**Theories of Punishment**

1. **Retribution**: Criminals have earned punishment through their actions and deserve it.
2. **Deterrence**: Punishment ensures that rational people do not choose crime.
3. **Rehabilitation**: Punishment removes the economic and social/moral causes of crime.
4. **Incapacitation**: People are divided into dangerous and nondangerous, and the dangerous ought to be prevented from endangering others.

**Actus Reus**

1. **Voluntary acts** (including irresistible urges must not including unconscious acts)
   1. Common law: All elements must be voluntary, *Martin* (public intoxication)
   2. MPC 2.01(1): Need only “include” a voluntary act, other aspects may not be
2. **Omissions**
   1. Common law
      1. Duty to act/protect in the following situations only, *Jones* (child care)
         1. Statute or contract imposes a duty to act on D
         2. Status relationship (parent-child, e.g.) between D and V
         3. D controlled and secluded V such that others could not aid
         4. D was the cause of V’s peril – not mentioned in *Jones*
      2. Additionally, there is no misprision of felony (duty to report), *Pope* (care for crazy mother & child)
      3. Exception allows liability where there is intent to cause death, *Pestinikas* (starve old man)
   2. MPC 2.01(3): No duty to act/protect unless imposed by law or sufficient under the statute

**Mens Rea**

1. **Broad conception**: If you are malicious you may be liable for any offense
2. **Modern conception**: Limited list of mens rea states, each element of an offense requires one of the limited list
3. The mens rea states
   1. **Purpose**, MPC 2.02(2)(a): Conscious object to cause result
   2. **Knowledge**, MPC 2.02(2)(b): Practically certain will cause result
   3. **Recklessness**, MPC 2.02(2)(c): Disregard substantial, unjustifiable risk
   4. **Negligence**, MPC 2.02(2)(d): Should know of substantial, unjustifiable risk
      1. Gross/criminal negligence usually required, *Santillanes*
      2. Sometimes civil negligence suffices, *Hazelwood* (Exxon Valdez)
4. Default MPC mens rea rules
   1. MPC 2.02(3): If statute does not specify mens rea, purpose, knowledge or recklessness required
   2. MPC 2.02(4): If statute specifies mens rea, that is required for all elements (unless contrary to purpose)

**Homicide** (causing the death of another) **Murder** (homicide w/ malice)

1. Types of malice
   1. Intent to kill/inflict great bodily harm
   2. “Depraved heart,” reckless disregard for human life, *Malone* (shoot friend)
      1. Can include acts committed while intoxicated, *Fleming* (drunk driver)
2. Types of murder
   1. Common law: 1st degree murder is willful (purpose), deliberate (pros and cons) and premeditated
      1. Premeditated: Had time to think, perhaps includes designing and planning the murder
         1. Five minutes can be enough time, *Carroll*
         2. But intent alone does not establish premeditation; there must be some time, *Guthrie*
         3. Premeditation can be inferred when there is no other evidence, use *Anderson* factors
            1. Close relationship btwn D and V gives opportunity and reason to plan
            2. “Exacting” method of murder suggests planning
            3. D made an attempt to disguise the crime after it was committed
      2. Policy: More “wicked” to premeditate and easier to escape if planned; deterring unplanned, hotblooded murder is hard but can deter plans; counter: Katie Poor feminist critique
   2. MPC 210.2, 210.6: No categories of murder, instead use aggravating and mitigating factors in sentencing
      1. Grants judges more power, changes plea bargaining and creates a different burden of proof

