as act **where** there was **legal duty & notice of that duty**. 4 categories where there is a duty of care:
    - Statutory duty
    - Status relationship (e.g. parent/child, master/apprentice, husband/wife, captain/crew & passengers, inn-keeper/customer)
    - Contractual duty
    - Voluntarily assumed duty to care for helpless indiv. by precluding others from doing so
  + **Past:**
  + ***Robinson v. CA***: Addiction is a **status = not an act** and **not in the past** (it’s merely a propensity to act in the future, which we don’t punish – only past acts). Also, could have become addicted involuntarily. Convicting for status is cruel & unusual punishment under the 14th Amendment.
  + ***Powell v. Texas***: Alcoholism isn’t a status, but not punishing alcoholism anyway – punishing for going into public while drunk.
    - Being a gang member is a status and thus not punishable (*Chicago v. Morales*)
  + **Voluntary:** (must be avoidable and deterrable)
  + ***Martin v. State***:Act of being drunk in public **not voluntary** when was **forced outside**. Foreseeable that would get boisterous, but not that would do it in public. Whether you find a volitional act can depend on how broad a timeframe you consider.
  + ***People v. Grant***: **Automatism** = knows consequence of his actions, but can’t control his actions **= not voluntary =** full **exoneration**. If it were found that he knew drinking would provoke seizure (foreseeability, notice), could find voluntariness.
  + ***People v. Decina***: Had notice that is epileptic. Getting in a car is the voluntary act – not punishing being an epileptic. Court opens up the timeframe being considered, unlike in *Martin*.
  + ***Johnson v. State***: Transmitting cocaine through umbilical cord not voluntary. Court looks to legislative history to see which acts were intended to be punished and relies on the Rule of Lenity: If 2 constructions of a statute are possible, should be construed in favor of the accused.
  + **Specified:** ((1) avoids criminalizing potentially lawful behavior; (2) captures only the behavior it intends to; (3) avoids arbitrariness of application)
  + ***Chicago v. Morales***: The statute isn’t clear about what is being criminalized (“loitering”?) or where it’s prohibited to do it, so the statute is illegal b/c no notice.
    - Attacks on statute usually unsuccessful; tend to uphold to protect public safety
  + ***Papachristou***: Anti-loitering law is too vague – have to either limit the geographic scope or limit the illegal activity to loitering for specified purposes.
  + **In advance: *Rogers v. Tennessee***: **Conduct shouldn’t be criminalized retroactively** b/c (1) need notice, (2) would allow discrimination, and (3) would produce fear in society. Here, the year and a day murder rule CAN be changed ex post b/c prohibition only on legislatures – not courts; this was never actually law; had notice b/c knew could be murdering when stabbed; had notice b/c the rule was outmoded due to modern medical knowledge. So sometimes courts DO mimic legislatures.
  + **By statute:** ***Rogers v. Tennessee***: The crime has to be statutory – not just at common law.
  + **In the jurisdiction**: In *Robinson v. CA*, D could have gotten addicted through acts committed elsewhere, so he couldn’t be tried in CA.

**Mens Rea**

* Strict liability – no mens rea requirement
  + Applies only to regulatory crimes (= not present in common law) like speeding, statutory rape, misdemeanors that wouldn’t be punishable in and of themselves, except that society has chosen to prohibit them. **Purpose is to create duties in society rather than simply to punish**.
    - ***People v. Dillard***: Carrying loaded gun is regulatory offense so doesn’t require mens rea. Also, b/c public safety is paramount we’re willing to lower proof requirement such that it’s ok to deny D ability to raise the lack of mens rea as a defense. **Court doesn’t read implicit mens rea requirement into the statute**.
    - Exception I: ***Morissette v. U.S.***: Ok to read mens rea into the statute not to steal gov’t property b/c theft is a **common law crime** so can assume it requires mens rea.
    - Exception II: ***Lambert v. CA***: Ok to read in mens rea b/c (1) punishing for not joining a felon registry is punishing status – *Dillard* involved an act; (2) passive nature means was no notice that should trigger realization of a need for caution; (3) potential for punishment here isn’t simply slap on the wrist; (4) offense doesn’t harm public welfare
  + +ve:
    - Want to make sure that people exercise a level of care in esp. dangerous situations
    - Volume of people doing these acts is great so need to be able to regulate en masse
    - Source of authority to punish is result of industrial society rather than Judeo-Christian values
    - Punishment is relatively small and not very stigmatizing
    - Prosecutors can exercise discretion to not bring a case they don’t think they’ll win (i.e. a 15 year old rapes a 40 year old – you wouldn’t charge the 40 year old with statutory rape). If the prosecutor still brings the case, the jury can exercise discretion.
  + –ve:
    - Punishing non-blameworthy conduct together w/ blameworthy – no distinction
    - Assigns stigma to violators who didn’t mean to do anything wrong
    - Anti-due process? – strips Ds of their defense and no notice
    - No deterrent effect
  + MPC opposes strict liability
* Categories of Culpability
  + REMEMBER: **State always has burden of proof**. If the jury instruction suggests otherwise 🡪 anti-due process
  + MPC definitions; inspire statutory definitions. EACH element of an offense requires mens rea.

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| **Purposely** (sp. intent) | * The conscious objective is to achieve the planned result * If involves attendant circumstances, he knows of them and or believes/hopes they exist |
| **Knowingly** (sp. intent) | * Knows or is practically certain what will result from his conduct, even if that’s not his objective. If he didn’t actually know but was in a position to find out, he’s still “knowing” |
| **Recklessly** (gen intent) | * **Aware of and consciously disregards** a **substantial and unjustified risk** that the material elements exist/will result from his conduct. Given the circumstances known to him, the risk grossly deviates from what a reasonable person would do |
| **Negligently** (gen intent) | * **Unaware of** a **substantial and unjustified risk** that the material element exists/will result from his conduct. Given the circumstances known to him, he should have been aware so the risk grossly deviates from what a reasonable person would do |

