

## Criminal Law

### I. Intro:

- a. Criminal law as imposing social condemnation and punishment via criminal sanction
  - i. Authorizing the coercive power of the state
  - ii. Distinguishable from tort
  - iii. Sword and shield of social control
- b. Demands carefully delineated rules → legitimacy
  - i. In sync with community values
  - ii. Understandable by the community (for deterrence purposes)
- c. Criticism:
  - i. Mass incarceration
- d. Criminal law: statute dependent; incorporated in a criminal code
  - i. Not common law; Model Penal Code (MPC) + state codes

### II. Culpability

- a. *Mens Rea*: “vicious will”; mental element of any offense
  - i. Fault, not harm
  - ii. General: elements of any offense
  - iii. Specific: as applied to particular crimes
  - iv. Prosecutor’s burden (of proving guilt)
- b. Broad v. narrow (legal req.) usage
  - i. Intended, expected, or should have expected
- c. MPC, in decreasing degrees of culpability (2.02(1)):
  - i. Intent/purpose
  - ii. Knowledge
  - iii. Recklessness
  - iv. Negligence
    1. See 2.02(2)(a)-(d) for definitions
      - a. 2.02(3)-(4) = default rules for statutory interpretation
- d. Mens rea defenses:
  - i. Involuntary act; accident; mistake; duress
  - ii. Legal insanity

### III. *Regina v. Cunningham* (1958)

- a. Facts:
  - i. D removed gas meter, asphyxiated mother in law; charged with theft (1) and causing ingestion of gas (2)
  - ii. (2) requires a finding of malice
- b. Holding:
  - i. Conviction overturned; judge erred in instructing jury that malicious meant “wicked,” rather than requiring foresight
- c. Rationale:
  - i. Unlawful act, not appealed; also malicious? Requires mens rea
    1. Mens rea = intend or foresee
    2. Malice = recklessness or actual intention (Prof. Kenny)
      - a. “foresight of the prohibited consequence”
      - b. Intention + foresight

- c. Restricts statute's definition of "cause"; not prejudicial to jury, as was the trial judge's instruction defining "malice"
  - i. Statutory purpose?
    - 1. "administer to" v. "causes to be administered"... "to inflict upon"
  - ii. In tort, damages would likely have been granted
    - 1. Tort law holds that a loss must be accounted for
      - a. Not so in criminal law

IV. *Regina v. Faulkner* (1877)

- a. Facts:
  - i. Sailor lights match while stealing rum, burns ship
- b. Holding:
  - i. Conviction overturned; act was not intentional and willful
    - 1. Error of trial judge in ignoring intention requirement (recklessness = foresight)
      - a. Transferred intent theory → error
        - i. Must prove mens rea (blameworthiness)
- c. Rationale:
  - i. If D commits felony and accidentally commits another felonious act, D is not guilty of second act by transfer (not criminally responsible for every result)
    - 1. Felony murder rule:
      - a. If a death occurs during commission of a felony, D is liable for death (charged with homicide)
        - i. But, depends on foreseeability, so the rule is widely criticized
          - 1. Imputes mens rea from another crime
  - ii. Specific intent:
    - 1. Requires further objective (breaking and entering as specific intent to commit burglary)
    - 2. Or, requires subjective awareness/actual knowledge (bigamy)
  - iii. General intent:
    - 1. Only requires intentional act (trespass)
  - iv. Proving intent:
    - 1. Presumption
      - a. Constitutionality of mandatory presumptions
        - i. *Francis v. Franklin*: presumption that person of sound mind intends natural consequences of actions held to be unconstitutional
    - 2. Permissive inferences: more likely than not
      - a. *Barnes v. United States*: possession of stolen property and knowledge

V. **Negligence**

- a. Ordinary carelessness v. gross departure from reasonable standard of care
- b. *State v. Hazelwood* (Alaska 1997)
  - i. Facts:
    - 1. Exxon Valdez prosecution; D charged w/ discharging oil
  - ii. Holding:
    - 1. D guilty of offense by acting negligently (ordinary neg. standard)
  - iii. Rationale:
    - 1. "Criminal negligence" v. negligence necessary to support a civil action

- a. Distinction rejected by trial judge (defined negligence as a reasonable standard of care)
      - i. Reversed by appellate court, in turn reversed by Alaska SC
      - ii. Criminal negligence only requires a greater *risk* (no difference in standard of care)
    - b. Dissent: negligence should not result in imprisonment, esp. if it cannot, alone, justify punitive damages
  - 2. Deterrence rationale
- c. *Santillanes v. New Mexico* (NM 1993)
  - i. Facts:
    - 1. D cut child's neck negligently in altercation with 3<sup>rd</sup> party
  - ii. Holding:
    - 1. trial court erred in using standard definition of neg.
  - iii. Rationale:
    - 1. Criminal punishment requires that conduct be morally culpable; mens rea element requires "criminal negligence"
      - a. Criminal negligence = mental state

## VI. Model Penal Code 2.02 (mens rea mental states)

- a. MPC 2.02(1)
  - i. Mens rea mental states: purpose, knowledge, recklessness, negligence
- b. MPC 2.02(2)(a)
  - i. Purpose: conscious object or belief
    - 1. Intent; most culpable mens rea state
- c. MPC 2.02(2)(b)
  - i. Knowledge: practically certain
    - 1. Possessory crimes (drugs, guns, stolen property)
    - 2. With purpose → intentional/willful mens rea states
- d. MPC 2.02(2)(c)
  - i. Recklessness: conscious disregarding a substantial and unjustifiable risk (gross deviation from reasonable standard of conduct)
    - 1. "conscious risk creation"
- e. MPC 2.02(2)(d)
  - i. Negligence: gross deviation from reasonable standard of care
    - 1. With recklessness → creation of risk without intent mens rea states
- f. MPC 2.02(3)
  - i. Culpability required (established by purpose, knowledge, or recklessness)
  - ii. Negligence as culpability must be prescribed by the statute (comment)
- g. MPC 2.02(4)
  - i. Prescribed subjective culpability requirement applies to all material elements of offense
    - 1. Exception in 2.05:
      - a. does not apply to violations
        - i. No moral condemnation
      - b. Does not apply where statute establishes strict liability
    - ii. If a statute requires culpability for any element of an offense, it can be assumed that it was meant to apply to all of the elements

1. False imprisonment statute example: requires that offender knowingly restrain the victim, and know that he is doing so unlawfully

VII. Comment to 2.02:

- a. Material elements: conduct, attendant circumstances, and results
  - i. Material elements + culpability = offense
  - ii. Material elements defined in MPC 1.13(9) and (10):
    1. Material: anything not related to jurisdiction (statutes of limitations, venue, etc.)
- b. Purpose v. knowledge
  - i. Purpose significant in attempt, conspiracy, complicity offenses; otherwise, knowledge sufficient
- c. Recklessness:
  - i. Conscious risk creation
  - ii. Risk = substantial and unjustifiable
- d. Negligence:
  - i. Does not require a state of awareness (but, ought to be aware of risk)
  - ii. Gross deviation from reasonable standard of care

VIII. Applying the MPC analysis

- a. 1.) Determine the material elements of the offense
- b. 2.) Determine which type of mens rea is required with respect to EACH material element
- c. Examples (material elements and mens rea):
  - i. Burglary (NY)
    1. Enters or remains unlawfully (knowledge); intent to commit a crime therein (purpose); dwelling (knowledge)
  - ii. Burglary (CA)
    1. Enters with intent (purpose); inhabited (knowledge); all other kinds (recklessness)
  - iii. Destruction of property (DC)
  - iv. Destruction of property (NY)
- d. Purpose v. motive
  - i. Motive = legally irrelevant (“remoter” intention, but still an intention)
  - ii. Also, see distinction between purpose v. wish
- e. Recklessness v. negligence (culpable unintentional actions)
  - i. Negligence = inadvertent; recklessness = aware of the danger but acted anyway (awareness)
    1. “should be aware”; “gross deviation”; in a like situation
      - a. Takes into account all exigent circumstances
      - b. “subjectivize” negligence
        - i. Does the situation warrant societal condemnation?
    - ii. MPC: recklessness requires awareness of three elements (that there is a risk; that risk is substantial; that risk is unjustifiable)
    - iii. *State v. Muniz* (Arizona 2011)
      1. Shooting at chair, struck child; convicted of recklessness (not negligence)
    - iv. *Shimmen’s* case
      1. Karate kick broke window; convicted of recklessness (awareness + failure to take precautions)
      2. Court erred: not reckless, if D thought that he had eliminated the risk
  - v. Morgan Pina
    1. Killed by driver distracted by cell phone

2. Held to be not reckless (did not fully appreciate the risk)
  - a. “opaque recklessness” – aware of risk but unaware of its gravity (substantialness)
- vi. Rockefeller (Metro North crash)
  1. Criminal charges?
    - a. No intent, no conscious risk creation, no recklessness
  2. Negligence?
    - a. “conscious sleep”

**IX. Knowledge v. Recklessness**

- a. *Flores-Figueroa v. US*
  - i. Identity theft statute requires that “knowingly” apply to all material elements (D had to know that he was in possession of a SSN belonging to another person, rather than merely a fake SSN)
    1. Reversed conviction
- b. *US v. Holloway*
  - i. Car-jacking; statute specifies taking from another with the intent to cause death or serious bodily harm
    1. MPC 2.02(6):
      - a. Purpose requirement can be satisfied even if the purpose is conditional
    2. Scalia:
      - a. Unqualified intent means that actual intent is required; would acquit the D
        - i. One cannot intend a result that one hopes will not happen
          1. Plans contingent on circumstances that are far from certain

**X. Willful ignorance**

- a. *US v. Jewell* (9<sup>th</sup> Circ., 1976)
  - i. Facts:
    1. Driving with 110 lbs. of marijuana, claimed ignorance;
  - ii. Holding:
    1. Willful ignorance of marijuana constitutes knowledge/culpability
  - iii. Rationale:
    1. Jury instruction: conviction could result if ignorance was result of conscious purpose to avoid knowing the truth (presence of marijuana)
      - a. *Willful* blindness = knowledge; “ostrich” instruction
        - i. Ignorance must be “solely and entirely a result of...a conscious purpose to avoid learning the truth”
        - ii. MPC 2.02(2)(b): “attendant circumstances”
      - b. Requires intent to “cheat the administration of justice”; narrow scope (since otherwise would equate willful blindness w/ negligence)
        - i. Culpable knowledge does not require certainty
        - ii. MPC 2.02(7) = “aware of a high probability”
          1. Creating substantial/unjustified risk? Reckless?
    2. Dissent (Kennedy):
      - a. Jury instruction erred:
        - i. Culpability requires awareness of high probability that controlled substance was inside car

- ii. D could not be convicted if he “actually believed” there was no marijuana
    - iii. True ignorance = not culpable
  - 3. Notes:
    - a. Is willful ignorance doctrine a legitimate interpretation of “knowledge” mens rea?
      - i. How to define? Evidentiary rule?
        - 1. Consider efforts to avoid information
- b. *Global-Tech Appliances v. SEB S.A.* (SC 2011)
  - i. Facts:
    - 1. Civil suit; culpability based on knowledge of patent infringement
  - ii. Holding (Alito):
    - 1. Willful blindness doctrine applies to civil suits
      - a. High probability + deliberate actions to avoid learning truth (“purposely contrive to avoid knowledge)
      - b. Doctrine surpasses recklessness/negligence
  - iii. Rationale:
    - 1. Kennedy dissent: willful blindness is not knowledge
      - a. Question is one of morality (D’s *motives* for remaining blind); questions of morality and policy are best left to legislatures
    - 2. Affirmative acts v. omissions
      - a. “shutting eyes” v. failure to actively investigate
- c. *US v. Giovannetti* (7<sup>th</sup> Circ., 1990)
  - i. Facts:
    - 1. D rented house to gamblers, knowing their intentions
  - ii. Holding (Posner):
    - 1. D’s conviction reversed; knowledge that lessees were professional gamblers NOT sufficient to establish culpability
  - iii. Rationale:
    - 1. “ostrich instructions” require evidence of deliberate (active) avoidance; only affirmative acts
- d. *US v. Heredia* (9<sup>th</sup> Circ., 2007)
  - i. Facts:
    - 1. Marijuana in trunk of borrowed car
  - ii. Holding:
    - 1. Conviction upheld on willful blindness test (high probability + affirmative acts)
  - iii. Rationale:
    - 1. Motive is accounted for in “deliberate” prong; so, other motives could constitute evidence that actions were not deliberate, designed to avoid knowing truth
      - a. But, D deliberately did not investigate, since it was unsafe to do so (rather than to deliberately avoid learning the truth)
    - 2. Concurrence:
      - a. No duty to investigate if no crime is intended
      - b. Specification of *Jewell* instruction

**XI. Mistake of Fact**

XII. *Regina v. Prince* (GB 1875)

- a. Facts:
  - i. D unlawfully took unmarried girl of under 16 (Annie Phillips) out of her father's possession, thinking that she was 18 (mistake of fact re: age)
- b. Holding:
  - i. Conviction upheld; the act itself was wrong ("moral-wrong" approach)
    - 1. Mistake cannot exonerate
- c. Dissent (Brett):
  - i. The result makes the offense ("he runs the risk"); "lesser-crime" approach
    - 1. Ignorance of the law does not excuse
  - ii. But, if reasonable mistake of facts causes D to believe that his acts are lawful, no mens rea
    - 1. Majority's rationale can only apply where the act knowingly committed is a crime (such as where assault results in murder)
      - a. So, dissent would allow the defense that D's mistaken belief was reasonable
        - i. Under lesser-crime doctrine, ignorance of the *law* is still no defense
      - b. MPC 2.04: ignorance or mistake
- d. Rationale:
  - i. Holding: narrowly tailored only to apply to sexual offenses?
    - 1. Or, broadly applied to hold that mistake of fact is never a defense?
      - a. Type of offense dictated by strict liability
  - ii. Hughes critique:
    - 1. Community ethics cannot be easily defined
  - iii. "acoustic separation"
    - 1. Statute designed to speak to two audiences: the public and courts
    - 2. Decision rules v. conduct rules
  - iv. MPC approach:
    - 1. Determine whether mistake negates mens rea
    - 2. Adopts lesser crime approach; holds that aggravating circumstances require additional awareness of those circumstances for conviction of a greater crime

XIII. *State v. Benniefield* (Minn. 2004)

- a. Drugs within 300 feet of a school
- b. MPC 2.02(4): mens rea requirement applies to each element of the offense

XIV. *People v. Olsen* (CA 1984)

- a. Strict liability for lewd and lascivious
- b. Reconsideration of strict liability?
  - i. Mandatory sentencing laws, sex offender registration
    - 1. Fairness argument
  - ii. *Lawrence v. Texas*
    - 1. Throws into question the concept that act is a moral wrong, or that there is a lesser crime

XV. *B (A Minor) v. Director of Public Prosecutions* (UK, 2000)

- a. 15 year old boy soliciting sex from a 13 year old girl (mistake of age)
  - i. Upholds mens rea requirement

XVI. *Garnett v. State* (MD, 1993)

- a. Retarded man charged with rape of 13 year old girl (mistake of age)
  - i. Strict liability; no mistake of fact defense
  - ii. Dissent: presumption of innocence requires mens rea

XVII. **Strict Liability**

XVIII. *US v. Balint* (1922)

- a. Drug statute, enacted by Congress under authority to regulate taxation (Narcotics Act)
- b. SC upheld conviction, even though D's did not know they were selling prohibited drugs
  - i. Based holding on statute's wording and legislative intent

XIX. *US v. Dotterweich* (1943)

- a. SC (Frankfurter) upheld conviction of Director of pharmaceutical company, convicted of selling misbranded drugs
  - i. FDA statute did not require mens rea; holding based on legislative intent
    - 1. FDA statute passed under Congress' commerce powers
  - ii. Liability imposed on actor best able to avoid the offense (rather than imposing risk on the public)
    - 1. But, what deterrence function, if not requiring actors to act reasonably (distinct from negligence)
- b. With *Balint*, D did not know/did not act recklessly/negligently (no mens rea)

XX. *Morrisette v. US* (1952)

- a. Facts:
  - i. D took shell casings from Air Force practice range, sold them; charged with conversion
  - ii. Trial judge instructed that conviction should be based on whether D intended to take the property, rather than whether he intended to commit the offense
    - 1. State SC reversed
- b. Holding (Jackson):
  - i. Conviction reversed; D's intent to steal another's property must be proved
- c. Rationale:
  - i. Strict liability for "public welfare offenses"
    - 1. **mala prohibita**, as opposed to **mala in se** (wrong in itself) offense
  - ii. For crimes well defined in the common law, statutory silence re: mens rea should not imply legislative intent for strict liability

XXI. *Staples v. US* (1994)

- a. Facts:
  - i. D unwittingly possessed an automatic weapon (did not know it was capable of firing more than one shot)
  - ii. Trial court refused to instruct jury that D's knowledge of automatic capability must be proved, D was convicted
    - 1. Conviction upheld in appellate court
- b. Holding (Thomas):
  - i. Conviction reversed (mens rea required)
    - 1. Distinguished from *US v. Freed* (grenade case); possession of hand grenades is "not innocent in and of itself"
- c. Concurrence (Ginsburg):
  - i. What level of knowledge suffices? Knowledge of possession, that the weapon is dangerous, or that the weapon is outside regulated parameters?
    - 1. Conviction requires the third level of knowledge (D must know that he possesses a machine gun)
- d. Rationale:
  - i. Statute silent on mens rea required



- ii. Does case fall within category of “public welfare” or “regulatory” offenses, where strict liability governs?
  - 1. In these cases, a statute’s silence is construed to imply that mens rea need not be established
- iii. Strict liability in this case would criminalize a wide range of permissible conduct (gun ownership)