**Manslaughter** (Homicide w/o malice)

1. **Voluntary**: Intentional killing in “heat of passion” w/ “adequate provocation” and “no cooling time”
   1. Heat of passion: any sort of passion or rage
   2. Adequate provocation: three tests
      1. Common law #1: Limited list of legitimate provocations
         1. Relative attacked; false arrest; witness adultery; extreme assault; combat, *Girouard*
      2. Common law #2: Objective reasonable person standard, *Maher*
      3. MPC 210.3(1)(b): Subjective reasonable person standard, *Casassa*
         1. If a person in situation as D believed it to be would have extreme emotional disturbance
   3. Before sufficient cooling time: Short period, not hours, *Bordeaux*
   4. Is this a justification or an excuse? Note on killing of bystanders
      1. Excuse: Still manslaughter when mistake bystander for provoker, *Mauricio*
      2. Justification: But murder when kill bystander w/o mistake as to their identity, *Scriva, Spurlin*
   5. Policy
      1. In favor: Less serious crime, reasonable person might so react, reject aspirational standards
      2. Against: Encourage taking law into own hands, demeans Vs, create aspirational standard
2. **Involuntary**: Killing through gross negligence or recklessness w/o depraved heart, *Welansky* (nightclub fire)
   1. MPC 210.3(1)(a): Recklessness only, negligence insufficient
   2. Recklessness, *Hall* (professional skier)
      1. Substantial risk increased by behavior
      2. Unjustifiable risk as goal was only own enjoyment
      3. Conscious disregard, infer this from Hall’s expert status
   3. Gross negligence, *Williams* (sick Native American baby) – actual civil negligence there by statute
      1. Usually no specialization, just look to factors of reasonableness
      2. Contributory negligence is no defense, *Dickerson*

**Felony murder** (Kill w/ intent to commit felony)

1. Two different common law mens rea tests
   1. Strict liability for killing during a felony, *Stamp* (robbery, heart attack)
   2. Recklessness for killing during a felony, *Serné* (arson, kill son) – redundant w/ murder
2. MPC 210.2(1)(b): Presume reckless for robbery, rape, arson, burglary, kidnap, or felonious escape (+1st degree)
3. Restrictions on felony murder
   1. **Proximate cause**, *King* (drug running, plane crash); *Stamp* might have a less rigorous test
   2. Only “**inherently dangerous**” felonies can be predicate offenses, two tests
      1. In the abstract, *Phillips* (bad medical practice, larceny)
      2. As committed, *Stewart* (crack binge, child neglect), *Hines* (drunk felon w/ firearm)
         * 1. Majority in *Hines* requires foreseeable danger; dissent requires a high probability of danger
   3. **Merger rule**: Some felonies merge with the killing and cannot be predicate offenses, many tests
      * 1. Included-in-fact, *Ireland* (assault w/ deadly weapon)
        2. No independent purpose, *Burton* (armed robbery), *Mattison*, *Robertson*
        3. Look to legislative intent to see if would elevate all assaults to murder, *Hansen* (drive-by shooting)
        4. Assaultive felony w/ threat of immediate violent injury, elements in the abstract, *Sarun Chun*
           1. Policy: Administrability; presumption in favor of D; avoids problem where violent child abuser less liable than negligent child abuser, e.g.; shrinks annoying felony murder doctrine
   4. **Third party killings** during a felony
      1. Agency theory, must be acting in concert, and foreseeable and in furtherance, *Canola*
      2. Proximate cause theory, need only foreseeability/direct cause
         1. If V is a cofelon, could still say that cofelon assumed the risk
      3. Policy: Unfair to hold D liable for others’ actions? Might be justification or excuse for innocent third parties; why not for felon? Does the proximate cause test use broad mens rea?
4. Policy
   1. In favor: Take care during felonies; easier to charge actual murderers w/ murder; deters all felonies
   2. Against: Standard for other felonies low; might consume all homicide; disproportionate, not enough blame