* + ***Regina v. Faulkner***: Not guilty of rum fire b/c statue required high level of intent and there’s no proof of this. Guilt for one crime doesn’t make you culpable of everything that results (unless there’s strict liability like w/ misdemeanor MS and felony murder).
* If no mens rea specified by statute, can look at:
  + Judicial opinions
  + Other statutes
  + Legislative history
    - If these don’t help, default is “knowingly” unless the requirements are met for barring a reading in of a mens rea requirement

**Mistake of Fact**

* Works as a defense b/c means was no mens rea. Usually framed as not having the necessary mens rea.
  + ***Regina v. Prince***: Argues mistake of fact – thought the girl was over 16. While his mistake of fact negates the mens rea for the act of “taking” and the attendant circumstances of “taking out of the possession” and “against the will of her father” (sp. intent standard), court reads in strict liability for the first attendant circumstance, “unmarried under-aged girl” so he’s guilty.
  + ***State v. Guest*** (thought she was 16 but was 15): Court reads negligence standard into statutory rape, thus allowing use of mistake of fact defense (even though MoF usually only gets you out of specific intent crimes). This is an **outlying case** – usually strict liability and usually MoF doesn’t work for gen intent crimes. However, closeness in age might be used as mitigating factor in sentencing.

**Mistake of Law**

* Usually not a defense b/c people should have to inquire if they don’t know what the law is.
  + ***U.S. v. Baker***: Not valid excuse that didn’t know the prohibition on trafficking counterfeit Rolexes was criminal rather than just civil.
* Exceptions:
  + Wholly **passive conduct** (b/c doesn’t trigger an indication of illegality) & law **not widely known**
    - In ***Lambert v. CA*** D was excused b/c the law punished passive conduct (failure to register) and was new and obscure.
  + Reasonably **relied on** an **official/authoritative interpretation** of the law
    - ***Twitchell*** (Christian Scientists): Not taking child to Dr. would have been neg/reck, but succeed w/ defense that they relied on misleading advice from the Attorney General (even though this was in a secondary source – the Christian Science publication).
* +ve:
  + Too onerous a burden for the government to make sure that every citizen knows the law
  + The excuse would be available for every defense and would be hard to disprove
  + Would incentivize ignorance
* –ve:
  + No deterrence if D didn’t know the law
  + Notice/due process issues

**Mental Impairment**

* Mental impairment **works** to negate mens rea **when req is sp. intent**, but not where it’s gen. intent
  + - Results in getting off free; insanity results in hospital
  + ***Hendershott v. People***: Court allowed D’s mental impairment defense (that he lacked impulse control) in an assault case (which requires only general intent). This is an outlier case.
  + ***State v. Cameron***: D was permitted to bring mental impairment defense (that she was intoxicated) in a case involving aggravated assault, possession of a weapon, and resisting arrest (specific intent crimes), but still convicted b/c court found she wasn’t drunk enough to negate her mens rea. **Very high standard for intoxication to qualify as mental impairment**.

RAPE (mens rea requirement is negligence as to the victim’s lack of consent)

**What is the function of rape law?**

1. One option: Protect sexual autonomy
2. Second option: Prevent emotional harm

**Stranger Rape v. Acquaintance:**

* only 22% raped by total strangers
* 75% some prior relationship as family member, intimate, or acquaintance
* more likely to convict strangers

**Reporting/Outcomes:**

* 100,000 rapes reported per year; maybe 1/5 of total number
  + hostility/indifference of police/prosecutors
  + involves acquaintances or relatives
* 2/3 arrests lead to convictions; 2/3 convictions produce sentences

**Historical Evolution:**

* Historically under-enforced, except against black men accused of raping white women. Women typically had to show that resisted to the utmost – distrust of women’s accusations
* W/ the women’s movement developed rape shield laws: D prevented from cross examining P about her sexual past; resistance requirement abolished (recognizing that people react to force differently); now her word just as legitimate as his, w/o corroborating evidence.
  + Nowadays the focus is mostly on D’s actions to find evidence of force and lack of consent (though there always has to be some focus on P to show if there was consent). There’s a tension btwn balancing interests of the complainant w/ due process rights of the accused.
    - **Estrich**: Look only to D’s mens rea and make him prove consent – avoid any focus on P. Shift the framework from “was she raped” to “did he rape her”?
    - **Henderson**: Both scholars agree that neg. should be the standard, but she argues that need to look at P’s conduct to determine what reasonable person would have thought.
* Trend toward broadening definition of rape to include w/in marriage, beyond penile/vaginal, redefine force and non-consent
* ***People v. Barnes***: To prove rape, must establish that D used **force or fear of force** AND P’s **non-consent**. No resistance requirement, but proof of such would support non-consent and the case that P submitted under fear. Shifts focus away from P’s actions to D’s, but P’s actions aren’t disregarded.
  + +ve of requiring force:
    - Gives some info about whether a person’s will was compromised and gives the prosecution something to work with
    - Means you don’t have to worry about either party’s mental state, which is hard to show
    - Not requiring fear of force essentially means that you’re requiring resistance
    - Puts this crime in the category of the crime of violence. This is a moral statement
    - We’re trying to balance reducing the historic focus on P’s actions w/ not turning an inquiry into a he said/she said determination
  + –ve: Resistance could cause escalation and more violence
* ***State v. Smith***: **No force requirement** – just **objective manifestation of non-consent**. Can interpret non-consent from P’s words and actions.
  + ***Fischer*** holds that sexual inexperience of perpetrator and victim can’t be taken into account for a finding of mistake of fact. But most jdctns allow subjective evidence for a showing of MoF
* ***M.T.S.***: Force requirement fulfilled by P’s lack of consent (i.e. eliminates force req). All that is required is a **lack of affirmative consent** – silence or ambivalence doesn’t mean yes; need some outward act
* In common law, mens rea required was specific intent (very D-friendly). Mens rea now required is generally **negligence**. Should it be?
  + Yes 🡪 Showing purposeful or knowing is too hard so there would be no convictions. Requiring strict liability brings
  + Yes 🡪 Happy medium btwn negligence, which deters better than specific intent because it forces more caution, and strict liability, which would cover too many types of sexual encounters that you don’t want to punish, and would give the sense of morally equating specific intent crimes w/ no intent crimes.
  + No 🡪 Depending on the jdctn, should use recklessness if the act requirement is more lenient than force + non-consent (e.g. just non-consent), in order to balance out the burden of proof.