**XXII. *US v. X-Citement Video* (1994)**

- a. Facts:
  - i. Statute prohibiting visual depiction of a minor engaged in sexual conduct
- b. Holding (Renquist):
  - i. Scierter (mens rea) requirement applies, since statute’s qualification of “knowingly” applies to all elements of the statute (since otherwise, conduct would not constitute a crime)
    - 1. So, conviction requires proof of knowledge that the subject was a minor
- c. Dissent (Scalia):
  - i. Plain text of the statute (where “knowingly” only applies to its surrounding verbs) should dictate whether mens rea is required in other parts of the statute
    - 1. Would apply strict liability

**XXIII. Vicarious Liability of Employers**

**XXIV. *State v. Guminga* (Minn., 1986)**

- a. Facts:
  - i. Vicarious liability imposed on owner of a bar for waitress’ serving alcohol to a minor
- b. Holding:
  - i. Statute imposing vicarious liability on owner for acts of waitress unconstitutionally violated owner’s substantive due process, since he was unaware of the waitress’ actions
- c. Dissent:
  - i. Vicarious liability as a deterrent
- d. Rationale:
  - i. Due process analysis of a statute entails weighing public interest protected + intrusion on personal liberty + any alternative means
    - 1. Intrusion on personal liberty requires an assessment of the penalty (imprisonment treated differently from fine, but both entail loss of reputation)
  - ii. Vicarious criminal liability of employers
    - 1. “entity liability” distinct from vicarious criminal liability imposed on individual owners, as individuals
  - iii. Vicarious liability of parents; statutes struck down in many jurisdictions
    - 1. Distinct from vicarious liability of employers
    - 2. Less problematic if imposing liability for failure to supervise, etc., since parent is held responsible for own actions
  - iv. MPC 1.04(5): re: violations
    - 1. Violations: no legal disadvantage resulting
    - 2. But, all punishment carries reputational implications

**XXV. Involuntary Act Defense to a Strict Liability Crime**

**XXVI. *State v. Baker* (Kan., 1977)**

- a. Involuntary act did not exonerate, since speeding was a strict liability crime (no mens rea requirement)

**XXVII. *Barnfather v. London Borough* (UK, 2003)**

- a. Vicarious liability imposed for failing to ensure child regularly attended school
- XXVIII. *Regina v. City of Sault Ste. Marie* (Canada, 1978)
- a. Discussion of rationale for strict liability in public welfare cases:
    - i. Incentive to maintain standard of care
    - ii. Administrative efficiency (prosecutorial burden)
    - iii. Slight penalties usually imposed
  - b. Criticism of strict liability:
    - i. Violates fundamental principles of penal liability
    - ii. No evidence that it results in the observation of a higher standard of care
  - c. Middle position proposed:
    - i. Allow D to prove that he did not act negligently as a defense to a strict liability offense
      - 1. Burden of proof on the D
    - ii. Use legislative intent to identify which category the offence falls under

XXIX. Notes on strict liability:

- a. Strong presumption against strict liability has recently been countered by defenders
- b. Goodhart, *Possession of Drugs and Absolute Liability*
  - i. Difficulty to prove some public welfare strict liability offenses
  - ii. Consideration of future harm, if crime goes unpunished
- c. Kelman
  - i. Strict liability does not necessarily apply to the moment of the offense (in the statutory rape context, an offender could have evaluated the victim's age prior to the moment of the act)
- d. Johnson
  - i. D could avoid strict liability by not going into business at all
    - 1. But, business ownership is not inherently unlawful
- e. Schulhofer
  - i. Again, D could avoid activity to avoid strict liability
    - 1. But, it is not the most careful who avoid the activity, it is the most confident, who are more likely to be careless
- f. Husak
  - i. Injustice is a function of the severity of the penalty imposed
- g. MPC

XXX. **Mistake/Ignorance of Law**

- a. *ignorantia legis*: "ignorance of the law is no excuse"
  - i. but, does ignorance provide a mens rea defense?
  - ii. also, ignorance as a defense in some statutes
    - 1. reliance on an official document/official advice
    - 2. good faith ignorance/misinterpretation of law compared to good faith mistake of fact

XXXI. *People v. Marrero* (NY, 1987)

- a. Facts:
  - i. federal corrections officer convicted of possession of a loaded firearm
  - ii. misinterpretation of "peace officer" exemption in statute
  - iii. trial judge refused to instruct on the defense of mistake of law
- b. Holding:
  - i. no mistake of law defense permitted
    - 1. Reference to MPC 2.04
- c. Dissent:

- i. criminal law predicated on punishing those who “choose freely to do wrong”
    - 1. cites *Morissette*
  - ii. punishment based on good faith mistake of law serves no deterrence function
  - iii. NY did not adopt the MPC
- d. Rationale:
  - i. *Gardner v. People*
    - 1. mistake of law does not relieve D of criminal liability
    - 2. statute did not require intent
      - a. as in the weapons possession statute in *Marrero*
  - ii. *People v. Weiss*
    - 1. court held that judge erred in not instructing jury that mistake of law could relieve D’s of mens rea intent requirement (intent req. in kidnapping statute)
  - iii. NY Penal Law:
    - 1. exception for mistake based on official advice or statute
      - a. D: mistake of law founded on reading of statute
        - i. but comparison with MPC 2.04(3) indicates that mistake must be based on a statutory reading that is later found to be erroneous (not so when misinterpreting a valid provision)
      - b. dissent points out that NY has not adopted the MPC
    - 2. degree of an offense = “grading” of offenses
    - 3. Rule of lenity may apply

XXXII. Notes on Ignorantia Legis:

- a. General assumption – ignorance of the law is no excuse (ignorance should not be encouraged)
  - i. Presumption of public’s “limited uncertainty” of the law encourages caution
  - ii. Deterrence function could be served while allowing a defense for reasonable mistake of law
- b. *Crain v. State* (Tex. 1913)
  - i. Transporting disassembled handgun
- c. *Regina v. Smith (David)* (UK 1974)
  - i. D damaged walls of apt. to retrieve wiring, under mistake that he owned the property
    - 1. Court held that mens rea was required (no offense if D thought that he was damaging his own property)
      - a. Does the mistake negate mens rea?
      - b. Difficult to police the distinction bet. Mistake of fact and law
- d. *State v. Varszegi* (Conn. 1993)
  - i. Landlord repossessed computers; conviction reversed (no “felonious intent”)
- e. MPC 2.02(9)
  - i. General req. of culpability
  - ii. Knowledge of the law is not a required element of an offense
- f. MPC 2.04(1)
  - i. Ignorance or mistake
  - ii. Ignorance of the law is a defense if it negates mens rea
    - 1. For example, offense of theft req. claim of right (MPC 223.1)
- g. MPC Comment to 2.02
  - i. Circumstances of an offense can include a legal element (such as a right of property in theft); ignorantia legis is a defense if the mistake of law is in regards to the legality of an attending circumstance

1. See definition of “material element” of an offense
2. Ignorance of law is no defense when law is that defining the overall offense

XXXIII. **Willfully and Knowingly in Mistake of Law**

XXXIV. *Cheek v. United States* (SC 1991)

- a. Facts:
  - i. D failed to pay taxes, since he considered tax law unconstitutional; honest (good-faith) belief that he was not required to pay income tax
- b. Holding:
  - i. Standard for statutory willfulness is voluntary, intentional violation of a known legal duty
    1. Good faith belief that law does not apply negates willfulness, regardless of whether belief is objectively reasonable
  - ii. But, District Judge erred in disallowing D to present evidence of good faith belief, in determination of willfulness
- c. Rationale:
  - i. Knowledge/willfulness interpreted differently across jurisdictions:
    1. Awareness of specific statute
    2. General awareness that acts are unlawful
    3. Mere awareness of facts themselves
- d. *United States v. International Minerals and Chemical Corp.* (SC 1971)
  - i. D’s mere knowledge of actions at question constitutes “knowing” violation of statute
- e. *Liparota v. United States* (SC 1985)
  - i. Food stamp fraud requires knowledge that acts are in violation of the specific statute (opposite conclusion from *International Minerals and Chemical*)
- f. *United States v. Ansaldi* (2d Cir. 2004)
  - i. GBL (GHB) possession; knowledge/intent to violate the law is not an element of the drug distribution statute
- g. *US v. Overholt* (10 Cir., 2002)
  - i. Governed by *International Minerals*; no req. of knowledge of a specific statutory violation

XXXV. **Official Reliance**

- a. Mistake of law defense based on reliance on official advice or statutory wording that is later determined to be erroneous
- b. *Hopkins v. State* (Md. 1950)
  - i. State attorney advised D that public notary sign was lawful; official reliance argument overruled
    1. Argument wouldn’t fall under MPC (not an official interpretation)
      - a. Even if MPC had been adopted by Md. in 1950
- c. MPC 2.04(3) and Comments:
  - i. Limited official reliance defense, where:
    1. Act is consistent with general law-abidingness of the actor
    2. Where possibility of collusion is minimal
    3. Where reasonableness can be easily determined by the court
  - ii. Any warning negates defense
- d. MPC 2.13
  - i. Entrapment: knowingly making false representations or persuasion
- e. Due process limitations:
  - i. *Raley v. Ohio* (SC 1959)

1. Official reliance as “entrapment by estoppel”
- f. Reasonableness requirement
- i. *US v. Albertini I & II* (SC 1987)
    1. Trespass violation for protest at a naval base
    2. Subsequent protest after conviction overturned by 9<sup>th</sup> Cir.
    3. Convicted for 2<sup>nd</sup> protest after 9<sup>th</sup> Cir. Decision was overturned in SC
      - a. 2<sup>nd</sup> conviction overturned on official reliance due process argument
  - ii. *US v. Rodgers* (SC 1984)
    1. “latest controlling [judicial] opinion” does not necessarily give way to official reliance
      - a. Since court’s decision to overturn such an opinion, if appealed, is reasonably foreseeable
  - iii. *US v. Qualls* (9<sup>th</sup> Cir. 1999)
    1. Overruled *Albertini*; upheld conviction of D whose conduct had been lawful at the time that he acted
    2. Dissent: restrains conduct that may later be deemed legal by the court
- XXXVI. *Lambert v. California* (SC 1957):
- a. Facts:
    - i. Los Angeles registration statute; D arrested for suspicion of another offense
      1. Convicted for violating statute, req. reg. within 5 days
  - b. Holding (Douglas):
    - i. Statute violates due process req. of notice; conviction reversed
      1. Distinguished from other registration/licensing statutes
        - a. No mens rea
        - b. No notice
      2. Knowledge of the duty to register is required to violate statute
        - a. Passive acts are distinct
  - c. Dissent (Frankfurter):
    - i. Constitutionality line between public welfare cases and the present case is false
  - d. Holding:
    - i. Both opinions cite *Balint (Dotterweich)*
      1. Strict liability in public welfare cases (police power outweighs mala in se)
- XXXVII. *State v. Bryant* (NC 2005)
- a. Sex registration case; distinguished from *Lambert* since sex registration laws are general safety measure, rather than law enforcement device
    - i. Also, since most states have sex offender registration laws, D should have inquired as to requirement
- XXXVIII. Entrapment by omission in cases of official reliance
- a. *State v. Leavitt* (Wash. 2001)
    - i. Misleading statement from sentencing judge led to conviction reversed, even though knowledge of illegality was not an element of the firearms statute
  - b. *United States v. Wilson* (7<sup>th</sup> Cir. 1998)
    - i. Opposite result of *Leavitt*; required only proof of knowledge of actual facts
    - ii. Posner dissent: unreasonable to expect D to know of violation
  - c. CA Penal Code revision, Section 500: Ignorance or Mistake
    - i. Ignorance of law is a defense if:

1. Mistaken belief is reasonable
  2. Reasonable efforts to ascertain the law
  3. Misinterpretation of the law
  4. Official reliance (reasonable)
- ii. Comments:
1. No defense in cases where conduct suggests that inquiry is necessary
    - a. Even in mala prohibita cases (public welfare), where nature of activities suggests inquiry (highly regulated activities)
  2. *Long v. State* (Del. 1949)
    - a. Reasonable belief by D that he was divorced
    - b. Diligent and exhaustive efforts to learn the law should allow the defense
      - i. Criticism:
        1. Time-consuming to prove
        2. Too easily fabricated
        3. Unfairness problem is already addressed with prosecutorial discretion

XXXIX. Cultural Defense:

- a. *Rex v. Esop* (UK 1836)
  - i. Sodomy conviction upheld even though it was not a crime in D's native country
- b. Examples of acquittals with cultural evidence
  - i. Discriminatory level of protection for victims who are members of culture in question
  - ii. Reliance on prosecutorial discretion

XL. **Limits on Punishment**

- a. Legality
  - i. Fair warning required
    1. Violated by retroactivity; vagueness
  - ii. *Nulla poena sine lege* – “no punishment without law”
- b. Culpability
- c. Proportionality

XLI. *Commonwealth v. Mochan* (PA, 1955)

- a. Facts:
  - i. D charged with harassment for lewd phone calls (common law offense, no stat. prohibition)
- b. Holding (Hirt):
  - i. D convicted of common law misdemeanor
- c. Dissent (Woodside):
  - i. Judicial invasion into the legislative sphere
    1. Division of powers argument (legislative role in drafting law)
    2. Problem of anti-democratic lawmaking
  - ii. In context of social penalty/condemnation implications
- d. Rationale:
  - i. Compare with MPC 250.4 (Harassment)
  - ii. Common law as a “gap-filler” and the problem of “loop-holing”
  - iii. Under prevailing view, the reach of the criminal law is determined solely by statutory language

XLII. *McDoyle v. United States* (SC 1931)

- a. Facts:

- i. Does transporting a stolen aircraft violate the National Motor Vehicle Theft Act?
  - 1. Aircraft not included in statute
- b. Holding (Holmes):
  - i. Conviction reversed; including aircraft in statutory prohibition would violate fair warning requirement

XLIII. *United States v. Dauray* (2d Cir., 2000)

- a. Facts:
  - i. D convicted of violating child pornography statute, 18 USC 2252
    - 1. Possession of “matter, three or more in number, which contain any visual depiction”
  - ii. QP: are individual pictures (cut out from magazines) “matter...containing” depictions?
    - 1. D contested meaning of “other matter”; “loop-holing”?
- b. Holding (Jacobs):
  - i. Statute is ambiguous, so the rule of lenity applies; conviction reversed
- c. Dissent (Katzman):
  - i. No grievous ambiguity in the statute; conviction should be upheld (rule of lenity should not apply)
- d. Rationale:
  - i. Statutory interpretation:
    - 1. Plain meaning
      - a. Dictionary definitions
      - b. Circuit court precedent
    - 2. Canons of construction:
      - a. *Noscitur a sociis*
        - i. Meaning of terms determined by reference to their relationship with other associated/surrounding words
      - b. *Ejusdem generis*
        - i. Meaning of a general term following a list of specific terms should be limited to the meaning specific to the particular terms listed (sharing characteristics with those specific terms)
    - c. Statutory structure:
      - i. Drafting differences across sections provide evidence that Congress intended to punish collectors, rather than possession of one image
    - d. Statutory amendment:
      - i. Presumption against superfluous language
    - e. Avoiding absurdity
      - i. Both interpretations arguably yield absurd results
  - 3. Legislative History
- ii. Rule of lenity
  - 1. Applies only in criminal cases
  - 2. Used to overcome fair warning deficit
  - 3. MPC 1.02(3)
    - a. In cases of ambiguity, interpret statute to advance general purposes of code
  - 4. *Smith v. United States* (SC 1993)
    - a. Statute prohibiting “use” of a firearm in a drug transaction deemed to include bartering gun for drugs

XLIV. Criminal law by analogy:

- a. If there is no penal law covering an act, it should be punished under the most analogous law
  - i. Danzig/Gdansk decree
  - ii. Gap-filler law; addresses problem of loop-holing
  - iii. But, characteristic of totalitarianism, where morality is equated with law
- b. Repudiated in US jurisdictions
  - i. Criminal law as a sword and a shield
    - 1. In US, if crime is not covered in a statute, D can use code as a shield

XLV. *Keeler v. Superior Court* (Cal. 1970)

- a. Facts:
  - i. Does killing unborn fetus violate statute prohibiting murder of a human being?
- b. Holding (Mosk):
  - i. Fetus is not considered a human being under statute
- c. Rationale:
  - i. Example of constitutional ban on retroactive punishment
  - ii. Fair warning req. reflected in const'l prohibition against Ex Post Facto laws
    - 1. *Bouie v. City of Columbia* (SC 1964):
      - a. Requirement of fair warning violated by ex post facto or retroactively-applied laws
      - b. Includes retroactive application by judicial enlargement of an existing statute (same constitutional restriction on legislature applied to courts)
      - c. Ex post facto law defined in *Calder v. Bull*

XLVI. *Rogers v. Tennessee* (SC 2001)

- a. Facts:
  - i. “year and a day” qualification applied to homicide statute
- b. Holding (O’Connor):
  - i. Ex post facto restriction on legislature does not apply to judiciary
- c. Dissent: (Scalia):
  - i. Ex post facto violation by judiciary is prohibited even if not “expected”/“foreseeable” or “indefensible”
    - 1. Still violates fair warning req. and Due Process
- d. Notes:
  - i. Example of “good behavior” reduction in prison sentences
    - 1. Reform of practice (allowing less reduction for good behavior) violates due process, since it involves a retroactive increase in punishment

XLVII. *People v. Garcia* (NY 2004)

- a. Facts:
  - i. D stepped on and killed goldfish during domestic dispute
    - 1. Violation of statute prohibiting aggravated cruelty to animals?
    - 2. D moves to dismiss charges on Due process grounds (statute is unconstitutionally vague)
- b. Holding (Kahn):
  - i. “companion animal”, “domesticated” under statute is not unconstitutionally vague
    - 1. Conviction upheld
- c. Rationale:
  - i. Statutory interpretation used to address constitutional prohibition on punishment based on vague statutory language