**Mistake**

1. **Mistake of fact**: At least three different standards, arguably four
   1. Moral Wrong Principle (moral wrong exists and must be punished), Bramwell in *Prince*
      1. Strict liability requirements, *Olsen* (trailer girl)
         1. Strict liability for regul. offenses, *Balint* (opium), *Dotterweich* (mislabeling), but see *Staples* (guns)
         2. S.l. resisted for non-regul. offenses w/ moral opprobrium, *Morrissette* (steal govt shell casings)
         3. MPC rejects strict liability altogether
   2. Lesser Crime Principle (crime if mistaken belief true), Brett in *Prince*
      1. MPC 2.04(2): Charges reduced to the lesser crime under MPC, not in common law
   3. MPC 2.04(1)(a): Full defense if the mistake negates the required mens rea
2. Note on **rape** and mistake of fact
   1. Rape elements: Intentional or reckless intercourse through force, fear or fraud w/ no consent from V
      1. Honest belief in consent, recklessness standard, *Morgan* (wife)
      2. Honest and reasonable belief in consent, negligence standard, protect Vs, *Sherry* (nurse)
      3. Strict liability, “No means no”, social norms concerns that it gets around
3. **Mistake of law**
   1. Generally no defense, even w/ reasonable belief, *Marrero* (prison guard carrying gun)
   2. Exceptions where mistake of law allowed
      1. Official statement rule, rely on offic. statement of law later determined invalid/erroneous, MPC 2.04(3)
      2. Entrapment by estoppel, warranty by govt, Constitutional issues, *Raley* (plead the 5th)
      3. Collateral mistake of law, when mistaken about a separate law, *Smith* (floorboards), MPC 2.04(1)(a)
         1. In *Woods*, ct did not recognize as a defense to adultery claim
      4. Law establishes a defense, e.g. to committing a violation “willfully”, *Cheek* (taxes), MPC 2.04(1)(b)
      5. Failure to notify, no social awareness, *Lambert* (felon registry); only if not publ. avail., MPC 2.04(3)(a)
   3. Policy arguments
      1. Opposed: Induces wrongdoers to not know law; prosecution difficult; would have to know all offenses
      2. In favor: Induce to read law to find exceptions; criticisms do not apply in reality

**Causation**

1. **Common law approach to proximate cause**
   1. **Foreseeability**, three different general approaches
      1. Broad foreseeability of general risk, *Acosta* majority (helicopter crash)
      2. Made V vulnerable, result foreseeable and related, *Arzon* (two arsons), *Kibbe* (mug, hit by truck)
      3. Specific foreseeability of exact circumstances, *Warner-Lambert* (factory explosion), *Acosta* concurrence
   2. **Subsequent voluntary acts** may sometimes cut off liability
      1. Intentional acts, intervening human will severs liability, *Campbell* (goad to commit suicide), *Kevorkian*
      2. Reckless acts, divided standards
         1. Reckless action of another may cut off chain, *Root* (drag race, other veers into opposite lane)
         2. However, it may not due to lower recklessness or if it is highly foreseeable, *McFadden* (drag race)
         3. Encouraging reckless activity can overcome intervening act, *Atencio* (Russian roulette)
2. **MPC approach to proximate cause**
   1. MPC 2.03(2-3): There is proximate cause if the result differs from the intended or risked result only by affecting a different person/property—transferred intent—or causing a lesser injury, or if it is the same kind of injury and is not too remote or accidental to impose liability (very permissive standard)
   2. MPC 2.03(4): Proximate cause in s.l. cases requires that the result be a probable consequence
3. **But-for cause**, MPC 2.03(1)
   1. In dual-cause cases, courts redefine the result, e.g. death from two bullet wounds