HOMICIDE

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| **Evidence Showing** | **Possible level of Homicide** | **If evidence shows…** |
| **Intentional Killing** | 1° murder | Intent + premeditation & deliberation. (Any length of time vs. hot/cold blood inquiry) |
| 2° murder | Express malice (knowing) but impulsive (no premed., delib., provocation, or social utility) |
| Voluntary manslaughter | Purpose/knowledge + provocation to a heat of passion (subj.) + no cooling off period + **unreasonable** response (obj.) |
| **Unintentional Killing** | Felony Murder (1°) | Inherently dangerous felony + causation (i.e. immediacy). No mens rea needed. |
| 2° murder | Implied malice (extreme recklessness, high probability of death, no social utility) |
| Involuntary manslaughter | Usually gross, sometimes regular negligence |
| Misdemeanor manslaughter | Inherently dangerous misdemeanor + causal link to death (no mens rea needed) |

**Involuntary Manslaughter**

Remember: need to establish EACH element!

* ***State v. Williams*** (baby w/ abscessed tooth): Most states require gross neg. Regular neg. stnd. applied here – convicted b/c should have sought medical care. **Culture doesn’t excuse** (thought feds might take child away from Native American parents), **but often mitigates sentence**. If gross neg. was applied might not have been found guilty b/c they had legit concern of baby stealing.
* **Vehicular MS (negligent homicide):** **Requires gross negligence**
  + ***Porter v. State***: D missed stop sign on country road. A regular neg. standard would expose too many to liability, including those from higher classes.
  + Punishment is typically light b/c society is dependent on cars and juries identify w/ the driver.
* **Misdemeanor MS:**
  + No mens rea requirement - intent to kill is found from intent to commit the misdemeanor
  + Misdemeanor must usually be **inherently dangerous** 🡪 **foreseeable risk of harm**
  + Must have **proximately caused** the death
  + **Limited to malum in se** (i.e. common law) crimes – NOT strict liability (i.e. regulatory) crimes
    - EXCEPT it also applies to malum prohibitum crimes that are focused on protecting public safety (e.g. unlicensed gun)
  + Very few jdctns have misdemeanor MS
  + E.g. ***U.S. v. Walker***: All state must prove is carrying gun w/o license + causal connection 🡪 death. Attenuation can defeat the causal connection.

**Voluntary Manslaughter**

Remember: need to establish EACH element!

* Voluntary MS requires:

1. **SUBJECTIVE** standard: Adequate **provocation** such that D was in a **heat of passion**. Look to the victim’s behavior (like w/ rape). If both are established, **mitigates from murder**.
   1. **Common law**: Provocation satisfied by specific male-centric categories: (1) physical attack or threat; (2) seeing wife adulterizing; (3) seeing son sodomized. **Mere words** **insufficient**.
   2. **Modern law**: Judge decides categories that constitute provocation (these have expanded to include battered spouse and child syndrome, female witnessing adultery, etc.). In most jdctns mere words still insufficient, but **some jdctns allow words if refer back to an actual event** you suffered OR to **event that hasn’t happened but would be adequate provocation if it did**. Provocateur doesn’t need to know it will cause strong emotion.
      1. Jury decides if provocation was sufficient by putting selves in D’s shoes. Must consider immediacy of killing and whether was a chance to cool off. Can consider the following as evidence of provocation:
         1. “continuing provocation” – cumulative emotional stress over time as long as there’s no cooling off period (***Berry*** – Israeli girlfriend)
         2. psychiatric testimony that provocateur meant to provoke (***Berry***)
         3. provocateur’s size/characteristics
         4. cultural norms – no other options other than to kill (***Wu***)
         5. D’s emotion (any emotion works EXCEPT revenge (***Berry***; ***Wu***))
2. **OBJECTIVE** standard: Must be feasible that a reasonable person who has been thus provoked would respond that way. (Don’t think of yourself as in the D’s shoes.) **If response is reasonable, excused** (self-defense 🡪 perfect defense). If not, find voluntary MS.
   * ***Rowland v. State***: Seeing wife sleeping w/ another man is adequate provocation. So not murder. But response not reasonable so he gets voluntary MS rather than excusal.
   * ***People v. Walker***: Provoked by friend being threatened, continuous attack, got cut. Response reasonable through when knocked attacker out w/ brick. Ruled not guilty even after killing w/ own knife b/c was still in heat of passion & no premeditation, but this arguably not reasonable.
3. Alternative way to get voluntary MS is the imperfect self-defense: D has honest fear of imminent severe physical harm, but the fear is found objectively unreasonable.

* +ve of there being a category of voluntary MS:
  + Victim more blameworthy
  + D’s actions less intentional – no malice aforethought – so less morally culpable
  + Less of a deterrence function when killing done in heat of passion
* Tension btwn upholding normative standards of self-control and being forgiving of human frailty

**Second Degree Murder**

Remember: need to establish EACH element!

* Express malice: **Intent** to kill, BUT **no premeditation**, **provocation**, **or any social utility**
  + ***Francis v. Franklin***: Evidence of express malice = D’s desire to escape, took gun from guard, waited on porch, pointed gun at decedent, safety was off, fired twice, no provocation, hits decedent suggesting aim. Evidence against = doesn’t use other opportunities to kill, just wanted to scare, second shot seconds later shows was accidental, didn’t hurt others.
* Implied malice: an act w/ a high probability of death that reveals an **abandoned and malignant heart**, or an extreme indifference to human life. **Unintentional but extremely reckless**.
  + ***Commonwealth v. Malone***: Evidence negating intent to kill (arguing for involuntary MS) = thought had 4 empty chambers, were friends just playing, distraught reaction, asks decedent if wants to play – didn’t seem like death would result. Evidence of extreme recklessness = **(1) conscious awareness of the risk, (2) severity of the risk, (3) no justification for taking the risk**.
  + ***People v. Protopappas***: Evidence of extreme recklessness = knew patients sensitive to anesthesia, gave them ODs, failed to monitor, assigned to care of unqualified people, didn’t properly resuscitate. If only happened once could maybe argue involuntary MS (only neg.) or mistake of fact (negating mens rea and exonerating him). **Pattern helps show recklessness**.
  + ***People v. Scott***:Intend to kill A, but accidentally kill B 🡪 **intent to kill transfers**. Philosophically unsound, but allowed. Guilty of 2nd degree for decedent and attempt for the intended target.
  + ***Berry v. Superior Court***: Keeping trained killing dog in populated area found as **reckless**. Not merely misdemeanor MS b/c there’s recklessness: (1) high probability of death (2) don’t have control of the dog like you do in the gun misfiring case; (3) **no socially acceptable reason** to have fighting dog unlike have a gun
  + ***Commonwealth v. Dorazio***: Former boxer’s intent to do serious bodily harm is reckless b/c his hands are deadly weapons – **reckless b/c risk of death is foreseeable**. Same if you shoot someone in leg and he dies of infection. **Characteristics** like D’s size, manner in which weapon used, ferocity and duration of attack **can be used to find implied malice/recklessness**.
  + ***People v. Watson***: Drunk driver who killed found reckless b/c drove to a bar when he knew he’d have to leave and could be drunk. Intoxication NOT a defense in this case.