XLVIII. **Significance of Resulting Harm**

XLIX. Causation

L. Foreseeability and Coincidence:

LI. *People v. Acosta* (Cal. 1991)

a. Facts:

- i. Two helicopter collision during chase of D in stolen car
  1. D appeals conviction for second degree murder of helicopter occupants
    - a. Insufficient evidence of proximate cause
    - b. Insufficient evidence of malice

b. Holding:

- i. Conviction overturned; although D's act was the **proximate cause** of the accident, insufficient evidence of malice
  1. D could not be said to disregard a risk that was "barely objectively cognizable"
  2. acknowledgment that homicide requires mens rea
    - a. conviction for reckless endangerment would likely have been upheld

c. Dissent:

- i. D should not be held crim. liable, since his negligent act was not negligent in relation to the helicopters
  1. *Palsgraf v. Long Island R. Co.* (Cardozo, NY 1928): **risk imports relation**; "within the range of apprehension"

d. Rationale:

- i. Determination of proximate cause
  1. Established to address concerns of fairness, as well as expediency
  2. Only hold actor liable for results that he caused/for which he is responsible
- ii. First requires "actual cause" ("**factual cause**"; "but for" causation; *sine qua non*)
  1. Then, requires foreseeability
- iii. Prosser and Keeton (torts); adopted by majority
  1. Exclude extraordinary results and allow trier of fact to determine issue
    - a. "highly extraordinary result" standard
    - b. Also adopted by MPC 2.03(2)(b)
      - i. Exclude remote/accidental occurrences
- iv. *People v. Brady* (Ct. 2005):
  1. D held liable for aircraft crash during firefighting operation, after D recklessly set fire; deaths deemed to be reasonably foreseeable, since any firefighting operation would require many aircraft flying at low altitudes
- v. *State v. Montoya* (NM 2002):
  1. Proximate cause, with no factual cause (bodyguard left victim to die after he had been shot by another)
- vi. *State v. Muro* (Neb. 2005):
  1. Failure to obtain medical treatment
    - a. No proximate cause, since victim may have died anyway

LII. *People v. Arzon* (NY 1978):

a. Facts:

- i. D indicted for murder after setting fire to couch
  1. Second independent fire; fireman died
  2. D argued causal link required to satisfy elements of murder offense

- b. Holding (Milonas):
  - i. D is criminally liable if:
    - 1. His conduct was a **sufficiently direct cause** of death
    - 2. If ultimate harm was reasonably foreseeable result of act
- c. Rationale:
  - i. *People v. Kibbe* (NY 1974)
    - 1. Intoxicated robbery victim left in freezing weather, struck by truck
    - 2. Conviction upheld; D's conduct was sufficiently direct cause
  - ii. *People v. Stewart* (NY 1976)
    - 1. **Obscure and merely probable** connection
    - 2. Surgeon performed unsuccessful hernia procedure on stabbing victim

**LIII. *People v. Warner-Lambert Co.* (NY 1980)**

- a. Facts:
  - i. Explosion at chewing gum factory, due to ambient magnesium dust
- b. Holding:
  - i. Culpability requires *sufficiently* direct causation; exposure to the risk of death alone is insufficient
    - 1. Actor must foresee the **specific causal mechanism**

**LIV. Notes:**

- a. MPC 2.03:
  - i. Causal relationship between conduct and result
    - 1. But for causation (factual/legal causation)
    - 2. Any statutory causal requirements
  - ii. Divergence between **result designed** or contemplated and **actual result**
    - 1. Mens rea not established if result is not contemplated by actor, unless:
      - a. If result is only different property or person (or difference of degree)
    - 2. Between probable and actual result
      - a. If result is of the same type contemplated and is not accidental or remote
- b. Distinction between offenses that require culpable conduct, versus result
  - i. Homicide one of very few offenses defined in terms of result
    - 1. Proving causation significant where result is a necessary element of the crime
  - ii. Deterrence rationale?
    - 1. Prosecute/punish attempts and successes the same; both are morally reprehensible
      - a. Implications for recklessness (conscious disregard (implies foreseeability) of a substantial and unjustifiable risk)
        - i. Drunk driving, reckless endangerment
    - 2. "moral luck" argument; why should consequences matter?
  - iii. Simple assault v. aggravated assault
    - 1. Aggravated must result in "serious bodily harm"
      - a. But rather than specifying a result, serious bodily harm refers to the actor's conduct (intent); but, consequences still taken into account in some sense
    - iv. Distinct from tort, where result is first requirement
- c. NY courts:
  - i. Limit specific-causal-mechanism test to commercial/manufacturing contexts
- d. Prof. Crocker
  - i. Defense of foreseeability test

1. Probability of result
- e. Prof. Michael Moore:
  - i. “multiple description problem”; different ways to describe harm-causing event subject to manipulation
- f. Vulnerability of the victim:
  - i. *People v. Stamp*:
    1. Robbery victim died of heart attack due to fright; “robber takes his victim as he finds him”
  - ii. *State v. Lane* (NC 1994)
    1. Intoxicated man was punched, evaluated and not treated; died two days later of swelling exacerbated by alcoholism
    2. D convicted, even though victim was responsible for underlying condition
- g. Foreseeability of medical malpractice:
  - i. Proximate cause: death caused by wound v. medicine
  - ii. *State v. Shabazz* (Ct. 1998)
    1. D convicted after victim of stabbing died due to bleeding from surgery
      - a. Appellate court held that evidence of negligence was properly excluded
  - iii. *US v. Main* (9<sup>th</sup> Cir. 1997)
    1. D’s truck collided with car; accident victim not moved by officer, died from position of body
      - a. Court of appeals held that jury could be instructed that it could find that D’s actions were not proximate cause of death
        - i. Jury must find that victim’s death was within the risk created by D’s actions

**LV. Transferred Intent**

- a. D’s intent to commit offense is “transferred” to his action that committed another offense (ricocheting bullet example)
- b. Adopted by MPC 203(2)(a) (see above)
  - i. felony murder doctrine? “felony murder light”?
    1. distinction rests on meaning of “presumption”
      - a. “soft” presumptions, as defined in MPC, Article 1
        - i. jury is told that they *may* find, on the basis of the predicate fact, that the presumed fact occurred
        - ii. un rebuttable presumption is unconstitutional violation of due process

**LVI. Subsequent Human Actions**

- a. Subsequent Actions Intended to Produce the Result

**LVII. *People v. Campbell* (Mich. 1983)**

- a. Facts:
  - i. D was drinking with victim, encouraged him to kill himself and gave him a gun; D moved to dismiss after D shot himself
- b. Holding:
  - i. D’s conduct was not criminal; no intention to kill

**LVIII. *People v. Kevorkian* (Mich. 1994)**

- a. Facts:
  - i. D gave terminally ill patients machines to kill themselves; D committed actual act of suicide
- b. Holding:

- i. Case remanded for reconsideration of motion to quash
        - 1. Distinction between participation in the final overt act and furnishing the means
  - c. Dissent:
    - i. Rule disadvantages most vulnerable members of society (elderly, despondent)
  - d. Notes:
    - i. Result may be different if D recklessly or negligently makes means of suicide available
      - 1. Can be convicted of lesser offenses (involuntary manslaughter)
        - a. For cases of intoxication and despondency
- LIX. *Commonwealth v. Atencio* (Mass. 1963)
- a. Facts:
    - i. 2 D's playing Russian roulette w/ victim
  - b. Holding:
    - i. D could be found liable for manslaughter
    - ii. D's participated and could be found to be a cause of death
    - iii. Distinction between drag racing and Russian roulette
  - c. Notes:
    - i. Drug providers are often held liable
      - 1. Courts reject intervening-act doctrine in this context
    - ii. Hart and Honore criticism of MPC 2.03
      - 1. Problem of punishment imposed when but-for causation depends on voluntary human intervention
- LX. Culpability – Actus Reas (culpable conduct)
- LXI. **Omissions**
- LXII. *Jones v. United States* (DC, 1962)
- a. Facts:
    - i. D convicted of involuntary manslaughter for failing to care for child of family friend
  - b. Holding:
    - i. Conviction reversed; required a finding of a failure to perform a legal duty
  - c. Notes:
    - i. *People v. Beardsley* (see below)
      - 1. Omission of a duty can only result in criminal liability when the duty is a legal duty, not a mere obligation
    - ii. Four situations for when failure to act constitutes breach of a legal duty:
      - 1. Where statute imposes a duty
      - 2. Where one stands in a certain status relationship with another
      - 3. Where one has assumed a contractual status relationship
      - 4. Where one has voluntarily assumed the care of another and so secluded the person as to prevent others from rendering aid
    - iii. MPC 2.01(3)
      - 1. liability for omission only where one owes a legal duty
- LXIII. *Pope v. State* (Md. 1979)
- a. Facts:
    - i. mother in D's home killed child
  - b. Holding:
    - i. D had no legal duty (not “responsible for supervision of child”); no liability
- LXIV. *People v. Beardsley* (Mich. 1907)

- a. Facts:
  - i. victim died of morphine overdose while having affair w/ D
- b. Holding:
  - i. D owed no legal duty to vic.; conviction reversed
- c. Notes:
  - i. widely criticized holding (“outmoded”)
  - ii. *People v. Carroll* (NY 1999):
    - 1. stepmother held liable (had a legal duty toward husband’s children)
  - iii. *People v. Miranda* (Conn. 2005)
    - 1. refuses to extend legal duty to boyfriend (disincentive for non-family members to help care for children) who failed to protect baby from mother’s attack

LXV. *Commonwealth v. Cardwell* (Pa. 1986)

- a. Facts:
  - i. D failed to protect daughter from husband’s sexual assault; D was also a victim of domestic abuse
- b. Holding:
  - i. conviction upheld; D failed to take steps reasonably calculated to succeed in protecting daughter
- c. Notes:
  - i. *R. v. Evans* (UK 1999)
    - 1. duty to rescue imposed when D creates the peril (supplied heroin, failed to report overdose)
  - ii. *State v. Lisa* (NJ 2007)
    - 1. no legal duty to rescue victim; no liability due to vagueness legality principle (no adequate notice to attach criminal liability)

LXVI. Possession:

- a. omission or an act?
- b. MPC 2.01(1)
  - i. requires that D was aware of his control of the thing possessed
- c. *State v. Bradshaw* (Wash. 2004):
  - i. liability for possession of drugs, even though driver was not aware that he possessed them (rejecting MPC approach)

LXVII. Distinguishing Omissions from Acts

LXVIII. *Barber v. Sup. Court* (Cal. 1983)

- a. Facts:
  - i. physicians charged with murder for disconnecting life support on an unresponsive patient
- b. Holding:
  - i. conviction reversed; act of disconnecting life support constituted an omission (tantamount to not manually administering a drug)
    - 1. physician has no duty to continue unsuccessful treatment
  - ii. patient’s interests and desires should be considered
    - 1. wife was the proper agent due to patient’s incapacitation

LXIX. *Airedale NHS Trust v. Bland* (UK 1993)

- a. Facts:
  - i. life support discontinued for patient with no hope of recovery
- b. Holding:

- i. such an omission is not unlawful unless it constitutes a breach of a legal duty to the patient
        - 1. distinguished from an interloper who actively intervenes to prevent treatment
  - c. Notes:
    - i. *Cruzan v. Dir., Missouri Dept. of Public Health* (1989)
      - 1. SC recognized a constitutional right to refuse treatment
- LXX. See p. 472-481 for notes on objectivity and individualization in the concept of criminal negligence
- a. manslaughter
- LXXI. Duties of bystanders
- a. statutory duties to rescue
  - b. misprision – duty to report
    - i. known felonies; child abuse and professionals
- LXXII. Attempts**
- a. Failed attempts
  - b. Inchoate attempts
    - i. Crime in the making, which is stopped
- LXXIII. *Regina v. Khan* (UK 1990)
- a. Facts:
    - i. D charged with attempted rape
  - b. Holding:
    - i. conviction affirmed; mens rea for attempt identical to mens rea req. by offense of rape defined in statute
    - ii. Specific intent extends to the attendant circumstances of an offense
- LXXIV. MPC 5.01 – Inchoate attempts
- a. Criminal attempt:
    - i. If acting with same culpability of the offense
      - 1. Engages in conduct that constitutes a crime if the attendant circumstances are known
      - 2. If result required by an offense occurs as a result of act or omission
      - 3. Substantial step in a course of conduct
- LXXV. *Smallwood v. State* (Md. 1996)
- a. Facts:
    - i. D convicted of assault w/ intent to kill (rape with knowledge of HIV status)
      - 1. D argued that he lacked “specific intent” to kill
  - b. Holding:
    - i. Intent can be inferred:
      - 1. One intends the natural and probable consequences of his act
        - a. But, AIDS infection not sufficiently certain in absence of contrary evidence
        - b. Distinguishes from *State v. Hicklehouse* (Or. 1996)
          - i. D expressed intent to infect victims
      - ii. Intent may be proved by circumstantial evidence
  - c. Rationale:
    - i. Justifications for specific intent requirement for attempt convictions:
      - 1. Linguistic
      - 2. Moral
      - 3. Utilitarian
    - ii. Attempted manslaughter → voluntary v. involuntary
      - 1. Only the former can constitute an offense, since the latter requires specific intent

- LXXVI. *Thacker v. Commonwealth* (Va. 1922)
- a. Facts:
    - i. Drunk shoots at light inside of tent, misses victim
  - b. Holding:
    - i. No specific intent to kill
    - ii. Also, offense may have already been adequately addressed in reckless endangerment statute
      1. See MPC 211.2 (reckless endangerment)
        - a. Anytime “presumption” is used in the MPC, interpret as a “soft” presumption
          - i. Mandatory presumptions are unconstitutional in criminal law
- LXXVII. Preparation v. Attempt
- LXXVIII. *King v. Barker* (NZ 1924)
- a. distinction between acts of attempt and acts of preparation
    - i. rejects test in *R. v. Eagleton* (that D must have taken last step toward commission before liable for “attempt”)
      1. first step is not nec’y sufficient, last step not nec’y required
- LXXIX. *People v. Rizzo* (NY 1927)
- a. Facts:
    - i. 4 D’s intended to rob Rizzo or another, stopped by the police before they found him
      1. D’s argument: conviction must be based on evidence that D committed a crime in itself (attempted robbery), rather than mere preparation
  - b. Holding:
    - i. Distinction drawn between preparation acts (remote v. proximate to consummation) and attempt
      1. “dangerous proximity text” → adopted by NY Penal Code and in *Commonwealth v. Bell* (see below)
  - c. Rationale:
    - i. Proximity and abandonment
      1. Renunciation defense must prove that renunciation was **voluntary** and **complete**
      2. See MPC 5.01(4)
- LXXX. *Commonwealth v. Bell* (Mich. 1986)
- a. Facts:
    - i. Prostitution sting, D arranged to have sex with a baby and was arrested
  - b. Holding:
    - i. No conviction under dangerous proximity test
  - c. Rationale:
    - i. See MPC 5.01(2) for definition of “substantial step” (not necessarily exclusive)
      1. “under the circumstances as he believes them to be”
- LXXXI. Proximity and Abandonment
- LXXXII. *People v. Johnson* (NY 1982)
- a. Facts:
    - i. “just kidding” during robbery
  - b. Holding:
    - i. No renunciation defense allowed
    - ii. MPC 5.01(4):
      1. Renunciation was based on factors not apparent at the time that the crime was committed

LXXXIII. *People v. McNeal* (Mich. 1986)

- a. Facts:
  - i. Attempted rape victim convinces D to renounce
- b. Holding:
  - i. Conviction affirmed; renunciation must be voluntary
  - ii. Same facts decided differently in *Ross v. State* (Miss. 1992)
- c. Rationale:
  - i. Other ways to criminalize preparatory behavior
    - 1. Possession laws:
      - a. Robbery tools, drugs, guns

LXXXIV. *McQuirter v. State* (Alab. 1953)

- a. Facts:
  - i. Black male convicted of attempted assault with intent to rape
- b. Holding:
  - i. Conviction upheld
    - 1. Jury may consider social conditions and customs founded on racial differences
    - 2. Racist holding
- c. Rationale:
  - i. Equivocality test
    - 1. How clearly do acts indicate intention?
  - ii. *King v. Baker* (1924)
    - 1. Criminal attempt = attempt which shows crim. intent on its face (overt acts)
  - iii. *People v. Miller* (1935)
    - 1. Conviction of attempted murder reversed (no evidence of a direct act indicating intent)
- d. Criminalizing preparatory behavior:
  - i. Dangerous proximity test
  - ii. Equivocality test

LXXXV. Substantive Crimes of Preparation

- a. Common law crimes that consist of preparatory behavior
  - i. Burglary
  - ii. Assault
- b. Statutory preparatory offenses
  - i. *State v. Young* (NJ 1970)
    - 1. Prohibiting entry into school buildings with intent to disrupt classes
  - ii. Policing measures re: suspicious activity
  - iii. Anti-stalking statutes
    - 1. designed to address harassment that might lead to an assault
    - 2. California statute
      - a. Harassment + credible threat
        - i. but, not nec’y to prove intent to actually carry out the threat
    - 3. Kansas statute:
      - a. Requires objective standard of “reasonable person” to defeat vagueness in statute
        - i. example of crim. law as a sword and a shield
        - ii. also, discourages “self help”