**Attempt**

1. **Sentencing**
   1. Subjectivist perspective, mens rea central, punish attempt the same as completion, MPC
   2. Objectivist perspective, results central, lower punishment for attempt, common law
2. **Mens rea of attempt**: Two positions
   1. **Purpose/intent** required, traditional rule, *Smallwood* (HIV+ rapist); knowledge may suffice at c.l.
      1. MPC 5.01(1)(a) purpose for conduct; MPC 5.01(1)(b): purpose or knowledge for result
   2. **Parity rule**, mens rea for completed offense, some c.l. jx, *Khan* (attempted rape, parity for consent)
      1. Rationale of notice, on notice if attempted the offense previously
      2. Attendant circs, always parity, MPC 5.01(1)(c), *Dunne*, *Miller* (attempted statutory rapes, parity for age)
      3. Policy problems: Reckless drivers guilty of attempted homicide; theory of language; intent needed to show likely consequences; too much prosecutorial power and discretion
3. **Actus reus and attempt**
   1. Four different tests for actus reus
      1. Last Act Doctrine, last act before crime, *Eagleton*, rejected by *Barker*, no longer used
      2. **Dangerous proximity to success**, *Rizzo* (searching for victim), *Duke* (FBI agent posing as child online)
         1. Policy: Incentives to abandon criminality; might otherwise punish when no harm done; still risk completion and the harm that comes from completion; also, harder for police to enforce
      3. **Equivocality**, whether actions show unequivocal intent, subjective, *McQuirter*? (racist case)
         1. Criticisms: Juries can be biased; inferences skewed by view of world; merges mens rea & actus reus
      4. MPC 5.01(1)(c): “**substantial step**” towards culmination, list in MPC 5.01(2), *Jackson* (outside bank)
         1. Earlier arrests than equivocality, covers more activities than dangerous proximity
   2. Abandonment defense, not in c.l. (actus reus stricter), allowed in MPC 5.01(4) if “complete and voluntary”
4. **Impossibility**, special category of attempt
   1. **Objectivist**: Factual impossibility no defense; legal impossibility is a defense, *Jaffe* (buying “stolen” goods)
      1. Immediately contemplated act; was goal to acquire stolen goods or goods that happened to be stolen?
      2. Criticism, easy to transform, mostly courts’ intuitions
   2. **Subjectivist**: Liable if would be a crime had circumstances been as D believed, *Dlugash* (shoot dead man)
      1. MPC 5.01(1)(a), influential bc harsh
   3. Exceptions of no liability
      1. Voodoo doll exception, “so inherently unlikely”, ct discretion for lower or no charge, MPC 5.05(2)
      2. No-crime exception, mistake of law as to whether a crime exists, cannot impose self-liability

**Group Criminality**

**Complicity** (encouraging or aiding another in a crime)

1. Mens rea, two models
   1. **Purpose** for the principal’s criminal act, *Hicks* (“die like a man”), *Gladstone* (drug sale), MPC 2.06(3)
      1. Knowledge usually insufficient, *Gladstone*; sometimes sufficient for major crimes, Posner in *Fountain*
      2. Policy: Otherwise require to put self in harm’s way, hard to know what to prosecute, theory of language
   2. **Foreseeability of harm** model, *Luparello* (use force to find wife)
      1. Once you have purpose for one criminal act, liable for all natural and foreseeable crimes that arise
      2. Higher standard than conceivable, reasonably foreseeable, *Roy* (gun seller robs buyer), *Marr*
   3. Result offenses and attendant circumstances
      1. Result: parity rule only *McVay* (exploding steamship), MPC 2.06(4)
      2. Attendant circumstances: c.l. and MPC leave the question open for courts
   4. *Russell* fictions, rivals complicit in gunfight, reckless towards death
2. Actus reus, two models
   1. Objectivist, “some effect in reality”, no but-for cause, *Wilcox* (jazz player), *Tally* (judge stops telegraph)
   2. Subjectivist, no need to have any effect in reality, luck should not be a factor, MPC 2.06(3)
      1. Liable for complicit attempt even if the principal never made any sort of attempt
3. Abandonment, not in c.l., but MPC 2.06(6)(c) accepts as do some c.l. jx

**Conspiracy** (substantive offense independent of crime)

1. Policy: Earlier prosecution; procedural reasons; forum-shopping; poison the well; break up organized crime
2. Actus reus: Agreement to unlawful goal or means
   1. Common law: “unlawful” can civil violations, *Interstate Circuit*
      1. Inference test: nature of proposals; manner proposals made; unanimous action; no contrary evidence
      2. Mere gang membership might not be sufficient to infer agreement, *Garcia* (“talking smack”)
      3. Overt act requirement, adopted by statute, bar is low
   2. Model Penal Code, 5.03: “unlawful” must be criminal violations, overt act requirement
      1. Unilateral conspiracy: When only one party thinks they are conspiring, used for undercover agents
3. Mens rea, three tests
   1. Purpose to conspire and purpose towards unlawful goal/means, *Lauria* (prostitutes)
      1. Infer purpose from knowledge when: Financial stake in the venture; no legitimate use for services; volume of illegit use grossly disproportionate w/ legit use, *Lauria*
      2. Might find knowledge sufficient in serious crimes
   2. Purpose to conspire and parity rule for unlawful goal/means, MPC 5.03
   3. Purpose to conspire, liable for foreseeable crimes in furtherance of conspiracy, *Pinkerton* (taxes and booze)
      1. Including crimes not conceived as part of the conspiracy, *Bridges* (bodyguards shoot bystanders)
      2. Minor actors may have higher foreseeability standards, *Alvarez* (drugs and shootout), rejected in *Diaz*
      3. Furtherance requirement may be attenuated in some cases, *Brigham* (mistaken identity)
4. Abandonment, cannot be charged w/ further crimes but can be charged w/ conspiracy