**First Degree Murder**

Remember: need to establish EACH element!

Premeditation is often shown by lying in wait; complexity of the act; motive

Deliberation requires that D had time to reflect, but…

* **Some jdctns** say **any length of time** will suffice so long as D used it to reflect. Excludes impulsive acts.
  + ***US v. Watson***: Evidence that formed intent to kill = D initiated the struggle, had officer pinned, officer pleads for his life, time lapse, only one shot, D fired as was leaving. Evidence of premeditation = absence of passion, had motive, knew cops were following when entered house, sat at table with head in hands to plan escape. Evidence of deliberation = time lapse (officer begged for his life twice and kids had time to run away), had officer pinned, shot from a distance. Evidence of no premeditation = didn’t bring gun, head in hands shows anxiety, was provoked by cop threatening to blow head off, single shot shows was accident.
* **Other jdctns** (*Austin*)**say seconds not enough** – deliberation **requires cold blood**. Hot blood/impulsive action shows voluntary MS/2nd degree.
  + ***Mercy killing case***: Could show premeditation/deliberation b/c of time btwn getting the stocking and killing, motive, waits until sleeping, gives alternative explanation (died in his sleep), strangulation takes time. Could alternatively show was cold blooded – he’ll be bedridden forever so not impulsive, she said he would have wanted this so not hot blooded.
* **Mental impairment valid evidence** that even if formed intent to kill, couldn’t premeditate.
  + ***Gould***: Schizophrenic could claim he knew what he was doing was wrong, but couldn’t plan his action, so only 2nd degree. If you voluntarily get drunk hoping to kill someone, a court could look at the broader timeframe and find premeditation, or could not. But mental illness/alcohol/drugs CAN negate the ability to premeditate even if not the intent to kill.

Felony Murder:

Remember: need to establish EACH element!

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| Felony murder found | No felony murder |
| D & co-D commit felony (armed robbery), V has heart attack (*Stamp*) | Co-D commits arson, kills self in process (*Ferlin*) |
| D & co-D commit felony (burglary), cop kills cop (*Hickman*) | D and co-D commit armed robbery, V kills co-D (*Washington*) |
| D & co-D commit felony, V kills innocent (*Payne*) | When death is unforeseeable – teller electrocutes self on faulty emergency alarm (eg given in *Martin*) |
| During armed robbery, co-D kills co-D (*Cabaltero*) |  |
| D robs, during escape kills cop (*Gladman*) |  |

* Felony must be **inherently dangerous** (E.g. kidnapping, arson, burglary, robbery, rape, distributing drugs. Car theft may or may not be dangerous.) AND must be **causally linked** to death (death must occur during or immediately following the felony).
  + ***Gladman*** (D hid under car in parking lot): Considerations for immediacy (good for causal link both in felony murder and misdemeanor MS). These include (don’t need all of these):
    - Has D gotten to a place of safety?
    - Time elapsed btwn felony and death
    - Police in close pursuit?
    - Same location?
    - D still possesses the yield from the felony?
* There are 3 theories underlying felony murder. The third is most embraced b/c it most limits the application of felony murder.
  + Proximate cause: Dangerous felony causes volatile situation, and D is liable for all deaths regardless of who kills or is killed b/c felony is proximate cause of the death. Employs the “but for” rule. (*Martin* and *Stamp* disagree as to whether foreseeability is necessary.)
  + Protected person: Doesn’t matter who the killer is, but liability only extends where innocent people die. (D is liable for cop shooting another cop, but not for 3rd party shooting accomplice.)
  + Agency: Only have felony murder when the killing is in furtherance of the felony, death is foreseeable, & D or accomplice does the killing. (D only liable for his and accomplices’ actions.)
  + ***Martin***: But for burning the trash, wouldn’t have been death. “**But for” rule shows causation**. However, but for only works **if the death was foreseeable** from the felony. So could avoid felony murder liability if (1) D isn’t the one who committed the fatal act, (2) was not armed with a lethal weapon, and (3) had no reason to believe that co-defendant intended death.
    - [Wouldn’t be liable as accomplice either b/c didn’t share intent to cause the death]
  + ***Stamp***: Uses but for rule, but says **foreseeability isn’t necessary**. D is liable for felony murder even though not foreseeable that decedent would die from being made to walk quickly. **Strict liability for all death that occurs** from event set in motion by the felony.
    - You’re still liable if preexisting med conditions played a role. This is opposite of the case where ***person died of heart attack when witnessed a church theft*** – maybe more lenient there b/c was only a misdemeanor.
  + ***People v. Hickman***: Agrees w/ *Stamp* rule: “but for” and foreseeability unnecessary. D liable for causing cop to accidentally shoot another cop b/c D was fleeing after a burglary.
  + ***People v. Washington***: Limits the “but for” rule – **the accidental killing must be in furtherance of the felony**. Guy being robbed killed accomplice in self-defense. D not liable b/c: (1) accomplice assumed risk of harm to himself when committed the felony; (2) retribution looks at the wrongfulness of the act – can’t say the D did anything wrongful when a third party kills his accomplice; (3) furthers specific deterrence – makes people liable for their own conduct.
  + ***People v. Cabaltero***: D liable for felony murder when accomplice kills another accomplice (for endangering innocents) even though killing isn’t in furtherance of felony b/c of the “but for” rule. Employed this way, felony murder protects accomplices from being killed for no reason.
  + ***People v. Ferlin***: Co-D kills himself during arson. Arguments for no felony murder = co-D dying wasn’t part of the design, not foreseeable, was co-D’s own intervening negligence that caused the death, no moral culpability for the living D wrt the death. Arguments for yes felony murder = so what if it was co-D’s negligence – living D was negligent too in committing the felony, the felony is inherently dangerous, so likely that SOMEONE would die, but for the D’s involvement, co-D wouldn’t have died.
  + +ve:
    - Intent to commit the inherently dangerous felony makes you as morally blameworthy as someone who premeditated the murder.
    - Super-deterrent for people from committing felonies
    - Makes people commit felonies more safely
    - Achieves retribution – somebody should pay for the death!
    - Felony that causes death should be more punished than one that doesn’t
  + –ve:
    - No deterrence b/c was accident and b/c felons don’t think abt the felony murder rule when committing felony. Plus, why not just increase sentence for the felony?
    - Punishment depends on random facts like is decedent prone to dying from shock
    - If 1 person dies during felony, strict liability gives D perverse incentive to kill the rest
    - Transfer of intent from the felony in illogical. Not as culpable as premeditating killer
    - Want higher mens rea req. if we’re going to punish so severely – lacks the gradation we apply to other charges
    - Catches too many people in the net