- 4. New York statute
  - a. Material harm (to mental health), rather than credible threat
  - b. so, offense may not fall under MPC 250.4 (see below)
    - i. so, any limit?
- 5. MPC 250.4 (Harassment)
  - a. requires a purpose to harass
- iv. *City of Chicago v. Morales*
  - 1. Chicago gang loitering statute held to violate 14<sup>th</sup> Am.
- LXXXVI. *United States v. Jackson* (2d Cir., 1977)
  - a. Facts:
    - i. Conviction for conspiracy to commit armed robbery of a bank
  - b. Holding:
    - i. D's guilty of conspiracy as well as attempted bank robbery
  - c. Rationale:
    - i. Two-tiered inquiry for attempt by trial judge (formulated in *US v. Mandujano*):
      - 1. D acts with same culpability req. for offense
      - 2. D takes a substantial step toward commission of the crime
    - ii. MPC 5.01
      - 1. Substantial step (conduct manifesting intent)
        - a. Applies to act or omission
      - 2. No requirement of whether D would have desisted prior to commission
- LXXXVII. *US v. Harper* (9<sup>th</sup> Cir., 1994)
  - a. "bill trap" at ATM; conviction reversed
    - i. No substantial step
- LXXXVIII. *US v. Joyce* (8<sup>th</sup> Cir., 1982)
  - a. Cocaine sting; conviction reversed by 8<sup>th</sup> Cir., applying MPC
    - i. Mere preparation, rather than substantial step
- LXXXIX. **Solicitation**
- XC. *State v. Davis* (Missouri, 1928)
  - a. Facts:
    - i. D convicted of attempted murder after he and girlfriend conspired to kill her husband
      - 1. Undercover as hit man
  - b. Holding:
    - i. Conviction reversed
      - 1. Mere solicitation, with no act moving toward commission, is not an overt act (substantial step)
  - c. Rationale:
- XCI. *US v. Church* (ACMR 1989)
  - a. Facts:
    - i. D convicted of attempted murder of wife, after hiring hit man (UC)
  - b. Holding:
    - i. Conviction upheld by US Ct. of Military Appeals
      - 1. D's detailed participation constituted a substantial step
    - ii. holding contrary to that in *Davis*, where contracting for a crime held to be a mere act of preparation
  - c. Rationale:

- i. Solicitation as attempt
    - 1. punishment now based on “badness of the actor” rather than traditional approach, based on resulting harm
    - 2. substantial step?
      - a. but, no purpose to commit a crime personally
        - i. doesn’t fall under MPC 5.01(c)
          - 1. 5.01(1):
            - a. attempt to eliminate impossibility defense in virtually all situations
            - b. “as he believed them to be”
            - c. actor’s own mind should be standard for determining his danger to society
- ii. Solicitation as an independent crime:
  - 1. General statutes patterned on MPC 5.02
  - 2. 1<sup>st</sup> Am. concerns

**XCII. Impossibility**

**XCIII. *People v. Jaffe* (NY 1906)**

- a. Facts:
  - i. D convicted of attempt to buy stolen property, when property was not in fact stolen (but D thought it was)
    - 1. can D be liable
- b. Holding:
  - i. conviction reversed
    - 1. knowledge of the fact that prop. is stolen is an essential element of the offense
      - a. statute necessitates three elements: act, intent, and knowledge
- c. Rationale:
  - i. Distinct from “pickpocket cases”
    - 1. Guilty of an offense even if nothing is in the pocket
      - a. Notwithstanding the fact that facts unknown to D made crime impossible

**XCIV. *People v. Dlugash***

- a. Facts:
  - i. D shoots victim; 2<sup>nd</sup> D shoots victim again, thinking that he is dead (experts disagree on whether he was in fact still alive)
- b. Holding:
  - i. conviction for *attempted* murder affirmed; sufficient evidence that D thought vic. was still alive
    - 1. denied impossibility defense; based decision on 1967 revision of NY Penal Code (based on MPC 5.01(1))
  - ii. decision was later reversed in habeas corpus review
    - 1. if jury cannot find that vic. was alive, D’s intent to kill victim can’t be proved
  - iii. factual impossibility v. legal impossibility
    - 1. factual – pickpocket cases
    - 2. legal – taking a (fake) deer out of season
      - a. distinction obsolete in MPC (eliminates impossibility defense in both situations)

**XCV. *United States v. Berrigan* (3d Cir., 1973)**

- a. Facts:
  - i. imprisoned Vietnam War protester charged with attempt to violate fed. statute prohibiting unauthorized mail in jail
    - 1. but, Warden knew of activities
- b. Holding:
  - i. conviction reversed on legal impossibility
    - 1. in subsequent decision, 3<sup>rd</sup> Cir. limited holding to its facts
      - a. claiming to adhere to MPC 5.01(a)

XCVI. *United States v. Oviedo* (5<sup>th</sup> Cir. 1976)

- a. Facts:
  - i. D sold U/C fake heroin; charged with attempted distribution of heroin
- b. Holding:
  - i. conviction reversed; D's objective acts were not criminal (apart from indirect evidence of intent)
    - 1. will not allow intent alone to form sole basis for guilt
- c. Notes:
  - i. under NY Penal Code, D could be prosecuted for "fraudulent accosting" in such a scenario
    - 1. "accosts a person in a public place with intent to defraud him"

XCVII. **Accountability for the Acts of Others**

- a. principal and accessory
  - i. common law distinguished between accessory before/after the fact; now replaced with MPC (accessory, or aiding and abetting)
    - 1. sentencing discretion to apportion punishment for different degrees of culpability

XCVIII. *Hicks v. United States* (SC 1893)

- a. Facts:
  - i. Stand Rowe (principal) shoots vic.; D (accomplice) charged with aiding and abetting murder
- b. Holding:
  - i. conviction reversed (no accomplice liability)
    - 1. D must have intended his words to encourage principal to act (intended the *effect*)
    - 2. or, if there was a prior conspiracy or arrangement
- c. Notes:
  - i. criminal conspiracy: each responsible for foreseeable acts of co-conspirators
    - 1. Pinkerton doctrine: natural and probable consequences liability for conspiracy, where additional offenses further the conspiracy
    - 2. distinction in culpability accounted for in sentencing
  - ii. MPC 2.06: Liability for Conduct of Another; Complicity
    - 1. 2.06 (3)(iii): attempts to aid
  - iii. MPC 5.01(3) – Criminal Attempt; Conduct Designed to Aid Another in the Commission of a Crime
    - 1. accomplice liability for attempt, even if offense is not committed or attempted by principal ("attempted complicity")
      - a. aggressive formulation; accounts for conspiracy with police agents
  - iv. NY Penal Code: Criminal Facilitation
    - 1. believing probable that he is rendering aid to one who intends to commit a crime (misdemeanor)

- a. wider than original MPC formulation (which would have required “knowing” aid)
- b. would have encompassed Gladstone’s actions (see below); too watered down?

XCIX. *State v. Gladstone* (Wash. 1970)

- a. Facts:
  - i. D convicted of aiding and abetting Kent (principal) in sale of marijuana
    - 1. volunteered the name of a dealer and drew a map
- b. Holding:
  - i. conviction reversed; requires evidence of prior conversation between principal and accomplice
    - 1. D must “associate with the venture”
- c. Notes:
  - i. *US v. Peoni* (2d Cir. 1938) – L. Hand
    - 1. aiding and abetting implies purpose
      - a. qualified in MPC 2.06(3)(a)
    - 2. evaluate degrees of aid?
      - a. now, MPC mandates that accomplice must have purpose of promoting the facilitation of the commission of a crime
      - b. purpose required to convict of lesser offenses; knowledge sufficient for major crimes
        - i. See *US v. Fountain* (7<sup>th</sup> Cir. 1985)
          - 1. D convicted of aiding and abetting murder of prison guard
          - 2. Posner: sufficient to prove D’s knowledge, no need to establish purpose to kill guard
            - a. accomplice liability for a result (if mens rea for offense is predicated on result, such as homicide)
  - ii. Holding in *Gladstone* distinguished from *State v. McKeown*
    - 1. D contacted dealer, was present for sale; conviction affirmed

C. **Substantive Crimes of Facilitation**

- a. see statutory liability for seller of Columbine assault weapons (seller can’t be held liable as an accomplice, while misdemeanor facilitation statutes impose minor penalties)

CI. *Holder v. Humanitarian Law Project* (SC 2010)

- a. Facts:
  - i. federal statute prohibiting “material support for terrorism”
    - 1. humanitarian organization providing peaceful dispute resolution training to terrorists
- b. Holding:
  - i. Activities held to violate statutory definition of “training”
    - 1. Rejects First Am. and vagueness arguments
  - ii. Rejected argument that material support statute should be read to require specific intent
    - 1. Congress clearly selected “knowledge” as req. mens rea
- c. Notes:
  - i. “material” – if D knows or intends support to be used for one of a list of federal offenses
    - 1. Or if providing training to a specific list of organizations
    - 2. Increased actus reas required (support must be material) by “watered down” mens rea in statute
      - a. Separate crime of facilitation

- b. D could be charged with aiding and abetting terrorism but this would require greater mens rea

CII. Money laundering

- a. Accept money known to be acquired through illegal means in exchange for goods and services
  - i. Common in drug trade
- b. Two main federal statutes:
  - i. 18 USC 1956:
    - 1. Conduct any financial transaction knowing that the transaction is designed to conceal or disguise the nature of the proceeds of unlawful activity (20 years imprisonment)
    - 2. Conceptually the same as aiding and abetting
  - ii. 18 USC 1957:
    - 1. Knowledge that transaction involves money from an illegal source (distinct from 1956, which req. knowledge that transaction is designed to conceal or disguise)

CIII. *US v. Campbell* (4<sup>th</sup> Cir. 1992)

- a. Facts:
  - i. RE broker sold house to a client, suspicious that he paid in cash
- b. Holding:
  - i. Convicted of money laundering under willful blindness doctrine
    - 1. Convicted of 18 USC 1957

CIV. Mens Rea for Results and Attendant Circumstances

CV. *State v. McVay* (RI 1926):

- a. Facts:
  - i. Steamer explosion; Kelley (accessory before the fact) told captain and engineer of ship (principals) to create steam which the boiler could not handle
    - 1. Kelley charged with aiding and abetting manslaughter (a charge that is involuntary and without malice)
      - a. Accomplice liability for negligence? But, requires intent? Not for involuntary manslaughter
- b. Holding:
  - i. Conviction upheld; mens rea required was reckless/willful conduct, while principals were negligent
    - 1. Negligence mens rea usually only sufficient for result-defined crime (manslaughter, homicide)

CVI. *Commonwealth v. Roebuck* (Pa. 2011)

- a. Facts:
  - i. Victim lured to apartment complex and shot; D did not participate in actual shooting
    - 1. Accomplice liability for third degree murder?
      - a. Unintentional act?
    - 2. Liable if mens rea is sufficient under offense (including recklessness)
      - a. As with negligence, applies to result elements
- b. Holding:
  - i. Conviction upheld; accomplice liable for contributing to the conduct (to the degree that his mens rea = mens rea of the principal)
- c. Notes:
  - i. MPC 2.06(4):
    - 1. Liability for Conduct of Another; Complicity

- a. *Specific intent* to further the underlying *conduct* of the principal
- b. For result, mens rea as defined by the offense
- ii. But, MPC is silent on whether purpose applies to the attendant circumstances of the offense
  - 1. Mens rea for attendant circumstances:
    - a. Provide felon with a gun
      - i. Courts are split on whether strict liability imposes accomplice liability or whether liability depends on whether accomplice knew of felon's status
      - ii. If accomplice liability is imposed for an aider-and-abetter of a gun purchaser, no need for background checks

CVII. *People v. Russell* (NY 1998)

- a. Facts:
  - i. Shootout in Red Hook Houses kills principal; three shooters, fatal bullet unidentified (could not prove causation)
    - 1. 3 D's convicted of 2<sup>nd</sup> degree murder
- b. Holding:
  - i. Convictions upheld; D's aided each other, no "community of purpose" nec'y
    - 1. D's all created "zone of danger"
    - 2. All acted with mens rea req. for 2<sup>nd</sup> degree murder
- c. Notes:
  - i. *People v. Abbott* (NY 1981):
    - 1. Both participants in drag race held liable for accident

CVIII. Natural and Probable Consequences Theory

CIX. *People v. Luparello* (Ca. 1987)

- a. Facts:
  - i. D instructed accomplices to beat up wife's friend; accomplice shot and killed victim
- b. Holding:
  - i. D was liable for both the offense that he intended to facilitate AND for any reasonably foreseeable offense committed during commission
- c. Concurrence:
  - i. Foreseeable consequences doctrine imputes perpetrator's mens rea onto accomplice (D)
    - 1. Concern that liability depends on the "fortuity of the result"
- d. Notes:
  - i. Concerns with natural and probable consequences liability:
    - 1. Scott and LaFave:
      - a. Would permit liability based on negligence, even when offense req. greater culpability
  - ii. Pinkerton doctrine:
    - 1. Nat'l and prob. conseq. Liability for conspiracy, where additional offenses further the conspiracy

CX. *Roy v. United States* (DC 1995)

- a. Facts:
  - i. D held liable for armed robbery after telling victim where to buy a gun
- b. Holding:
  - i. Conviction reversed

1. Result must be within a reasonably predictable range of results (“ordinary course of things”; implies no intervening factors)
  - a. Otherwise, no limiting principle

c. Notes:

- i. MPC 2.06 rejects natural and probable consequences theory for accomplice liability

CXI. Actus Reas: Encouragement

CXII. *Wilcox v. Jeffery* (UK 1951)

a. Facts:

- i. D attends Coleman Hawkins concert while CH was prohibited from making money in England under visa

b. Holding:

- i. Liability imposed for aiding and abetting

c. Notes:

i. *R v. Coney*:

1. Prize fight; liability imposed unless presence was purely accidental
- ii. Now, statutes impose liability for intentional presence at dog fights, drag races
  1. But not gang rapes (New Bedford tavern, no liability for encouragement)

CXIII. *State ex rel. Attorney General v. Tally, Judge* (Ala. 1894)

a. Facts:

- i. D obstructed warning to victim that murderers were after him

b. Holding:

- i. Conviction for encouragement (aiding and abetting) upheld
  1. Assistance need not contribute to final result
    - a. Only needs to make the offense easier
      - i. But, actions of principal must be known
        1. Liability for aiding and abetting requires preconcert (accomplice encouraged principal)
          - a. Even with minimal possibility of actual aid or encouragement
    2. No need to establish factual (but for) causation

c. Notes:

- i. Materiality of the aid
- ii. MPC 2.06(3)(a)(1)
  1. Solicitation as basis for accomplice liability
- iii. MPC 5.02(2)
  1. Solicitation can be established even without communication
    - a. Attempted complicity
- iv. MPC 2.06(3) (see above):
  1. Predicated on actual commission of offense; otherwise, attempt or conspiracy
  2. Requires a purpose to facilitate the offense

CXIV. *People v. Stanciel* (Ill. 1992)

a. Facts:

- i. Parent fails to protect child

b. Holding:

- i. Accomplice liability imposed for omission where one has a legal duty to prevent the offense

CXV. Relationship between the Liability of the Parties

CXVI. *State v. Harris* (Missouri 1981)

- a. Facts:
  - i. Accomplice intents to entrap D in burglary of grocery store
- b. Holding:
  - i. Conviction reversed; can't impute detective's acts to an accomplice who committed no offense himself (did not enter building)
- c. Notes:
  - i. Innocent agent doctrine:
    - 1. MPC 2.06(2)(a)
      - a. Legally accountable for commission of crime when using an innocent or irresponsible agent to commit crime (considered a principal)

CXVII. *Vaden v. State* (Alaska 1989):

- a. Facts:
  - i. D maneuvered aircraft so that U/C could illegally shoot foxes
- b. Holding:
  - i. Conviction affirmed, even though acts of U/C were justified
    - 1. Public authority justification defense
      - a. Justification was personal to U/C and does not avail D of liability
- c. Dissent:
  - i. Act of a "feigned accomplice" may never be imputed to the targeted D (see *Neely* below)
- d. Notes:
  - i. *State v. Neely* (Mont. 1931):
    - 1. U/C infiltrated cattle stealing ring
    - 2. Targeted D stood by while U/C stole cattle; conviction reversed under *Harris* rationale

CXVIII. *Farnsworth v. Zerbst* (5<sup>th</sup> Cir. 1938)

- a. Facts:
  - i. Accomplice convicted of aiding and abetting espionage, where principal had diplomatic immunity
- b. Holding:
  - i. Conviction affirmed; principal's immunity (as with U/C's public authority justification) is personal, and no defense to accomplice
- c. Notes:
  - i. The culpable but un-convictable principal

CXIX. *Queen v. Tyrell* (UK 1894)

- a. Facts:
  - i. Victim as accomplice
  - ii. Conviction of underage girl for aiding and abetting statutory rape
- b. Holding:
  - i. Conviction reversed; inconsistent with statute's policy aims
- c. Notes:
  - i. MPC 2.06(6) excludes victims from accomplice liability

CXX. **Corporate Criminality**

- a. Pros:
  - i. Moral justice view: impose moral judgment via criminal sanctions
  - ii. Instrumentalist view: incentive for managers to supervise



- iii. Deterrence view: Deepwater Horizon example
- b. Cons:
  - i. Corp. as mere instrumentality (no intention or volition)
    - 1. But, see *Citizens United*
  - ii. Excessive monitoring and litigation costs
  - iii. Civil sanctions already deter
  - iv. Corp. may be victim of its own agents
    - 1. See Arthur Anderson example and collateral consequences
    - 2. Also, applies to shareholders
- c. Prosecutorial discretion and AG Holder's factors to consider
  - i. Thompson memo
  - ii. Refusal to pay legal fees and forced waiver of attorney privilege
    - 1. Held to violate 6<sup>th</sup> Am. right to legal counsel
    - 2. Now, prosecutors more likely to seek deferred/non-prosecution agreements, without forced waiver of atty. Priv.
- d. Proposed alternatives
  - i. Missouri broadly-defined "high managerial agent" category under MPC approach (see below)
  - ii. Compliance insurance
  - iii. Impose additional burden for corp.'s to maintain effective preventative policies ("corporate culture" approach)

CXXI. *New York Central & Hudson River R.R. v. US* (SC 1909)

- a. Facts:
  - i. Violation of Elkins Act (price fixing) by issuing rebates
    - 1. D's argue: violation of stockholders' due process to hold corporation criminally-liable
- b. Holding:
  - i. Ct. upholds Elkins Act; imposes criminal liability when an employee commits a crime while in the scope of his employment, and for the benefit of the corp.