**Justifications and Excuses**

**Self-defense** (justification, makes the action not morally wrong)

1. Common law: Reasonable belief; necessary force; against imminent unlawful force; not excessive
   1. Objective reasonability of belief, *Goetz* (subway muggers shot)
      1. NY statute in *Goetz* allowed deadly force when being robbed
      2. Policy: Subjective standard would allow Ds off easy; indivs determine when deadly force necessary; upsets idea that social norms establish criminal law
   2. Imperfect self-defense when belief is honest but unreasonable, results in voluntary manslaughter
   3. No defense when D incited the assault, when it could have been avoided, *Peterson* (waved gun)
2. MPC 3.04(1): Subjective standard, only honest belief is required
   1. MPC 3.09(2): An unreasonable belief is not a defense to a reckless or negligent crime (no murder, though)
   2. MPC 3.04(2)(b): Deadly force only permitted in threats to life, bodily harm, kidnapping or rape
3. Imminence of unlawful force issues for battered women, etc.
   1. Experts allowed for battered woman syndrome, *Kelly* (kill w/ scissors)
      1. Makes D’s testimony more credible, prevents incorrect jury assumptions
   2. Interpreted narrowly, *Norman* (kill sleeping husband), *Schroeder* (prison assault), *Ha* (gang, no English)
   3. Alternative, unadopted interpretation, “necessary to save life”, Rosen article
4. **Duty to retreat**: Deadly threat, know retreat gives complete safety, *Abbott* (hatchet), MPC 3.04(2)(b)(ii)
   1. Castle exception, no duty to retreat from home, *Tomlins*, except possibly from cohabitants, *Gartland*
   2. MPC 3.04(2)(b)(ii)(1): No duty to retreat from home, and none from work except from coworker

**Necessity** (justification, makes the act not morally wrong)

1. MPC 3.02(1): Honest belief in danger greater than harm visited by D’s crime
   1. Legislature has discretion to define how dangerous the crime is and whether necessity exists for it
2. New York statute: Actually imminent danger, not D’s fault, clearly greater than harm visited by D’s crime
3. Illinois statute: Reasonable belief in danger, not D’s fault, greater than harm visited by D’s crim
4. Other factors to consider in specific circumstances
   1. List of factors for consideration in felonious escape in *Lovercamp*, *Unger* (prison escape, sexual assault)
      1. Specific threat of death, sexual assault or substantial bodily injury; No time for complaint or history of futile complaints; No time/opportunity to resort to cts; No force used against prison personnel or third parties in escape; Prisoner immediately reports to authorities once achieved a position of safety
   2. Necessity cannot be invoked for civil disobedience, *Schoon* (Nicaragua protest)
   3. Might not allow killings to be justified under necessity, issues of human dignity, *Dudley and Stevens*?

**Insanity**

1. Rationales for the insanity defense
   1. Insanity negates mens rea, but it does not always do so
   2. Punishment fails to deter lunatics, again not always true
   3. Insane persons are not morally blameworthy as they know not what they do
2. Common law: Always requires mental illness, then two alternative tests (“severe” mental illness in federal law)
   1. Cognitive: Did not know either nature of act or its wrongfulness, *M’Naghten* (pol. assassination), federal law
   2. Volitional: Did not act of own volition, *Davis*, rejected in *Lyons* and *Blake* (bank robbery)
3. MPC 4.01(1): mental illness, D lacks “substantial capacity” to understand wrongfulness or act w/ volition, *Blake*
   1. Discards the “quality or nature” criteria bc MPC considers it redundant w/ mens rea