Capital Murder:

* 35 states allow death penalty; most countries including all other Western democracies have banned it.
* After striking down death penalty in *Furman*, Sup. Ct. switched and upheld it in *Gregg* so long as there’s a **separate penalty phase**, **appellate review**, & a **rational procedure to guide sentencing** 🡪 guide jury discretion to avoid arbitrariness. [*Woodson* struck down automatic application of death penalty; later case limited it to murder convictions.]
* Guilt phase must convict unanimously based on beyond a reasonable doubt standard. Penalty phase **must unanimously determine that at least one aggravating factor exists** AND that the **aggravating factor(s) outweigh mitigating factor**s. If not unanimous, sentence is life in prison.
  + ***Olsen v. State***: State sought to prove these **aggravating factors** (**must be statutorily enumerated**): Great risk of death to 2 or more people, killed to avoid arrest, esp. atrocious or cruel, during the course of an independent felony, posed a future threat. Jury didn’t unanimously agree on the latter factor. Court struck down great risk of death b/c this only applies to non-intended victims, and especially cruel b/c this is reserved for particularly protracted and torturous killings.
  + ***Lockett v. Ohio*** (getaway driver’s accomplices killed someone): **Mitigating factors need not be statutorily enumerated**. Permit evidence reflecting on **D’s character** (e.g. personal history, prior record, capabilities, illnesses), **bad character of decedent**, or **circumstances** – even factors that wouldn’t be allowed as defenses in the guilt phase (e.g. didn’t actually shoot, was just the lookout, etc.). This is b/c we’re deciding the moral desert at sentencing rather than just whether the act matches the statute.
    - Still can’t bring as mitigating factors evidence not relevant to these 3 categories such as questions reexamining crim law policy (e.g. conditions as a prisoner, ineffectiveness of deterrence, agony of execution, questionable religious basis for retribution).
    - **Some jurisdictions allow** jury full **discretion in balancing** aggravating and mitigating factors. **Others** reserve death penalty for crimes that are **most aggravated and least mitigated**, so wouldn’t allow death penalty if are 10 mitigating and only 1 aggravating.
  + Should mitigating factors be delineated by statute just like aggravating factors?
    - No – don’t want to give impression that: (1) list is exclusive; (2) factors ranked by imp.
    - Yes: (1) could give D ideas; (2) could make jury give more weight to mitigating factors.
  + Tension btwn: rules 🡪 limit arbitrariness; & discretion 🡪 give fairness precedence when life is at stake.
* Categorical limits on imposition of the death penalty:
  + ***Tison v. Arizona***: Sons who broke dad out of jail, steal car, and kidnap family get death penalty even though didn’t shoot family. **To get death penalty for felony murder, must show at least recklessness wrt the death**. Appropriate to seek majoritarian evidence (poll state practices) if leads to clemency but not if leads to execution b/c Const. only restrains majority in the latter.
  + ***Atkins v. Virginia***: **Unconstitutional to execute mentally retarded Ds** b/c: (1) justifications for punishing less applicable; (2) trend among states toward banning; (3) professional orgs and international consensus says not to execute.
  + ***Roper v. Simmons***: **Unconstitutional to execute Ds under 18** b/c: (1) trend among states toward banning; (2) psychological evidence that takes a while for brains to develop judgment.
  + ***McClesky v. Kemp***: **Can’t apply death penalty in arbitrary manner**. **But court rejected statistical evidence** that blacks more likely to be executed than whites b/c: (1) would implicate entire justice system – job of the legislature to fix if it’s broken; (2) factors other than discrimination could explain the disparity.
* Capital punishment system is flawed. +ve: serves retributivist purposes and prevents vigilantism, BUT
  + Race of the victim is statistically significant (white 80% of the time)
  + Many convictions of destitute Ds and these often result from harmful D’s counsel
  + Innocent people have been executed and rate of acquittal from death row is rising. DNA testing is having an impact; the system is run by people and people make mistakes
  + Childhood MATTERS so just b/c killer doesn’t show mercy doesn’t mean we shouldn’t
  + Juries are death-qualified
  + More expensive than life in prison

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| **Attributing Criminality** | | | |
|  | **Act** | **Mens Rea** | **Withdrawal** |
| **Attempt** | Substantial Step or Dangerous Proximity | Specific intent for crime to be committed | Voluntary & complete renunciation  **Other defenses:** Legal impossibility works; factual does not |
| **Complicity** | Molecule of an act in furtherance | Knowledge of principal’s design and intent to assist.  Mens rea must match principal’s but if D has higher intent, can have higher liability | Deprive complicit act of effectiveness, timely warn cops, or make other effort to prevent offense’s commission |
| **Conspiracy**  \*If Blockburger or Identical Elements Test is met, can’t charge w/ consp. & attempt | Agreement + overt act showing intent to further the conspiracy | Intent to agree + intent to promote objective of the conspiracy (*Lauria*: unless felony, in which case knowledge – applies only the second element) | Take action reasonably calculated to inform some co-conspirators of withdrawal  **Other defenses:** Entrapment rarely works, legal imp. doesn’t |