CXXII. *US v. Hilton Hotels Corp.* (9<sup>th</sup> Cir. 1972)

- a. Facts:
  - i. Hotel's purchasing agent gave preferential treatment to supplies who supported convention association (boycott of other suppliers)
    - 1. Despite explicit instruction from superiors to not participate in boycott (since such would violate the Sherman Act)
- b. Holding:
  - i. Corp. held liable for acts of purchasing agent
    - 1. Even though conduct was not within the agent's authority
      - a. Corp. pressure on agent
      - b. Corp. realizes a profit from agent's conduct

CXXIII. *US v. Sun Diamond Growers of CA* (DC 1997)

- a. Facts:
  - i. Corp. charged with wire fraud and illegal campaign contributions when agent bribed the brother of the Sec. of Agriculture
- b. Holding:
  - i. Corp. held liable under respondeat superior (see below), even though agent concealed his conduct from the corp.

1. Still, corp. presumed to receive some benefit from fraud

c. Notes:

i. Respondeat superior approach:

1. Broad approach
2. Crime + scope of employment + intent to benefit the corp.
  - a. Can also be met through ratification (subsequent approval of conduct by corp.)

ii. Crimes that a corp. is incapable of committing?

1. Homicide? Manslaughter?
  - a. See Wagner Lambert chewing gum factory explosion

iii. Collective knowledge doctrine

1. Where corp. is justly to blame but no one individual has req. mens rea (some employees have part, others have other parts)
2. Upheld in *US v. Bank of New England*
  - a. Some employees were aware of reporting requirements, others were aware of transactions in question
3. Rejected in *Commonwealth v. Life Care Centers of America* (Mass. 2010)
  - a. Corp. only acts with req. mens rea if at least one employee possess req. mens rea

iv. MPC 2.07:

1. Liability of Corporations, unincorporated associations, and persons acting/under duty to act in their behalf
  - a. Combines respondeat superior approach with “high managerial agent” qualification
  - b. Not as widely adopted as RS, narrower in scope
  - c. Allows for due diligence defense

CXXIV. *Commonwealth v. Beneficial Finance Co.* (Mass. 1971)

a. Facts:

- i. Employees who violated bribery statute were employees of wholly-owned subsidiaries
  1. Corporate liability under MPC?

b. Holding:

- i. Conviction upheld
  1. “high managerial agent” can be defined as one who is assumed to represent corporate policy
  2. Ct. finds evidentiary difficulty in MPC requirements
    - a. Easy to conceal responsibility, as directors do not vote on illegal activities
    - b. So, Ct. broadens MPC, adopts respondeat superior even though liability would also have been imposed under MPC

CXXV. *State v. Community Alternatives Missouri, Inc.* (Mo. 2008)

a. Facts:

- i. Violation of resident neglect statute (bed sores)

b. Holding:

- i. Liability upheld against corp. for the (in)action of local manager
  1. Relatively low ranking in vast corp. structure but her sphere of influence with respect to subordinates was sufficient to render her a high managerial agent

c. Concurrence:

- i. Illustrates difficulty in defining HMA's
- CXXVI. (Personal) liability of corporate agents
  - a. MPC 2.07(6):
    - i. No distinction for activity performed for corp. and for oneself
    - ii. Agent responsible for duty to act imposed on corp.
- CXXVII. *Gordon v. United States* (10<sup>th</sup> Cir. 1954)
  - a. Facts:
    - i. D's (partners) convicted of selling sewing machines at illegal credit terms
  - b. Holding:
    - i. partners held liable personally, rather than holding the partnership itself liable as an entity
    - ii. more than negligence, less than "bad purpose"
  - c. Dissent:
    - i. D's had no knowledge/intent to violate the law
      - 1. distinct from "knowledge of its agents in the knowledge of the corporation", since partners were held liable personally
  - d. Supreme Court holding:
    - i. reversed 10<sup>th</sup> Cir. decision
    - ii. statute required "willfully"
- CXXVIII. *United States v. Park* (SC 1975)
  - a. Facts:
    - i. rodent-contaminated warehouse violates fed. FDC Act
    - ii. CEO charged personally, was repeatedly informed of warehouse conditions
    - iii. jury instruction at issue:
      - 1. whether D held a position of authority within the company and was responsible in relation to the issue
        - a. D argued, instruction did not satisfy *Dotterweich* requirement that a "responsible relationship" be shown for public welfare offenses (jury instruction implied that D could be held liable if he had any responsibility within company; if CEO, guilty)
    - iv. trial ct. convicted, ct. of appeals reversed, SC reversed
  - b. Holding (Burger):
    - i. conviction upheld
    - ii. no need to establish "wrongful action," just "reasonable relationship" (despite delegation within company) and failure to correct condition
      - 1. **responsible corporate officer doctrine**
    - iii. not a strict liability offense, since defense of "powerlessness" is allowed (that D was "powerless" to correct the condition)
      - 1. form of impossibility defense
        - a. See *New England Grocer* (MA, 1980)
          - i. broadened defense to include "extraordinary care"
  - c. Dissent (Stewart):
    - i. jury instruction was misleading, even if accurate
      - 1. permits jury to find guilt just because D was the CEO (instruction sounds like a directed verdict)
      - 2. majority is imposing de facto strict liability
  - d. Notes:

- i. parallels to *State v. Guminga*? (owner acquitted of vicarious liability for waitress' serving alcohol to a minor)
  - 1. in *Guminga*, court rejected that liability is imposed solely by a relationship, rather than by culpable conduct
  - 2. responsible corporate officer doctrine requires a showing that officer had responsibility and did not correct the condition

CXXIX. *United States v. MacDonald & Watson Waste Oil Co.* (1<sup>st</sup> Cir. 1991)

- a. Facts:
  - i. D (CEO) charged with violation of RCRA for illegal dumping
- b. Holding:
  - i. conviction reversed under responsible corporate officer doctrine
    - 1. no showing that D had knowledge of illegal actions
  - ii. distinguished from *Dotterweich* and *Park*
    - 1. statute imposed knowledge as requisite mens rea
      - a. *Dotterweich* and *Park* involved statutes with no scienter requirement
- c. Notes:
  - i. *United States v. Hancusek* (9<sup>th</sup> Cir. 1999)
    - 1. strict liability for public welfare offenses may impose liability for ordinary negligence
      - a. critical of the view that holding corporate officers personally responsible will result in changes in corporate practice
  - ii. expanding the responsibilities of corporate officers after *Enron*
    - 1. Sarbanes-Oxley Act of 2002 and accounting crimes
      - a. creates gap-filling statutes but does not alter the structure of liability for corporations and officers
        - i. more difficult to claim unawareness of illegal activities

CXXX. **Fraud**

- a. common law "cheats"
- b. false pretense
  - i. ownership of property transfers, not just possession
- c. larceny by trick
  - i. possession transfers, but not ownership
  - ii. *King v. Pear* (hired horse, didn't return, sold)
- d. embezzlement
  - i. honestly receives chattel, fraudulently converts to own use

CXXXI. *Hufstetler v. State* (Alab. 1953)

- a. Facts:
  - i. D drives off with gas after asking attendant to get him oil
- b. Holding:
  - i. conviction upheld
  - ii. "trick or fraud vitiates the transaction"
    - 1. owner of gas station retained constructive possession of gas with no intention to part with ownership of it until receiving payment

CXXXII. *Graham v. United States* (DC 1950)

- a. Facts:
  - i. lawyer indicted for grand larceny
  - ii. took money to bribe policeman, with no intention to do anything

1. distinct from trespass to chattel because victim intended to pass ownership of money to D (but was tricked into doing so)
    - a. larceny by trick
  - b. Holding:
    - i. D guilty of larceny by trick; judgment affirmed
  - c. Notes:
    - i. cites *Means v. United States*
      1. D offered to pay ransom to recover Lindbergh baby, with intention of converting money to his own use
    - ii. MPC 223.3 – Theft by Deception
    - iii. Compare with caveat emptor: do not criminalize trickery by deception (do not punish one man for making a fool of another) – classic approach
- CXXXIII. *People v. Ashley* (Cal. 1954)
- a. Facts:
    - i. D convicted of grand theft for obtaining loans that he did not intend to secure as promised
    - ii. D obtained property by false pretenses (intended to pass possession AND title)
      1. false pretense or representation
      2. intent to defraud owner of property
      3. pretense must have materially influenced owner to part with property
        - a. is a false promise a false pretense?
          - i. caveat emptor argument (*Rex v. Goodhall*) – bought meat on credit
            1. misinterpreted in *Commonwealth v. Drew* (MA 1837) to apply to “naked lies”
  - b. Holding:
    - i. false promise constituted a false pretense; grand theft conviction upheld
  - c. Concurrence:
    - i. intention behind a false pretense is purely subjective; proof of misrepresentation should be derived from objective facts
  - d. Notes:
    - i. federal fraud statutes (mail and wire fraud)
      1. white collar prosecutors “true love”
    - ii. MPC 223.3(1):
      1. deception should not be inferred from the fact alone that he did not subsequently perform the promise (consistent with *People v. Ashley*)
- CXXXIV. *Nelson v. United States* (DC 1955)
- a. Facts:
    - i. conviction for obtaining goods under false pretenses
      1. did D intend to defraud furniture store by providing security for credit with a vehicle which itself was secured with a mortgage
  - b. Holding:
    - i. intent to defraud is presumed when unlawful act is proved to be knowingly committed (*Agnew v. United States*)
  - c. Dissent:
    - i. D did not intend to defraud, since he secured loan with triple security (value of vehicle); no matter that he represented that the security was even greater
- CXXXV. *United States v. Regent Office Supply Company* (2d Cir. 1970)

- a. Facts:
  - i. office supply company's representatives made false statements to solicit sales (death of another customer, etc.)
  - ii. D convicted of mail fraud
- b. Holding:
  - i. conviction reversed; D deceived by did not defraud his customers
  - ii. govt. must show that some actual harm or injury was contemplated/intended
- c. Notes:
  - i. MPC 223.3 (Theft by Deception)
    - 1. "purposely obtains the property of another by deception"

#### CXXXVI. **Conspiracy**

- a. inchoate crimes
- b. accessory liability
  - i. punished as a separate and additional offense (unlike attempt/inchoate crimes)
- c. *actus reus* of conspiracy:
  - i. the agreement itself
  - ii. Jackson's criticism of conspiracy *actus reus* as unconstitutionally vague (*Krulewitch*)
    - 1. different proof for different offenses
    - 2. proof of agreement is typically inferred (act is mental)
    - 3. aggravates the degree of the crime
    - 4. allows rule of permissive joinder
    - 5. forces D's to defend from afar
    - 6. risk of guilt by association (perceived by jury)
      - a. First Am. concerns (freedom of association)
      - b. procedural consequence:
        - i. jury may hear evidence unrelated to D's crime, problem can only be addressed by jury instructions (potential for spillover bias)
    - 7. extends SOL's (ongoing conspiracy involves cover-up, etc.)
    - 8. "agency fiction" presumed whenever two people enter into an agreement
- d. MPC 5.05(1)
  - i. punishment for conspiracy to commit serious crimes is the same as for that offense
  - ii. see MPC 1.07 (when conduct constitutes more than one offense)

#### CXXXVII. *Interstate Circuit v. United States* (1939)

- a. Facts:
  - i. two movie theater chains and eight distributors enjoined from continuing in a combination and conspiracy in violation of the Sherman Act (unfair trade practices)
    - 1. government had to prove that D's had an agreement to fix prices with one another
    - 2. D's argue that each agreement cannot, by itself, constitute a conspiracy
- b. Holding:
  - i. unanimity of agreement supports inference that each D knew that the others would join (otherwise, irrational business practice to charge higher rates than everyone else)
- c. Notes:
  - i. NJ gang association statute:
    - 1. struck down as unconstitutionally vague

- a. parallels to membership in Communist party (*Dennis v. United States*); constitutionality of the Smith Act upheld but later overturned in a trio of cases in the 1950's/60's (*Noto; Yates; Scales*)
  - 2. compare with criminalizing association in probation/parole:
    - a. not guilty by association; rather, part of the prior punishment
- ii. MPC 5.03 (Criminal Conspiracy):
  - 1. mens rea: purpose of promoting/facilitating the commission of a crime
  - 2. 5.03(5):
    - a. overt act requirement
      - i. adopted by MPC, not so in common law (mental mens rea)
      - ii. other jurisdictions require that overt act constitute a "substantial step" (as in attempt)
    - b. overt act requirement excluded from conspiracy to commit *serious* felonies (requires knowledge alone; see *Lauria*)
      - i. MPC 2.03(5) approach - no overt act req.
- iii. inference of an agreement:
  - 1. only permissible when nature of acts would require coordination and planning
    - a. *US v. Garcia* (9<sup>th</sup> Cir. 1998)
      - i. no conspiracy for gunfight between Crips and Bloods

CXXXVIII. *People v. Lauria* (Cal. 1967)

- a. Facts:
  - i. D ran telephone answering service used by prostitutes
- b. Holding:
  - i. Contrasts approaches of:
    - 1. *US v. Falcone*
      - a. Suppliers of yeast acquitted of conspiracy despite knowledge of illegal use
    - 2. *Direct Sales v. US*
      - a. Conspiracy conv. Upheld for pharmaceutical wholesaler, based solely on knowledge
    - 3. Distinction:
      - a. "all articles of commerce can be used to illegal ends...but all do not have inherently the same susceptibility to harmful and illegal use"
        - i. Sufficiency of proof of intent varies with severity of offense
  - ii. To hold a supplier liable for conspiracy:
    - 1. Knowledge of illegal use of goods
    - 2. Intent to further that use
      - a. Evidence used in inferring intent/purpose from knowledge:
        - i. When supplier has a stake in the venture
        - ii. When no legitimate use of the goods/services exists
        - iii. When volume of business is grossly disproportionate to any legitimate demand (or where illegal sales are a significant percentage of total bus.)
- c. Notes:
  - i. MPC 5.03:
    - 1. Requires purpose

- ii. Contrast holding with *Morse* (D guilty of conspiracy because he raised price of plane to transport marijuana)
  - 1. Contrast *Morse* with *Blankenship* (D not guilty of conspiracy for agreeing to rent trailer for meth cook because cook never happened)

CXXXIX. Conspiracy as a Form of Accessorial Liability

CXL. *Pinkerton v. United States* (SC 1946)

- a. Facts:
  - i. Two brothers violated tax code, charged with conspiracy even though one was in prison
- b. Holding:
  - i. Brothers held liable for each other's acts in furtherance of a common objective
- c. Notes:
  - i. Holding rejected by MPC but upheld in majority of jurisdictions
    - 1. Pros:
      - a. Distributes costs "up the chain"
      - b. Information-forcing
      - c. Deters violence
    - ii. Doctrine expanded further in *Bridges* (defendant fighting, friends shot onlookers) and *Alvarez* (drug deal leading to a shootout)
      - 1. Where acts were **reasonably foreseeable** (no specific intent or agreement necessary)
      - 2. Dissent:
        - a. Negligent risk appraisal resulting in life in prison
      - 3. Approach essentially dispenses of causation inquiry
        - a. Walton and Diaz:
          - i. Proposed "minor participant exception"
    - iii. Inchoate offense – same family as attempts and solicitations, but can be held liable much earlier than for attempt
      - 1. overt act often required (MPC 5.03(5)) –
        - a. some states lower (purpose); some higher (substantial step)
      - 2. can also apply after completion: punish separately v. in addition to, completed crime
        - a. *Grunewald*
          - i. Conspiracy does not necessarily imply that a cover-up was also present
      - 3. each member liable for acts of all members
    - iv. procedural advantages for prosecution:
      - 1. venue, liberal evidence admission (hearsay gets in), grouping in mind of jury (spillover), extends SOL, pressure to rat out
    - v. can charge related conduct together
      - 1. MPC 5.03(4) – subject to limitation
    - vi. *Krulewitch* critique: vague, high penalty for low involvement
      - 1. so why persist?
        - a. groups pose special danger
          - i. if that's all it is, criminalize membership?
        - b. Right to assembly issue; struck down in *Lanzetta* ("gang" too vague) and *Dennis* (communist party membership criminalized but later reversed)
          - i. but given lack of explicit agreement req., this is effectively what we have
    - vii. problem: at common law, it's a felony to conspire to commit a misdemeanor



1. sentencing issue (double: additional offense and liability for acts of others)
2. majority approach: lessen
3. MPC: same unless serious
  - a. limitation in MPC 1.07(1)(b): can't convict of conspiracy and same crime
  - b. federal sentencing guidelines also don't allow but practice continues  
(Callanan)
- viii. actus reus of conspiracy = agreement
  1. kind of a legal fiction anyway; def. will argue narrow, prosecution broad
  2. *Interstate Circuit* (movie theaters agreed on terms): no simultaneous action needed; goes beyond mere chance
  3. *Garcia*: not proved simply by common gang membership, also need parallel action that requires planning
    - a. prosecution argued that violence of foreseeable from gang membership
- ix. mens rea of conspiracy = purpose
  1. given early liability, subjectivity necessary?
- d. Mistake of law / fact defenses
  - i. *Powell*: corrupt motive requirement
  - ii. *Freed*: no mistake of fact defense if fact just makes underlying crime worse
  - iii. long SOL
    1. *Krulewitch*: not merely concealing facts, otherwise effectively no SOL
    2. withdrawal: retroactive v. prospective
  - iv. *Jimenez Reico*: no impossibility / automatic termination defense; threat to stings
  - v. *Randall*: communication must be direct to leader or police; “maturing out” of gang insufficient
  - vi. MPC 5.03(7)(c)
  - vii. MPC 5.03(6): renunciation allowed if prevents substantive crime from occurring
  - viii. MPC 5.03(7)(b): abandonment presumed if no overt act

#### CXLI. Single vs multiple conspiracies

#### CXLII. *Kotteakos v. United States*

- a. Facts:
  - i. D placed fraudulent loan applications on behalf of 8 people
- b. Holding:
  - i. wheel not met –need rim uniting spokes in addition to hub
- c. Notes:
  - i. contra: narcotics trade
    1. *US v. Bruno* (2d 1939)
      - a. Smugglers, middlemen, retailers all knew of whole supply chain despite no communication
        - i. Only one conspiracy, despite 86 D’s
    - ii. MPC 5.03(2) only requires knowledge of others as well
      1. here even connects groups of retailers who may not have known of each other, though alt approach: focus on intent by group (e.g. wholesalers vs. dealers)
    - iii. *US v. McDermott* (2d 2001) (insider trading, woman sleeping with two men and passing both stock tips):
      1. no conspiracy because no knowledge
    - iv. MPC: there can be multiple crimes and it can remain a single conspiracy

1. prosecution can't just create many conspiracies to enhance sentence (*Braverman*)
  2. contrast with *Albernaez*: if multiple statutes violated
- CXLIII. **RICO** (Racketeer Influenced and Corrupt Organizations Act (1970)) – 18 USC 1961-1963
- a. Sen. McClellan sponsored; part of the OCC (Organized Crime Control Act)
    - i. Enacted to address concerns re: infiltration of organized crime into the legitimate economy
    - ii. Creates private right of action with treble damages
      1. Also authorizes seizure of assets
  - b. 1962(a)
    - i. Unlawful for any person who has received income from a “pattern of racketeering activity”...or to use or invest in any “enterprise” engaged in interstate commerce
    - ii. Addresses money laundering (with list of qualifying offenses)
      1. Illicit money funneled into legitimate businesses
  - c. 1962(b)
    - i. Or to maintain any interest in such a venture
    - ii. Using crimes to obtain an interest in an enterprise
      1. Such as using violence or bribes to acquire influence in a business
      2. Distinct from 1962(a), which focuses on buying businesses with illicit income
  - d. 1962(c)
    - i. Targets employees of an enterprise who participate in racketeering activities
      1. Provision with the most prosecutions
  - e. 1962(d)
    - i. Or to conspire to violate 1962
    - ii. Hard to imagine a scenario where a violation of 1962(c) would not also violate 1962(d)
      1. Expanded by *Salinas* (see below)
        - a. Only requires that D has agreed to *assist* co-conspirators in committing 2 requisite acts (need not have participated)
          - i. Sufficient that D knew about scheme and agreed to facilitate it
  - f. 1962: enterprise, pattern, conduct, participation
    - i. “racketeering activity” – qualifying offenses in 1961
  - g. 1961 (4):
    - i. Enterprise defined
    - ii. Association in fact, legal association, or individual
  - h. 1961 (5):
    - i. “Pattern” defined
    - ii. At least **two acts of racketeering activity within ten years** of each other
  - i. Pre-RICO:
    - i. ITAR
      1. Predecessor to RICO (travel for racketeering statute)
    - ii. Title III:
      1. Authorized wiretapping (1968); evidence acquired would be admitted in court
    - iii. Witness protection program
    - iv. Transformation of the FBI after Hoover
  - j. VICAR:
    - i. Violence in racketeering Act (18 USC 1959)
  - k. RICO violation and prosecutions for the underlying substantive offenses
- CXLIV. Enterprise Requirement

- a. *US v. Turkette* (SC 1981)
  - i. An enterprise for RICO purposes can include an exclusively criminal org.
- b. *Boyle v. US* (SC 2009)
  - i. Association must have some structure (3 features)
    - 1. Allows prosecution of gangs using RICO

#### CXLV. Pattern Requirement

- a. Prosecution can use past crimes to establish a pattern
  - i. Double jeopardy problem?
- b. *Reeves v. Ernst & Young* (1993)
  - i. 1962(c)
    - 1. Requires that D had some role in “directing or managing” the enterprise’s affairs
      - a. Operation or management test
- c. *HJ Inc. v. NW Bell Telephone* (1989)
  - i. Employees bribed state public utility commission to approve excessive rates
  - ii. Pattern need not involve separate illegal schemes
    - 1. Continuity and relationship test
  - iii. Scalia dissent:
    - 1. Invites challenge for vagueness

#### CXLVI. Civil Remedies under RICO:

- a. 1964:
  - i. Victims given COA to sue (adopts private atty. General idea from Sherman Act)
  - ii. Allows treble damages
  - iii. Also authorizes govt. to restrain prospective RICO violations using all equitable civil remedies (asset freezing/seizure; injunctive equitable relief)

#### CXLVII. *Salinas v. US* (1997)

- a. Facts:
  - i. D convicted of 1962(d) (conspiracy), even though he was acquitted of underlying offenses under 1962(c)
- b. Holding:
  - i. Operation and management test does not apply for 1962(d)
    - 1. See also *US v. Fernandez* (9<sup>th</sup> Cir. 2004)
      - a. Knowing facilitation required
- c. Notes:
  - i. *US v. Elliott* (5<sup>th</sup> Cir. 1978)
    - 1. Analogized criminal organization to a business conglomerate
      - a. Common purpose of making money, even though different D’s engaged in different crimes
      - b. Question of whether this is a justified approach is left to Congress

#### CXLVIII. **Exculpation – Defenses of Justification and Excuse**

- a. Three types of defenses:
  - i. Failure to establish one or more elements of an offense
  - ii. Justifications
    - 1. E.g. self-defense
  - iii. Excuses
    - 1. E.g. insanity

#### CXLIX. Principles of Justification: Protection of Life and Person

- a. *US v. Peterson* (DC 1973)
    - i. Self-defense
      - 1. The “law of necessity”
      - 2. No other alternative
      - 3. Objectively reasonable threat
        - a. Deadly force must correspond to threat of death or serious bodily injury
          - i. Threat must be unlawful and immediate
    - ii. If assessment of threat is mistaken, SD is an excuse, rather than a justification
      - 1. See imperfect SD
- CL. *People v. Goetz* (NY 1986)
  - a. Facts:
    - i. D shoots 4 youths after fearing being mugged
      - 1. One shooting took place after threat had passed
        - a. Prosecution might have had more success if only charged D with the 4<sup>th</sup> shooting
    - ii. D argues that prosecution erred in jury instruction
  - b. Holding:
    - i. Ct. allows instruction that D’s prior experiences could be considered as evidence of the reasonableness of his belief
      - 1. Subjective standard, although holding purports to be upholding an objective standard, considering the D’s “circumstances”
        - a. Determination of reasonableness includes physical attributes of the parties, D’s knowledge re: victim, any prior experiences
        - b. Acknowledge that D’s own perceptions can’t exonerate him
          - i. Would allow D’s to set their own standards
            - 1. Legislative intent in including “reasonably” was to retain an objective standard
    - ii. Holding addresses MPC approach re: negligent/reckless mens rea but notes that NY Penal Law did not adopt that provision
      - 1. MPC 3.04(2)(b)
        - a. If a D’s belief is mistaken, can only be convicted of an offense requiring negligent/reckless mens rea (manslaughter)
        - b. Imperfect SD (excuse)
      - 2. MPC 2.02
        - a. Definition of negligence (reasonable person in the actor’s situation)
  - c. Notes:
    - i. Race implications:
      - 1. Biases/statistics allow D’s to kill young black men b/c of perception of fear
        - a. Argument that race-based evidence of reasonableness is more prejudicial on a jury than probative, should be abandoned
    - ii. MPC 3.04(2)(b)
      - 1. Allows use of deadly force in response to life-threatening threat, threat of kidnapping, or threat of rape
        - a. NY Penal law also allows use of force in response to threat of robbery
      - 2. MPC 3.11(s)
        - a. Deadly force

- iii. Restak: “Fiction of the Reasonable Man”
  - 1. Reasonable person arg. Is illogical (no reasonable people under threat of death)
    - a. Witness for the defense in *Goetz* explained the effect of limbic system
      - i.
- iv. *Heller/McDonald*
  - 1. Constitutional right to keep and bear arms
    - a. SD is a basic right, applies to handguns
- v. Subjective test of reasonableness:
  - 1. Asks whether D was negligent in deciding that use of force for SD was reasonable
    - a. Only unreasonable mistake is when D is drunk (comments to MPC 3.09)
  - 2. Adopted in MPC 3.04(2)(b)
- vi. Objective standard:
  - 1. Qualifications (“hybrid” standard in most jurisdictions)
    - a. Reasonable person in the actor’s situation
      - i. What factors can be considered to define “situation”?
        - 1. *People v. Carillo*
          - a. Allowed evidence of prior muggings
        - 2. *People v. Romero*
          - a. Role of culture was inadmissible
        - 3. *People v. Maggio*
          - a. Evidence of a “fearful delusion”/acute neurotic fears allowed
- vii. Grading based on reasonableness
  - 1. Prevailing view – same penalty if belief that SD was necessary was mistaken
  - 2. Various doctrines of mitigation:
    - a. “imperfect SD” = voluntary manslaughter
    - b. Involuntary manslaughter
      - i. Similar to MPC approach
        - 1. 3.09(2)

CLI. Battered-Woman’s Syndrome (BWS)

- a. Domestic violence homicide and self-defense

CLII. *State v. Kelly* (NJ 1984)

- a. Facts:
  - i. Non-confrontational killing
  - ii. D stabbed her husband in his sleep
  - iii. QP: whether trial ct. erred in its exclusion of expert testimony on BWS
- b. Holding:
  - i. Tr. Ct. erred in excluding testimony; case remanded for a new trial
  - ii. BWS: common characteristics
    - 1. Learned helplessness (Prof. Walker)
    - 2. Subjective element in SD – relevant?
  - iii. D convicted of reckless manslaughter

CLIII. *State v. Norman* (NC 1989)

- a. Facts:
  - i. D argues perfect SD: D believed it necessary to kill victim to protect herself from serious bodily harm or death

- 1. D tortured and forced into prostitution by husband; shot husband in sleep
- b. Holding:
  - i. Danger was not *imminent*
    - 1. Imminence req. necessary to prevent “opportune homicide”
      - a. Predictions of harm are speculative in non-confrontational situations
      - b. Victim can’t provide testimony on his own behalf
  - ii. D’s alternative argument: imperfect SD
    - 1. D believed murder was necessary but belief was not reasonable
      - a. Rejects this arg. As well, although D was only charged with voluntary manslaughter anyway (still available under imperfect SD)
- c. Dissent:
  - i. D believed that escape was impossible
    - 1. See morally-relevant factors that are not considered under the law

- d. Notes:
  - i. Imminence req.:
    - 1. *State v. Schroeder* (Neb. 1978)
      - a. Inmate stabbed cellmate; Conviction upheld
        - i. Can’t legalize preventive assault for threats
    - 2. *Ha v. State* (Alaska 1995)
      - a. D shot Bou; conviction upheld
  - ii. Due process argument:
    - 1. Killing vic. Robs them of chance to defend themselves
      - a. But, this implies adequate processes (see *Kelly* and *Ha*: no chance of using traditional avenues – police, courts, administration of social services)
  - iii. Mandatory arrest/“no-drop” policies?
    - 1. But, perverse effects

CLIV. Deadly force and the retreat requirement

CLV. *State v. Abbott* (NJ 1961)

- a. Facts:
  - i. Paving dispute; Abbott strikes each Scarano with a hatchet after they attacked him with it
  - ii. Retreat limitation on deadly SD
- b. Holding:
  - i. Conviction reversed; jury instruction was ambiguous and confusing
  - ii. Upholds principle of retreat, with limitations
  - iii. Cites MPC 3.04(2)(b)(i)
    - 1. Emphasizes that retreat is only required if D *knows* that he can avoid deadly force by retreating to a place of *complete safety*
    - 2. Compare with “true man” doctrine
      - a. *Erwin v. State* (Ohio 1876)
- c. Notes:
  - i. *State v. Smiley* (Fl. 2006):
    - 1. Cab driver shot robber but could have driven away
      - a. Convicted of first degree murder under retreat req.
  - ii. “Stand your ground” statutes:
    - 1. Passed to supersede judicial imposition of retreat req.
      - a. Possible alternative: duty to retreat with sentencing discretion

- iii. Castle exception:
  - 1. *People v. Tomlins* (1914)
    - a. Distinguishes between intruders, guests, co-habitants
- iv. Trayvon Martin/Zimmerman case:
  - 1. Prosecutor's theory – you cannot invoke SD if you are the aggressor
    - a. Can't create your own necessity (see *Allen* below)

CLVI. *Allen v. State* (Okla. 1994)

- a. Facts:
  - i. D struck with a rake by Leathers, follows Leathers; Leathers approached and D shot her
- b. Holding:
  - i. Conviction upheld
  - ii. D created provocation, lost right to SD
    - 1. Must be “free from fault”
      - a. See *Mayes v. State* (Ind. 2001)
        - i. Illegal possession of gun forfeited right to SD
        - ii. But, requires a causal connection between crime and confrontation

CLVII. *US v. Peterson* (DC 1973)

- a. Facts:
  - i. D re-initiated confrontation and killed attacker
- b. Holding:
  - i. Conviction affirmed
    - 1. Cites *Laney* (1923):
      - a. Mob beats D; D escapes, returns, and shoots vic.
      - b. In accord w/ MPC approach
- c. Notes:
  - i. MPC 3.04(2)(b)(i):
    - 1. SD justification denied for actor who provoked the use of force against himself in the same encounter
      - a. With purpose of causing death or SBH
      - b. When provocation used with intention to kill vic.

CLVIII. **Use of Force in Protection of Property**

CLIX. *People v. Ceballos* (Cal. 1974)

- a. Facts:
  - i. Spring gun mounted after burglaries, shoots vic.
- b. Holding:
  - i. Majority declines to adopt *Gilliam* rule (D may do indirectly what he could have done directly)
    - 1. *Gilliam* rule = dependent on fortuity of result
    - 2. Rule would lead to allowance for use of deadly force to repel all burglaries, even if actor might realize deadly force was not nec'y if he was actually present
      - a. Rule might apply to effort to apprehend a felon (but not present in this case)
- c. Notes:
  - i. MPC 3.06 -> no justification for using a deadly device
  - ii. MPC 3.06(3)(d)(ii)(2):
    - 1. Deadly force permitted when using moderate force would expose vic. To threat of death or SBH

- iii. Colorado “Make My Day” law:
  - 1. Deadly force permitted in response to any unlawful entry
- iv. Fla. “Stand your ground” law:
  - 1. Applies to vehicles and dwellings, attempts and unlawful entries
    - a. But, requires unlawful and *forcible* entry

CLX. Hattori/Peairs case

- a. Facts:
  - i. Vic. Approached D’s door in Halloween costume, did not respond to questions due to lack of English proficiency
    - 1. D shot vic., acquitted
- b. Holding:
  - i. Acquittal upheld
    - 1. D had right to shoot intruder (“burglar likely to use unlawful force”)
- c. Notes:
  - i. MPC 3.06(3)(d)(ii): Use of Deadly Force for the Protection of Property
    - 1. Attempting to commit a felony + threat of deadly force (or when exposure to threat of death or SBH in using less than deadly force)

CLXI. Privileged Use of Force by Law Enforcement

CLXII. *Durham v. State* (Ind. 1927):

- a. Facts:
  - i. D shot vic. After arresting him for illegal fishing (shot after being beaten with an oar)
- b. Holding:
  - i. Judgment reversed: PO may shoot resisting misdemeanor to prevent death or SBH (doesn’t nec’y apply to fleeing misdemeanants)

CLXIII. *Tennessee v. Garner* (SC 1985)

- a. Facts:
  - i. D killed fleeing burglar to prevent him from eluding capture
    - 1. Constitutionality of Tenn. Statute authorizing use of deadly force to prevent escape challenged
    - 2. Ct. of Appeals held that stat. violated 4<sup>th</sup> Am. (unreasonable “seizure” of life)
- b. Holding:
  - i. Judgment affirmed; “it is not better that all felony suspects die than that they escape”
- c. Dissent:
  - i. Burglary is inherently dangerous
  - ii. Tenn. Legislature should determine public policy
- d. Notes:
  - i. MPC 3.07(2)(b): Use of Force in Law Enforcement
    - 1. Use of deadly force permitted for felonies (consistent with common law)
      - a. Where there is no substantial risk to bystanders
      - b. Where suspect poses a threat of deadly force or SBH if apprehension is delayed

CLXIV. Choice of Lesser Evil (General Justification – Residual Principle)

CLXV. *People v. Unger* (Ill. 1977)

- a. Facts:
  - i. D escapes from prison, claims necessity (threats of death and sexual assault)
    - 1. Cites *Harmon* (duress) and *Lovercamp* (necessity)



- ii. *Lovercamp* conditions:
  - 1. Specific threat, futility of complaining, no time to resort to courts, no force used in escape, immediately reports to authorities after escaping
  - 2. Latter condition not fulfilled (but, jury could assess credibility)
- b. Holding:
  - i. Reversed trial ct. judgment for failure to give necessity instruction
- c. Dissent:
  - i. Necessity defense should be confined to *Lovercamp* conditions (majority explicitly treats conditions as factors to be considered, rather than determinative)
- d. Notes:
  - i. *US v. Bailey* (US 1980):
    - 1. Necessity defense required a bona fide effort to surrender
  - ii. MPC 3.02 -> Choice of Evils: Justification Generally
    - 1. If harm sought to be avoided is greater than harm of conduct (measured by an objective standard)
      - a. Must be necessary, based on reasonable belief
      - b. Defense unavailable if D recklessly/negligently created the necessity (only where offense for which recklessness/negligence is a sufficient mens rea)
        - i. Also unavailable if explicitly precluded by statute (see *Leno* below)
    - 2. Distinct from duress