ATTEMPT

* Mens rea: Need the intent to commit the crime you’re being charged w/
  + Doesn’t apply to attendant circumstances – can be charged w/ attempted statutory rape even though there’s a strict liability standard for the attendant circumstance that victim is under age
* Actus reus: ***People v. Murray*** (incestuous marriage):Preparatory activity not punishable via attempt liability – goal is not to punish thoughts. Need act that is very predictive that crime will occur.
  + ***MPC***: **Substantial step test** = any action strongly corroborative of the intended purpose.
    - Includes lying in wait, enticing victim to, scoping out, or unlawfully entering the planned location of the crime, possessing materials specially designed for unlawful use or that can serve no lawful purpose near the location of the planned crime.
  + ***People v. Rizzo***: Ds hadn’t actually seen target yet so no attempted robbery. To reach attempt liability, must pass **dangerous proximity test** = any action that takes you so near completion that the crime would have been completed if not for timely intervention (harder to show).
* –ve of punishing attempt: Test for attempt can be vague. Also it depends on luck. Thus arbitrary.
* +ve of punishing attempt:
  + Causes psychological harm
  + Had the requisite act and mental state. Only luck that he didn’t succeed, so just as culpable as someone who did succeeded
  + Deterrence effect
* But punish less severely b/c:
  + Provides the basis for law enforcement to intervene before crime occurs
  + Attempt results in less harm so less punitive punishment
* Defenses:
  + Abandonment
    - ***People v. Staples***: D who drilled holes in floor **can’t claim abandonment** b/c he **crossed the line into attempt.** B/c the abandonment defense only comes into play once attempt has been established, the court essentially says you can’t ever use the abandonment defense.
    - ***MPC***: **Can claim abandonment if renunciation is complete and voluntary**. Abandonment from fear, postponement until a better time, or malfunctioning equipment isn’t valid. Reason is that the legit abandoner lacks dangerousness of character. Most jurisdictions hold like the MPC.
  + Impossibility
    - ***Booth*** (lawyer picking up the hot coat – legal impossibility b/c in police possession so no longer hot): **Legal impossibility works** as a defense – even if you complete the act it wouldn’t be illegal. **Factual impossibility doesn’t work** as a defense – the crime can’t be completed only because of some physical or factual condition unknown to the D.

ACCOMPLICE LIABILITY

* Complicity can be used to link an individual to a crime. You are not charged w/ complicity, rather w/ the crime under an accomplice theory of liability. Same liability as the actor that common law referred to as the principal. You CAN be an accomplice to an attempted crime.
  + If no offense was ultimately committed (including no attempt crime), that’s your defense against being charged as accomplice to the offense.
* To be guilty as an accomplice, must have **knowledge of the criminal purpose** (don’t need to establish direct communication; not important to know the details of the crime), **intent to assist commission of the crime**, AND a mere **molecule of an act in furtherance** of the crime (even encouragement).
  + ***Gains v. State***: D who drove getaway car not complicit in robbery b/c **didn’t know friends had robbed**. Would have been liable if: had duty to intervene and didn’t, facilitated crime by not doing anything, gave encouragement, was there as lookout or to intimidate. Mere presence during a crime doesn’t make you an accomplice – have to take some action in furtherance.
  + ***State v. Tally***: D liable for accomplice murder even though decedent probably would have been killed w/o his help. And **even though principals didn’t know about his help**. He took a molecule of action in facilitation by delaying the telegram so he’s liable.
    - MPC: **Even if attempted aid fails or ultimately hampers** completion of the crime, you’re liable as an accomplice.
  + ***Wilson v. People***: D who boosted other guy in window to rob store not liable for accomplice burglary b/c didn’t share mens rea of the other guy – he only meant to be a decoy. **Accomplice has to share the principal’s mens rea to be liable**.
  + If 2 Ds are attempting a murder and one kills someone who wasn’t the target, the other is liable as an accomplice b/c a death was a natural and probable consequence of the planned act. If were going for a dif. crime & the death wasn’t **foreseeable**, the other wouldn’t be liable.
  + Accomplice can be liable for higher crime if has higher mens reas than principal.
* MPC (and most jdctns say something similar) says that D **can renounce** complicity by: (1) wholly **depriving** his **complicit act of effectiveness**; (2) giving **timely warning to the cops**; OR (3) making other **effort to prevent commission of the offense**. Not enough to withdraw – need to act to prevent the crime, even if the act ultimately fails.
  + ***People v. Beeman***: D’s renunciation by verbally communicating his change of mind after telling friends how to rob his sister is insufficient – didn’t take any action to stop the crime.

CONSPIRACY

* Actus reus: (1) **agreement** (can infer constructive agreement, e.g. from phone calls and $$ transfer in ***Moussaoui***); (2) at least one **overt act** showing intent to further the conspiracy, even if it doesn’t actually further it, and even if the act is lawful.
  + The act doesn’t have to be as substantial as that required for attempt
    - ***State v. Verive***: Agreement to dissuade juror inferable from D saying “Woodall sent us”. Overt act is going to juror’s house. Note – this act not enough to show attempt.
    - Must apply **Blockburger test** to see if each offense requires proof that the other does not (i.e. if conspiracy is subsumed w/in attempt), and **Identical elements test** to see if same evidence used to prove both charges. If either test is met, can’t charge w/ both.
  + The act must be on top of any acts that were part of the formation of the agreement
  + One act by one person is sufficient to find all co-conspirators liable for conspiracy (need the act to ensure that we’re not punishing merely an idea)
  + **Pinkerton rule** allows us to **impute liability** for a crime in addition to conspiracy from one co-conspirator to the others if the crime: (1) was **part of the scope** (i.e. objectives) of the conspiracy; (2) was **in furtherance** of it; (3) was **reasonably foreseeable** as a consequence of it.
    - ***Diaz***: Co-conspirator brought gun to drug deal, D didn’t know abt it, still held liable
* Mens rea: (1) **intent to agree**; (2) **intent to promote the object of the conspiracy** (unless the crime is a serious felony, in which case knowledge of the object of the conspiracy is sufficient)
  + ***People v. Lauria***: Stake in the crime is one way to make out intent/purpose. **Can prove** a **stake** if: (1) there’s **no** other **legitimate purpose** for the good/service; (2) **charge extra** for those using the good/service for criminal activity; (3) the **bulk of business** comes from criminal users.
  + ***Moussaoui***: Agreement shown from phone calls and $$ transfer. Acts include taking flight lessons, attending Al Qaeda training camp.
* Defenses:
  + ***U.S. v. Recio*** (gov’t seized drugs):Legal impossibility NOT a defense b/c conspiracy punishes the preparatory act.
  + Entrapment IS a defense – D can argue that gov’t induced him to enter the conspiracy – but rarely works b/c we want to be able to use sting operations.
  + CAN **withdraw simply by** taking action reasonably calculated to **notify at least some co-conspirators** of the withdrawal. Works even if withdrawal is forced b/c nabbed by the cops. Engaging in acts counter to the object of the conspiracy also helps, but no act requirement.
    - If you withdraw you’re still liable for conspiracy and anything done prior to withdrawal, but not for things that happen after.
* Rationale: (1) We fear groups of people b/c they may help motivate each other to commit a crime; (2) working together makes it more likely other crimes will be committed; (3) decreases possibility that individuals involved will depart from the path of criminality
* Advantages of using conspiracy charge:
  + Allows joint trials to better explain each person’s liability in the context of each other person’s activities. Can use stronger cases to fill holes in weaker ones.
  + Hearsay from co-conspirators is admissible evidence.
  + Showing a continuing conspiracy and a recent overt act allows extension of the SoL.
* Strategy: Multiple vs. single conspiracy charges
  + Gov’t usually favors one large conspiracy charge b/c extends liability net and saves $$. But will favor multiple prosecutions if can rack up many individual conspiracy charges against hub man.
  + To charge **single conspiracy**, must show that the actors EITHER: (1) **know or should know** (neg. standard) **about each other** (don’t need to know actual identities); OR (2) are **interdependent**.
    - Can infer knowledge of other sellers if supplying only one would expose supplier to risk, or if an actor is hired to do a task that wouldn’t accomplish anything alone.
    - Can show interdependence if success of one depends on the existence of another.

DEFENSES

* Justification = Crime advances a social interest (e.g. self-defense, defense of others)
* Excuse = Perpetrator isn’t morally blameworthy (e.g. insanity)
  + These are argued after State has proven elements of the offense w/ necessary mental state
  + Only require *some* proof – not proof by a preponderance of the evidence (keeps the burden of proof on the State)
  + Both theories of defense result in acquittal
  + One justification will suffice for principals and accomplices, but each needs their own excuse

**Defense of Force** (self-defense or defense of others)

* Self-defense permitted even if D intended to kill.
* ***People v. La Voie***:D exonerated after killing one of 4 guys who rear-ended him. **Test for self-defense** –
  1. Did D believe he was in imminent danger of serious bodily harm? (subj.)
  2. Would a reasonable person have had the same belief? (obj.)
     + If D has honest fear, but the fear is found objectively unreasonable, this is an **imperfect self-defense 🡪 mitigates to voluntary MS**
     + If (1) isn’t found this would put you into 1st or 2nd degree murder, but could still argue that provocation + heat of passion get you to voluntary MS.
* ***State v. Leidholm***: (***People v. Goetz*** (mugging on subway) agrees w/ this test, as do most jurisdictions)
  + That husband was asleep doesn’t absolutely bar self-defense argument – psychology (battered spouse syndrome in this case) increases imminence in D’s mind and keeps her from leaving.
  + **You DO have to retreat/try other options first/not use disproportionate force UNLESS you reasonably believe you can’t do so safely OR are at home**.
  + **Test whether to find self-defense**:
    1. Did D believe he was in imminent danger of serious bodily harm? (subj.)
    2. Would a reasonable person in D’s circumstances and w/ D’s characteristics have had the same belief? (**obj./subj.**)
       - Softens the *La Voie* test b/c in determining reasonableness it allows jury to consider relative physical characteristics, gender, past history btwn the two, psych. characteristics, (e.g. battery syndrome, even beliefs like racism), etc.
         * Battery syndrome makes it so threat is constantly imminent; also inescapable so no duty to retreat
* Can also use force in the course of law enforcement. Constitutional constraint is that you can’t deprive life or liberty w/o due process of law.
  + - Non-Deadly:Must be reasonable & necessary under the circumstances. In most jx can be used to prevent or effectuate arrest following misdemeanor breach of the peace
    - Deadly: Also must be reasonable and necessary. Only for felonies. Many jx limit use to law enforcement.
  + **Arrest:**
    - Most jx only allow cops to use force and only for felony. Must be probable cause.
    - Some jx allow for misdemeanors
    - Many jx still allow civilian arrests, but can’t use deadly force
    - In most jx, police have no duty to retreat before using deadly force
  + **Escape from Custody:**
    - Can only use degree of force that could have used to make the initial arrest.
      * EXCEPTION: escape from jail or prison – can use deadly force in many jx.
  + **Crime Prevention:**
    - Can use force to prevent misdemeanors and deadly force to prevent very dangerous felonies
  + **Suppression of Riots or Disorder:**
    - Some jx still allow regular citizens to use deadly force
  + ***Tennessee v. Garner***: Cop shoots fleeing, unarmed burglar 17/18 yrs old (stole $10) who would not stop. Cop had no **probable cause** (**believes or has cause to believe**) that the fleeing suspect posed a serious threat to the cop or others if not arrested. Can use evidence abt whether the person is a felon to inform prospective harm. Also, cop should provide warning if feasible. Must balance the interest in seizing the non-violent suspect w/ the felon’s interest in his own life and society’s interest. **When the person is not armed and dangerous, we’d rather let the person go**:
    - Don’t want to erode confidence in the police
    - Want to allow for gradations of punishment
    - Don’t want to introduce dangerous elements where there was no danger
    - If felon thinks he’ll be shot at no matter what he does he may bring his own gun – promotes violent behavior
    - Want guilt to be determined by the right process
    - Law enforcement has an interest in arresting live suspects
  + ***People v. Ceballos***: D sets trap gun in garage that shoots 15-yr-old, one of 2 kids breaking in.
    - Can only use deadly force to defend property when: (1) it’s **your dwelling** (considered an extension of your body); (2) there’s a **threat of great bodily harm** to you; AND (3) **force is necessary**.
    - Can use non-deadly force to prevent trespass to your possessory interests in property IF threat is imminent AND force is necessary, BUT must seek peaceful resolution first.