CLXVI. *Commonwealth v. Leno* (MA 1993)

- a. Facts:
  - i. D's running needle exchange program convicted of unlawful distribution of an instrument to administer a controlled substance
- b. Holding:
  - i. Conviction upheld
  - ii. Issue of competing values had already been subject of deliberate legislative choice
    - 1. Explicit decision accounting for specific choice of evils
- c. Notes:
  - i. See Prison Rape Elimination Act of 2003
- d. Medical Necessity
  - i. *Commonwealth v. Hutchins* (MA 1991)
    - 1. Conviction affirmed for med. Use of marijuana
      - a. Necessity of using marijuana outweighed by public interest in enforcement of drug laws
    - 2. California Compassionate Use Act
      - a. Only applies to glaucoma and cancer
      - b. Also, still subject to federal prosecution
        - i. See *US v. Oakland Cannabis Buyers' Assoc.*
- e. Economic Necessity
  - i. Rejected by courts as a defense
  - ii. *Borough of Southwark v. Williams* (UK, 1971)
    - 1. Squatters
  - iii. *People v. Fontes* (Col. 2003)
    - 1. Disallowed economic necessity defense (economic nec'y accounted for in sentencing)
  - iv. Looting:

1. Always occurs in emergency situations, by definition (in Katrina example, precluded by statute)
  2. MPC:
    - a. No duress or choice of evils defense for natural events (must be the result of threat of unlawful human force)
- f. Execution of a public duty:
- i. MPC 3.03:
    1. Conduct is justifiable when authorized by duties of officers
  - ii. MPC 3.03(2):
    1. Applies to use of force and deadly force (b)
      - a. Applies when officer reasonable believes his conduct to be justified
- g. Consent:
- i. MPC 2.11: Consent
    1. Consent as a defense if it negates an element of the offense
  - ii. MPC 2.11(2)
    1. Consent to bodily harm
  - iii. MPC 2.11(3):
    1. Effective consent
- h. Entrapment:
- i. MPC 2.13
    1. Inducement or encouragement with purpose of acquiring evidence (by making false representations, etc.)
      - a. “other than those ready to commit offense” (measured under reasonable person standard)
    2. Defense not available when causing or threatening bodily injury is an element of the offense
  - ii. See *Jacobson v. US* (1992)
    1. Entrapment defense only available to D not “predisposed” to commit the offense
  - iii. “Operation Lucky Bag”
- CLXVII. **Principles of Excuse – Duress**
- CLXVIII. *State v. Toscano* (NJ)
- a. Facts:
    - i. D participated in insurance fraud scheme after being threatened
      1. Trial court: no duress instruction allowed (threat was not imminent, no threat of death or SBH)
      2. Common law duress defense:
        - a. Only permitted for threat of death (“standard of heroism”)
  - b. Holding:
    - i. Conviction reversed (error assigned for failing to submit duress instruction)
      1. Majority concerned with baseless defenses but upheld viability of duress defense
        - a. Where person of reasonable firmness would have been unable to resist (question for the jury)
          - i. Even for vaguely ominous threat (tone of voice was “vicious”)
        - b. MPC approach (adopted by proposed NJ Penal Code)
  - c. Notes:
    - i. Excuses:

1. Focus on the actor, not the act
2. Three categories:
  - a. Involuntary acts
  - b. Actions related to cognitive deficiencies
  - c. Actions related to volitional deficiencies
3. Principles:
  - a. Identify non-deterrable conduct
  - b. Confine liability to cases involving free choices
4. Testing the boundaries:
  - a. Drug addiction, childhood abuse, economic deprivation
- ii. MPC 2.09(1): Duress
  1. Interaction with 3.02 (Choice of Evils); same standard
  2. Duress is an affirmative defense, even for murder (other jurisdictions may reduce charge to manslaughter)
    - a. See NJ statute (partial v. complete excuse)
    - b. Other jurisdictions require threat to be immediate
  3. MPC hybrid standard:
    - a. More liberal than common law standard – imminence only one factor
    - b. Same scope as for recklessness/negligence
    - c. Consider tangible factors (size, strength, health), not temperament
    - d. Threat of unlawful force, rather than death or SBH
- iii. The objective standard – in the actor’s “situation”
  1. immaturity and mental retardation:
    - a. *State v. Heinemann* (Conn. 2007)
    - b. *US v. Johnson* (6<sup>th</sup> 2005)
      - i. cases reject notion that age/IQ make actor more susceptible to duress
        1. defense is too easily feigned
      - ii. but, others allow the defense – *Commonwealth v. DeMarco* (gross and verifiable mental disability)
  2. BWS:
    - a. duress defense for participation in other crimes (robbery, drug deals)
      - i. contrast with SD, where D kills abuser
    - b. *Pickle v State* – no duress defense
    - c. *State v. BH* (NJ 2005)
      - i. BWS evidence not relevant to reasonable firmness question, but relevant to decide whether D recklessly/negl. placed herself in the situation
  3. *US v. Lopez* (ND 1987)
    - a. D escapes prison via helicopter after being threatened by inmates
      - i. asserted defenses of duress and necessity
    - b. MPC:
      - i. choice of evils justification
        1. allowed regardless of the source of the peril
      - ii. duress excuse
        1. not allowed for naturally occurring sources
          - a. only for threats against the person

- b. other coercive threats (economic, etc.) excluded
- 4. *US v. Fleming* (CMR 1957)
  - a. POW violated Code of Mil. Justice by forcibly preparing propaganda
    - i. threatened with imprisonment in the caves (“certain death”)
  - b. duress defense rejected; threat was not imminent
- 5. *US v. Contento-Pachon* (9<sup>th</sup> 1984)
  - a. D swallowed cocaine and smuggled after dealer threatened to kill his wife and child
  - b. Dist. Ct. excluded duress defense; no immediacy and inescapability
    - i. Ct. of Appeals reversed:
      - 1. no reasonable opportunity to escape (police were paid off)
- 6. *Regina v. Ruzic* (1998)
  - a. D transported heroin from Yugoslavia to Toronto
    - i. acquitted; no reasonable choice (threat to kill mother)
      - 1. even though threat was not imminent/present
- 7. *Prosecutor v. Erdemovic* (ICTY 1997)
  - a. D participated in Srebrenica massacre
    - i. threatened with instant death, and massacre would certainly have taken place regardless
  - b. Holding:
    - i. duress not a complete defense but can be considered in sentencing
- iv. “brainwashing” defense – not a pure duress defense (but, less than voluntary activity)
  - 1. Patty Hearst case (Stockholm Syndrome)
  - 2. DC Sniper case
- v. MPC 2.10: Military Orders Defense
  - 1. ordered but not threatened with death
    - a. affirmative defense if D does not know that the act is unlawful

CLXIX. **Intoxication (Excuse) – Voluntary Intoxication**

CLXX. Specific Intent v. General Intent Offenses

CLXXI. *People v. Hood* (Cal. 1969)

- a. Facts:
  - i. D, intox., shot PO in the leg; Cal. App. reversed conviction due to confusing jury instruction
- b. Holding:
  - i. trial remanded with orders NOT to give intoxication instruction
- c. Notes:
  - i. specific intent v. general intent offenses
    - 1. general intent:
      - a. def. of crime consists only of description of a certain act
    - 2. specific intent:
      - a. def. of crime refers to D’s intent to do some further act or achieve some additional consequence
    - 3. assault held to be a general intent crime (no intoxication excuse)
    - 4. rationale:
      - a. effect of alcohol on aggressive impulses (general intent) v. effect on awareness of social consequences of act (specific intent inappropriate to impute to such a state)

- i. compare with *Stasio*, below
    - ii. two competing theories:
      - 1. intox. reduces moral culpability (act would not have been done sober)
      - 2. D voluntarily impaired moral perceptions
    - iii. subsequent CA statute:
      - 1. voluntary intox. defense allowed for specific intent offenses
- CLXXII. *State v. Stasio* (NJ 1979)
- a. Facts:
    - i. D convicted of assault with intent to rob
  - b. Holding:
    - i. evidence re: voluntary intox. inadmissible
      - 1. only admissible when:
        - a. offense requires premeditation/deliberation
        - b. intox. caused fixed state of insanity
      - 2. also relevant to demonstrate mistake in some cases
  - c. Dissent:
    - i. vol. intox. can negate mens rea element of an offense
  - d. Notes:
    - i. subsequent NJ statute:
      - 1. intox. evidence can be used to determine purpose or knowledge but not recklessness/negl.
    - ii. assault with intent to rob charge:
      - 1. MPC 222.1: Robbery
        - a. includes a force element
- CLXXIII. *US v. Veach* (6<sup>th</sup> 2006)
- a. Facts:
    - i. drunk D arrested for DUI told PO, “I’ll kill you”
  - b. Holding:
    - i. Ct. erred in excluding evidence of intox. for specific intent offense of assault with intent to impede
  - c. Notes:
    - i. MPC 2.08: Intoxication
      - 1. (2): not a defense for recklessness
        - a. purpose/knowledge only
          - i. otherwise, D’s would always claim intox. excuse
          - ii. under MPC, intox. as an “anti-excuse”
      - 2. (4): is a defense for involuntary intox.
        - a. including “pathological intoxication”
      - 3. states (CA, for example) might not adopt MPC approach b/c recklessness is not drafted into other aspects of the Penal Code to account for intox. excuse
- CLXXIV. Intoxication and Due Process
- CLXXV. *Montana v. Egelhoff* (SC 1996)
- a. Facts:
    - i. Montana Penal Code – intox. may not be considered
    - ii. Mont. SC held that statute was unconstitutional

1. statute allowed state to convict without proving guilt beyond a reasonable doubt (due process)
- b. Holding (Scalia):
  - i. reversed holding of Montana SC, upheld statute by a plurality
    1. any evidentiary rule can make it easier for a state to meet due process requirements
- c. Holding (O'Connor):
  - i. state impedes D's ability to throw doubt on state's case (violates fundamental principle of fairness)
- d. Holding (Ginsburg; deciding vote):
  - i. upheld statute b/c it redefined the offense, so intox. was irrelevant
    1. statute allowed conviction for killing while intoxicated
      - a. where, but for intox., D would have acted with purpose or knowledge
- e. Notes:
  - i. contrast w/ German statute:
    1. separate offense for committing a wrongful act while intoxicated
  - ii. boundaries of intoxication:
    1. prescription drugs
      - a. used properly v. abused
    2. invol. intox. is a more complete defense than insanity (due to commitment in insanity)

CLXXVI. Involuntary Intoxication

- a. common law approach:
  - i. invol. intox. allows defense of temporary insanity
    1. but, must meet test for insanity

CLXXVII. *Regina v. Kingston* (UK 1994)

- a. Facts:
  - i. D drank spiked coffee & sexually assaulted underage boy
    1. conviction reversed by Ct. of Appeals due to invol. intox. (absence of moral fault/mens rea)
- b. Holding:
  - i. House of Lords upholds conviction
    1. spurious defense
    2. absence of moral fault does not nec'y constitute absence of mens rea
    3. defense is too broad
      - a. applies to all offenses
      - b. complete answer to a charge
      - c. subjective:
        - i. dependent on D's susceptibility to temptation (self control)
    4. intox. evidence more suited to sentencing

- c. Notes:
  - i. MPC 2.08
    1. defense allowed for involuntary intox., where intox. renders D unaware of criminality/wrongfulness of acts (same wording as insanity defense)
  - ii. involuntarily intoxicating someone imposes accomplice liability for resulting crime

CLXXVIII. *US v. Fleming* (4<sup>th</sup> 1984)

- a. Facts:

- i. D convicted of first degree murder for DUI
  - 1. argued that he should be been convicted for manslaughter at most
- b. Holding:
  - i. proof of malice may be established by reckless and wanton conduct (disregard for safety or lives of others)
    - 1. difference in degree from gross negligence
  - ii. D drove in manner that could be taken to indicate depraved disregard of human life
    - 1. MPC 2.08(2):
      - a. voluntary intox. not a defense where actor was unaware of the risk due to voluntary drunkenness
- c. Notes:
  - i. MPC 210.2(1)(b):
    - 1. murder requires proof that D acted recklessly under circumstances manifesting extreme indifference to the value of human life
    - 2. inadvertent risk creation cannot be punished as murder
  - ii. *State v. Dufield* (NH 1988)
    - 1. D killed vic. in drunken orgy
    - 2. conviction affirmed;
      - a. intox. irrelevant for gross deviation from norm, since recklessness already established

**CLXXIX. Exculpations: Principles of Excuse – The Defense of Legal Insanity**

- a. *State v. Green* (1982)
  - i. homeless D shot PO in park
- b. *Yates v. State* (2005)
  - i. D killed her 5 children
- c. both D's held competent to stand trial; insanity defenses rejected by juries
  - i. insanity defense is rarely asserted and rarely accepted
- d. terminology:
  - i. mental illness
    - 1. disorder recognized by psychological community
  - ii. insanity:
    - 1. D's mental state
  - iii. incompetence:
    - 1. D's mental state at the time of a legal proceeding
    - 2. MPC 4.04
      - a. lacks capacity to understand proceedings against him as a result of a mental disease or defect
    - 3. *Sell v. US* (2003):
      - a. Constitution permits forced medication of D's to render competent for trial if govt. can show:
        - i. important govt. interest
        - ii. substantial likelihood of success w/o side effects
        - iii. alternatives unlikely to achieve same results
        - iv. treatment is medically appropriate
- e. execution:
  - i. *Ford v. Wainwright* (1986)

1. 8<sup>th</sup> Am. bans execution of the insane
- ii. *Atkins v. Virginia* (2002)
  1. 8<sup>th</sup> Am. bans execution of mentally retarded

CLXXX. Civil commitment:

- a. *Addington v. Texas* (1979):
  - i. dangerousness and mental illness must be proved by clear and convincing evidence
- b. competing approaches:
  - i. judge's discretion
  - ii. mandatory commitment
    1. constitutionality upheld in *Jones v. US* (1983)
    2. MPC 4.08:
      - a. protects the public and de-stigmatizes commitment
- c. duration of commitment:
  - i. confined until judge decides that D meets conditions for release (could be indefinite)
- d. guilty but mentally ill:
  - i. Michigan statute allowed juries a third option, "Guilty but mentally ill"
    1. allows for psychiatric treatment in prison
  - ii. perception that public safety concerns make dilution of the insanity defense a practical necessity
- e. Burden of proof:
  - i. presumption of legal sanity
    1. reasonable doubt of the sanity of the accused
  - ii. prosecution must prove sanity of D beyond a reasonable doubt
    1. widely abandoned after *Hinckley* verdict

CLXXXI. *M'Naghten's Case* (UK 1843)

- a. Facts:
  - i. D murdered PM's secretary, thinking that he was assassinating the PM
    1. jury found D "not guilty, on the ground of insanity" after jury instruction
- b. Holding:
  - i. to invoke insanity defense, D must prove that:
    1. mental defect or disease
      - a. so as not to know the nature and quality of the act
      - b. so as not to know what he was doing was wrong (regarding the specific act)

CLXXXII. *Blake v. US* (5<sup>th</sup> 1969)

- a. Facts:
  - i. D charged with bank robbery after increasing mental disorder and imprisonment
    1. definition of insanity given in charge was adopted from dicta in *Davis v. US*
      - a. *Davis* standard:
        - i. deranged condition of the mental and moral faculties
        - ii. rendered incapable of distinguishing between right and wrong
        - iii. or, actions are not subject to actor's will
      2. D objected to *Davis* standard, proposed use of MPC standard:
        - a. MPC 4.01:
          - i. result of mental disease or defect
            1. not including an abnormality "manifested only by repeated criminal or otherwise antisocial conduct"



- a. accounts for sociopaths
    - ii. lacks **substantial** capacity to appreciate the criminality (wrongfulness) of conduct
    - iii. lacks capacity to conform conduct to law
- b. Holding:
  - i. adopts MPC approach as in accordance with current knowledge of mental illness
    - 1. D could not have prevailed under *Davis* charge
    - 2. jury can determine “substantial”
  - ii. MPC approach adopts *M’Naghten* rule
    - 1. insane D’s are beyond deterrence, although incapacitation is still needed
      - a. but, does not lend itself to emotional abnormalities, such as affective disorders
    - 2. many jurisdictions supplemented *M’Naghten* rule with “irresistible impulse” test
      - a. addresses D’s volitional incapacity (where disorder overrides D’s self-control), rather than his inability to understand
    - 3. MPC accounts for a sense of understanding broader than mere cognition with language of “substantial capacity”

CLXXXIII. *US v. Lyons* (5<sup>th</sup> 1984)

- a. Facts:
  - i. D argued that drug addiction affected his brain so that he lacked substantial capacity to conform his conduct to law
    - 1. trial court excluded the evidence and D was convicted
- b. Holding:
  - i. drug addiction raises no issue of mental defect but D still should have been able to submit evidence, since it may have indicated additional mental damage
    - 1. overturns *Lyons* by altering the insanity approach (adopted from the MPC)
      - a. volitional prong (lack of capacity to conform conduct to requirements of law) is not in accord with modern scientific evidence
        - i. only allows defense if D is unable to appreciate wrongfulness of conduct
- c. Dissent:
  - i. potential threat to society posed by allowing defense under volitional prong is not borne out in empirical evidence
- d. Notes:
  - i. *Hinckley* controversy and changes in the law:
    - 1. trend in favor of MPC approach reversed with *Hinckley* verdict (not guilty by reason of insanity)
      - a. adjustments in the burden of proof
      - b. changes in dispositions of insanity acquitees
      - c. abolition of the insanity defense
        - i. *Finger v. State* (2001)
          - 1. Nevada SC struck down constitutionality of a statute banning insanity defense – due process requires that D be able to contest his guilt on the ground that he did not know his act was wrong
        - ii. no SC precedent on abolition of insanity defense
          - 1. *Clark v. Arizona* (2006)