**Necessity** (choice between evils caused by a thing, situation, or event – not a person)

* VERY difficult to get the defense
* ***Dudley & Stephens***: Ate weakest member w/o consent. Found guilty of murder. Would have reached the same verdict had there been a lottery rather than killing the boy without his knowing of the plan.
* Can claim necessity if ALL THESE ARE MET:
  1. D had a **reasonable belief** his act was necessary to prevent **serous and imminent harm** (obj.) (though imminence is not always required)
  2. Committing the crime is the **only option**
  3. Will cause a **lesser harm**
  4. **D can’t be at fault** for causing the initial source of harm
* To determine which harm is greater, consider: the impact of the conduct on other people, norms of morality, severity of the crime, intent behind the law, whether there were alternatives, whether it would open a slippery slope
* –ve of punishing despite necessity:
  + We want to set achievable standards – even the judges couldn’t live up to this standard
  + Necessity is an acknowledgment that legislature can’t carve out every exception to liability
  + D acted in keeping w/ our underlying value of preservation of life – don’t want to disincentivize this behavior
  + There’s no deterrent effect where starvation involved
  + Starvation led to mental impairment so they didn’t have a guilty mind
  + There’s no threat that D will be dangerous in the future so no reason to incapacitate
  + No possibility of rehabilitation
  + Not having necessity defense strips D of ability to show his mens rea
  + Necessity defense gives an obj. standard so that juries can’t simply discard the law and choose for themselves when necessity arises (prevents arbitrariness)
  + Utilitarian argument – we want people to think rationally to save lives; sacrifice 1 for sake of 3
* +ve of punishing despite necessity:
  + We want to aspire to higher norms. Even if this won’t lead to deterrence, it still serves retributivist purposes.
  + You can’t predict the future and say that harm really will occur, so utilitarian argument fails
  + Don’t want people to take matters into their own hands
  + People would use necessity as an excuse to commit other crimes

**Duress** (choice between evils caused by a person)

* VERY difficult to get the defense
* D admits to having committed the crime but should be excused because a 3rd party exerted mental control or pressure such that it overcame his will and he was coerced.
* Duress defense is available where ALL THESE ARE MET:
  + D **reasonably believes** (obj. standard) that committing the crime is the **ONLY way to rebuff** a credible threat of **serious bodily harm** to himself or family
  + Threat is **imminent** (i.e. gun-to-the-head)
  + Compulsion is **continuous** (i.e. not attenuated in any way)
  + **No opportunity to escape**
  + **D can’t be at fault** at all for the creating the situation
* ***State v. Crawford***: D committed robbery and kidnapping b/c son was being threatened if he didn’t pay $$ owed to drug dealer. Convicted despite attempted duress defense b/c put himself in the situation.
* ***U.S. v. Contento-Pachon***: In Colombia D threatened that wife and child would be killed if didn’t transport cocaine to U.S. Didn’t go to cops there or in Panama b/c thought they were corrupt. Duress defense allowed b/c didn’t think he was signing up for this and b/c threats to family were specific.
* +ve of having a duress defense:
* Must be volitional to be criminal (actus reus requirement)
* No moral blameworthiness when there’s duress
* Recognizes that will can be overcome (e.g. rape)
* No deterrence b/c people won’t act rationally when under duress
* Resistance could cause more harm (e.g. rape)
* Allowing D to go through w/ the crime allows law enforcement to get to the people behind it
* If D tries to tell cops abt the threat b4 committing the crime, threat would be hard to prove
* –ve of having a duress defense:
  + Weakens incentives to uphold the law – people would succumb to the duress rather than standing strong and going to the cops
  + Might incentivize people to get involved in illegal activity if they could rely on duress defense
  + Most crimes committed under some kind of duress (whether structural factors or b/c a crime lord would hurt them otherwise) – slippery slope. The defense would be too easy to use.

**Insanity** (as a result of a **mental illness**, either couldn’t appreciate that conduct was wrong or couldn’t conform conduct to the law)

* Typically D chooses which defense to raise. In some jx, judge can impose insanity defense if there’s sufficient evidence and if D can’t voluntarily and intelligently make the choice.
* If plan to raise insanity defense, must inform prosecutor, disclose names of relevant witnesses, and disclose psychiatric examination. If these reqs not met, defense can be precluded.
* Some jx have bifurcated trial – can bring up insanity defense only for charges to which it applies.
* Burdens of proof: There’s a presumption of sanity so D has initial burden to show he wasn’t sane by showing SOME evidence. In some jdctns, the standard is that the evidence raise REASONABLE DOUBT that there’s insanity. Others use a preponderance of the evidence standard. Fed courts say need clear and convincing evidence. Prosecution must then prove sanity beyond a reasonable doubt.
* Consequence:
  + If insane, can be civilly committed, even for longer than max sentence of the crime
  + If insane person charged with misdemeanor, will usually try to reduce charge without pleading
* **M’Naughten test for insanity:** D EITHER didn’t know the nature or the quality of his act (e.g. he thinks his gun is a magic wand) OR that it was wrong according to the social moral consensus
  + ***People v. Serravo***: D stabbed wife to death thinking god told him to. Insanity defense succeeds b/c knew his act was illegal but [in a crazy way] believed it was morally right.
    - Because D thinks God told him to do it, he can argue that he therefore believed that *society* would agree that his actions were morally right.