- a. SC rejected due process challenged to Arizona’s limited insanity defense (retaining only right/wrong prong of *M’Naghten* rule)
- 2. many jurisdictions returned to *M’Naghten* rule
  - a. whether D knew nature of crime
  - b. whether D was able to distinguish between right/wrong
- ii. ABA standard and APA standard retain the cognitive branch of the MPC test and reject the volitional branch
- iii. criticism of insanity defense:
  - 1. little basis of withholding condemnation from those whose mental illness causes them to act criminally when those whose deprived economic and social background causes them to act criminally are condemned
- iv. all prevailing formulations require:
  - 1. D unable to know that his act was “wrong”
  - 2. D suffering from a “mental disease or defect”

CLXXXIV. The Meaning of “Wrong”

CLXXXV. *State v. Crenshaw* (Wash. 1983):

- a. Facts:
  - i. D kills and decapitates wife, hides body
    - 1. follower of Muscovite faith – must kill unfaithful wife
  - ii. QP: Is right and wrong properly defined as **legal** right and wrong?
- b. Holding:
  - i. *M’Naghten* test – social standard of moral wrong (where legal and moral are synonymous)
  - ii. deific decree exception not found (distinguished from religious beliefs)
    - 1. rationale:
      - a. no person could resist God (deific duress defense)
      - b. D’s following God would be morally correct
    - 2. *State v. Cameron* (Wash. 1983)
      - a. reversed for failure to give deific decree instruction
- c. Notes:
  - i. *Serravo*:
    - 1. knowledge of illegality of act does not defeat defense under *M’Naghten*
      - a. insanity can still render D unable to comprehend immorality of act

CLXXXVI. Meaning of “Mental Disease or Defect”

CLXXXVII. *State v. Guido* (NJ 1963)

- a. Facts:
  - i. D shot husband after he refused to allow a divorce
    - 1. 2 psychiatrists changed their clinical opinion (changed conclusion without changing findings) and prosecutor accused them of fraud
      - a. D argued that prosecutor’s argument was prejudicial and unjustified
      - b. psychiatrists argued that they changed their opinion re: the meaning of “disease of the mind” required under *M’Naghten*
- b. Holding:
  - i. difficulty in defining “disease” precludes accusing psychiatrists of fraud; judgment reversed
  - ii. disease of the mind:

1. distinct from emotional/moral insanity, which is attributable to moral depravity/weakness (i.e. rage)

c. Notes:

i. *McDonald v. US* (DC 1962)

1. mental disease or defect = abnormal condition which effects emotional/moral processes and impair behavioral control

ii. See APA/ABA definitions

iii. personality disorders v. psychosis

1. different rationale from deterrence/punishment perspective

2. insanity defense as applied to the psychopath:

- a. antisocial personality disorder – knowledge of illegality but lack of capacity for empathy

- b. MPC 4.01(2)

- i. “caveat paragraph”

- ii. designed to exclude psychopaths

- iii. excludes “abnormality manifested only by repeated criminal conduct”

1. *State v. Werlein* (Wis. 1987)

- a. D opened fire for no reason

- b. psychological testimony established diagnosis that went beyond abnormality exhibited only in criminal behavior

2. *Wade v. US* (3<sup>rd</sup> 1961)

- a. possible to distinguish between psychopaths and recidivists

- b. but, other experts point to impossibility of treatment

iv. automatism:

1. insane automatism:

- a. result of a mental disease or defect

2. sane automatism:

- a. some other source

CLXXXVIII. Diminished Capacity

CLXXXIX. *US v. Brawner* (DC 1972)

a. Facts:

- i. QP: May expert testimony as to D’s mental condition be introduced to rebut the presumption that D has the required mental state for a particular offense, even if he was aware that the act was wrongful?

1. “diminished responsibility”; negating premeditation

b. Holding:

- i. expert testimony as to abnormal condition may be introduced to negative a specific mental condition that is an element of the crime

CXC. *Clark v. Arizona* (2006):

a. Facts:

- i. D shot PO during traffic stop; claimed that aliens were trying to kill him

b. Holding (Souter):

- i. Arizona’s restriction on introduction of mental-disease and capacity evidence (only allows observation evidence- see below) is permissible exercise of legislative power

1. rejects D’s due process argument

- ii. distinguishes between categories of evidence with potential bearing on mens rea:
  - 1. observation evidence
    - a. relevant to show state of mind at time of firing gun
  - 2. mental-disease evidence
    - a. establish category of defect
  - 3. capacity evidence
    - a. relevant to show D's capacity for cognition and moral judgment (and capacity to form mens rea)
- c. Dissent (Kennedy):
  - i. Arizona's evidentiary restriction improperly excludes evidence, no matter how credible and material it may be in disproving an element of the offense
- d. Notes:
  - i. mental disorder as a ground for mitigation
    - 1. "diminished/partial responsibility" can entitle D to reduction in severity of sentence
      - a. accounted for in Federal Sentencing Guidelines
    - 2. MPC 210.3:
      - a. rejects statutory reduction in sentencing for reduced mental capacity, where the elements of the offense are proved
        - i. otherwise would decrease incentives for actors to "behave as if they were normal"

CXCI. *Robinson v. California* (1962)

- a. Facts:
  - i. Constitutionality challenged of Cal. statute making it a criminal offense to be "addicted to the use of narcotics"
- b. Holding (Stewart):
  - i. statute violates 8<sup>th</sup> Am. (and 14<sup>th</sup> Am. by incorporation)
  - ii. criminalizes a status (continuously guilty)
- c. Concurrence (Douglas):
  - i. 8<sup>th</sup> Am. violation not from confinement, but from stigma imposed on a disease
- d. Concurrence (Harlan):
  - i. criminalizes desire to commit a criminal act
    - 1. merely for presence in Cal.
- e. Dissent (White):
  - i. ample evidence of use, just no evidence re: the precise location of use
    - 1. statute designed to deal with this problem
- f. Notes:
  - i. rationale of majority does NOT extend to a constitutional requirement of mens rea (as in Canada)

CXCII. *Powell v. Texas* (1968)

- a. Facts:
  - i. D charged with public intoxication
    - 1. trial court ruled that evidence of chronic alcoholism was no defense
- b. Holding (Marshall):
  - i. upheld tr. ct. judgment; D retained an element of free will
    - 1. statute does not punish status; punishment inflicted for an act
  - ii. to invalidate statute would be to define an insanity test in constitutional terms

1. such would invite constitutional challenges to other insanity standards (such as if *Durham v. US* was measured under *M'Naghten* test)
  - c. Concurrence (Black/Harlan):
    - i. punishment must be based on moral blameworthiness (*Morisette v. US*)
      1. but, state should not be constitutionally required to distinguish between what part of D's personality was reprehensible
  - d. Concurrence (White):
    - i. upholds *Robinson* but requires that addict take reasonable precautions
  - e. Dissent (Fortas):
    - i. criminal penalties may not be inflicted for being in a condition he cannot change
      1. retains essential constitutional defect
- CXCIII. *US v. Moore* (DC 1973)
- a. Facts:
    - i. D convicted of possession of heroin
      1. argued that addiction rendered possession an involuntary action (absence of free will)
  - b. Holding (Wilkey):
    - i. judgment affirmed; drug policies should not be weakened by accounting for compulsions caused by addictions
      1. not controlled by *Robinson*
  - c. Concurrence (Leventhal):
    - i. criminal law does not vary with individuals' capacity to meet the standards (absent a disability that is **gross and verifiable**)
      1. for lesser disabilities, assign weight accordingly in sentencing
  - d. Dissent (Wright):
    - i. criminal responsibility should not be imposed where D lack capacity to confirm his conduct to the law
      1. deterrence presupposes rationality
      2. D may be isolated with civil commitment (public safety argument)
    - ii. harm only accrues to the addict
  - e. Dissent and Concurrence (Bazelon):
    - i. would allow addiction/responsibility defense for additional crimes (trafficking, robbery), where D can be shown to be under duress because of addiction
  - f. Notes:
    - i. *Kansas v. Hendrix*
      1. civil commitment for persons predisposed to sexual violence
        - a. constitutionality of statute upheld by SC
    - ii. Meghan's law – registration for sex offenders
    - iii. economic deprivation
      1. Bazelon: "Rotten Social Background" Defense
        - a. *US v. Alexander*
          - i. D shot and killed a marine, invoked economic deprivation defense
      2. Morse critique of RSB defense:
        - a. all environments affect choice
          - i. slippery slope – no limiting principle (potentially limitless range of cases where social conditions could excuse harmful conduct)
        - ii. Bazelon defense skirts paternalism

CXCIV. **Sentencing**

- a. coercive state power in the service of punishment
  - i. types of punishment: incarceration, probation, fines, community service, etc.

CXCV. Sentencing Length

CXCVI. *US v. Madoff* (NY 2009)

- a. Facts:
  - i. sentencing for Ponzi scheme
- b. Holding:
  - i. purposes of punishment:
    - 1. retribution
    - 2. deterrence
    - 3. symbolism
  - ii. guideline range: does not bind judge
  - iii. mitigating circumstances – letters of character
  - iv. age/life expectancy

CXCVII. *US v. Jackson* (7<sup>th</sup> 1987)

- a. Facts:
  - i. D robs bank after being released from prison; sentenced to life w/o parole
- b. Holding (Easterbrook):
  - i. sentence was within range, permissible and free of appellate review
    - 1. subject only to clemency
  - ii. lower court considered *general* deterrence and incapacitation justifications
- c. Concurrence (Posner):
  - i. no ground to review sentence, but it is too harsh
  - ii. specific deterrence -> too speculative
    - 1. general deterrence -> unlikely (cites crime statistics)
  - iii. incapacitation justification also insufficient (another will take D's place)
    - 1. sentence should incapacitate D until his age makes him harmless

CXCVIII. *US v. Gementra* (9<sup>th</sup> 2004)

- a. Facts:
  - i. D sentenced to wear sandwich board after stealing mail
    - 1. Sentencing Reform Act: sentence must serve legitimate objectives
      - a. Deterrence
      - b. protect the public
      - c. rehabilitation
- b. Holding:
  - i. Humiliation satisfies deterrence/rehabilitation objectives
    - 1. Penalties always carry shame
    - 2. Sentence imposed = “re-integrative shaming”
- c. Dissent:
  - i. Bad policy and violates SRA
    - 1. Dehumanizing effect of shaming penalties

CXCIX. Proportionality

- a. Ct. rarely finds punishment to be “grossly disproportionate”
- b. Harm principle (Mill):
  - i. Avoids imposing uniform system of morality

- 1. But see criticism re: multiple/indirect harms
- ii. Implications for victimless crimes and emotional harm (bullying)
- c. MPC 1.02:
  - i. Safeguard against excessive, disproportionate, or arbitrary punishment
- d. Bentham's rules:
  - i. Punishment must be greater than profit from crime
  - ii. Punishment for greater offense must cause offender to prefer the lesser
  - iii. Punishment should be adjusted to give motive to restrain from committing each part
    - 1. Punishment for stealing \$10 v. \$5
  - iv. Punishment should be no more than necessary to compel conformity
- e. Effect of punishment on third parties (children)
- CC. *Ewing v. California* (2003)
  - a. Facts:
    - i. D received 25-life sentence under 3 strikes law; constitutionality of act challenged under 8<sup>th</sup> Am.
  - b. Holding (O'Connor):
    - i. 8<sup>th</sup> Am. contains a narrow proportionality principle (*Harmelin*)
      - 1. *Rummel* – Ct. upheld life sentence
      - 2. *Solem* – Ct. held sentence unconstitutional, under three factor test:
        - a. Gravity of offense + harshness of penalty
        - b. Similar sentences in the jurisdiction
        - c. Similar sentences in other jurisdictions
      - 3. *Harmelin* (Kennedy) – Ct. upheld life sentence
        - a. Primacy of legislature
        - b. Variety of penological schemes
        - c. Nature of the federal system
        - d. Objective factors
    - ii. Under *Harmelin*, sentence is only prohibited if it is “grossly disproportionate” (extreme)
      - 1. Cal. Had a reasonable basis for the law, so was entitled to deference
        - a. Rationale adopted by O'Connor
  - c. Concurrence (Scalia):
    - i. Proportionality is tied to goal of retribution and the Constitution does not mandate adoption of any one penological theory
  - d. Dissent (Breyer):
    - i. Advocates comparative analysis (with other sentences, as in *Solem*), that considers:
      - 1. Length of prisoner term
      - 2. The sentence-triggering conduct
      - 3. Offender's criminal history
    - ii. D's sentence is “extreme” under comparative analysis (unprecedented)
  - e. Notes:
    - i. Proportionality and recidivism (accounts for the fact that offender has not been deterred by criminal sanctions)
- CCI. *Graham v. Florida* (2010)
  - a. Facts:
    - i. 16 year old D sentenced to life for home invasion
      - 1. Challenged length of sentence

- b. Holding (Kennedy):
  - i. Categorical rules to define 8<sup>th</sup> Am. standards:
    - 1. Nature of the offense
    - 2. Characteristics of the offender
  - ii. Sentence of LWOP is prohibited for juveniles, due to special characteristics (impetuous, suspicious of adult legal representation, etc.)
- c. Concurrence (Roberts):
  - i. Would reach same judgment without creating categorical rule prohibiting LWOP for juveniles
- d. Dissent (Thomas):
  - i. LWOP sentences are justified on penological grounds (deter and incapacitate)
- e. Notes:
  - i. LWOP the rare category where SC has established limits, with capital punishment
    - 1. Also enforced a proportionality req. in fines, forfeitures, and punitive damages

## CCII. Discretionary Sentencing Systems

### CCIII. *Williams v. NY* (SC 1949)

- a. Facts:
  - i. D murdered during burglary
    - 1. Judge sentenced D to death after receiving additional information in pre-sentence report from Probation Dept.
      - a. “morbid sexuality,” 30 burglaries, etc. (hearsay evidence)
    - 2. Pre-sentence investigation not subject to due process; jury (asserts 14<sup>th</sup> Am. violation)
- b. Holding (Black):
  - i. No DP violation; judge not using info. to determine guilt
- c. Dissent (Murphy):
  - i. No fair hearing at every stage of the trial
- d. Notes:
  - i. *Williams* overruled for capital cases in *Gardner v. Florida* (1977)
  - ii. *US v. Fatico* (2d 1979) – “Fatico hearing” to account for hearsay
  - iii. Indeterminate sentences:
    - 1. Individual discretion for judges and parole officers
      - a. Rests on aim of rehabilitation; individualization
        - i. But, has resulted in disparity between similarly-situated D’s
          - 1. “amnesty” for some, exemplary sentences for others
    - 2. Rejected in federal sentencing guidelines (under SRA)
      - a. Parole eliminated; rejected rehabilitation objective of imprisonment
    - 3. Distinct from but connected to judicial discretion (by statute)

### CCIV. Sentencing Reform

- a. Mandatory minimums -> to eliminate discretion
  - i. But, disparity has continued to increase
  - ii. Still allow for discretion through plea bargaining (for assisting the govt.)
    - 1. Discretionary mandatories

### CCV. *US v. Vasquez* (EDNY 2010) (Statement of Reason for Sentence)

- a. D faced w/ 20 year mandatory minimum for drug trafficking pled guilty to lesser offense w/ 5 year mandatory minimum during plea bargaining



- i. Judge powerless after US Atty. Refused to drop 5 year charge, would have sentenced D to 24 months

- 1. Discretionary mandatory shifts power from judge to prosecutor

#### CCVI. Federal Sentencing Guidelines (SRA)

- a. Promulgated by Sentencing Commissions

- i. Abolished parole

- b. Narrow range of authorized sentences (18 USC 3553), based on:

- i. Seriousness of the offense
  - ii. Effective deterrence
  - iii. Public protection
  - iv. Providing vocational training
  - v. Aggravating/mitigating factors not considered by the Sentencing Commission

- c. Rationale for using Sentencing commissions

- i. Sprawling, unorganized fed. law
  - ii. Initial set of rules will require modification
  - iii. Insulate from politics

- d. Sentencing table: offense level + criminal history (includes misdemeanors, even though not subject to the same hearing requirements; likely unrepresented)

- i. Offense level:

- 1. Base offense level (statutory definition)
    - 2. Specific offense characteristics (victim's injury, use of a handgun, quantity of drugs, etc.)
    - 3. Additional adjustments (D's role, obstruction, particularly vulnerable victim, multiple counts, etc.)

- ii. Zones:

- 1. A – judge may grant probation
    - 2. B – judge may grant home detention
    - 3. C – no more than 6 months home detention
    - 4. D – neither probation nor home det.

- e. Purposes of SRA:

- i. Abandon rehabilitation/medical model of punishment
  - ii. Establish “truth in sentencing” by reducing sentencing discretion (D's serve at least 85% of sentence)
  - iii. Addressed unwanted disparity
  - iv. Brought law and due process to fed. sentencing (subject to appellate review)

- f. Criticism of sentencing guideline approach:

- i. In capital cases, SC has mandated individual review
  - ii. Loss of moral condemnation?
  - iii. Accounting for “soft” factors?
    - 1. False uniformity
    - 2. Judges can manipulate subjective considerations to re-impose disparity

- iv. Judges instructed to base sentence on “all relevant conduct”

- 1. The “real” offense, not the charged offense

- a. All states have rejected this approach, as it allows judge to decide (by preponderance of the evidence), rather than jury (by beyond a reasonable doubt standard)

