**Criminal Law Attack Outline**

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**Remember with murders during felonies, consider felony-murder, misdemeanor-murder, accomplice, conspiracy, and depraved-heart involuntary manslaughter.**

**Remember with any crime about Luparello liability for additional crimes.**

**If you can’t argue but for causation for a person, but they’re working together, you can charge accomplice liability**

**Remember to consider Corporate Criminal Liability and Law Enforcement Defense**

**Actus Reus**

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| Common Law | MPC |
| 1. **Act**    1. Voluntary – usually only one act needs to be voluntary; intangible acts qualify  * Martin: every single act must be voluntary * Low/Barnes: knowingly possessing something is voluntary * Bradshaw: possession is voluntary even if unknown (minority) * Eaton: possessing when involuntarily taken into jail is not voluntary  1. **Omission**    1. Voluntary    2. Duty: Traditional  * Parent/relationship (Bartley: parent duty for m/p kid with disabilities past 18 / Beardsley: no duty to unmarried lover; more p13) (true even if parent a victim: Cardwell – majority, yes; Knox – no) (Jones, Pope – others, no) * Statute imposes duty (+ Minn., VT, RI to refuse to render aid to person in peril; some to stop peril if no risk to self) * Contractual duty * Assume the care and seclude helpless person to prevent others from caring   1. Duty: Special Circumstances * If you caused the danger (Levesque - fire) * De Facto family (step-parents - controversial) (Miranda – no; Carroll – yes) * Misprision: certain professions have duty to report things like child abuse * Some statutes require reporting a felony (S.D. & Oh.; SC by common-law); 18 U.S.C. 4 for active concealment of felony (Brantley)   DEF: If categories are stretched too far, violates a person’s right not to be involved, notice, and penalizing people who are being helpful  GOV: Utilitarian argument that these people are in best position and they have assumed a duty of care | 1. **Act**    1. Conduct must include voluntary act    2. Not voluntary [2.01(2)]  * Reflex/convulsion; unconscious or asleep acts; hypnosis; not conscious OR habitual.  1. **Omission**    1. Requirements for liability  * Omission is expressly suff by law;   OR   * Duty (see CL duties)  1. **Possession (Act) MPC 2.01(4)**    1. Requirements for liability  * D knowingly procured/received   <thing>; OR   * D knew he possessed <thing> and didn’t dispose of it for a reasonable period of time |

**Mens Rea**

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| Common Law | MPC |
| 1. **Is there any mens rea trigger term?**    1. YES - Step #2    2. NO - Strict Liability Analysis below 2. **Should mens rea term travel?** (X-Citement – knowledge of underage porn for federal statutes)    1. Leg’s intent (compare with similar law; look at section of penal code)    2. Grammar    3. Punctuation    4. Jurisdictional elements not important    5. Argue at least recklessness for federal statutes (Elonis)    6. States have right to limit mens rea (Clark) 3. **Defining trigger term**     1. Intent  * Specific: D intended conduct + result * General: D intended conduct/NOT result * Transferred Intent – Mixed results about whether the intent was used up (no transferred intent if different result) * Oblique Intent – intent results even where the person is practically certain that the result would happen   1. Knowing + WB * WB - Global Tech: (1) D subjectively aware high risk that fact exists + (2) take deliberate actions to avoid knowing (true belief is not read in there)   1. Malice (notoriously shaky – only if high court in juris. has interpreted it this way) * Cunningham: recklessness (inc purpose + knowledge) [NOT “wicked”] * Faulkner: intentional + willful * Gray: D aware that posed substantial risk of causing forbidden harm   1. Negligence (Hazelwood - barge) (p16-bottom) * Criminal: high risk, gross deviation (DEF) (Santanilles) – could be subjective recognition of harm, a risk of a very serious harm, or a higher statistical probability of harm * Civil: ordinary, any deviation (GOV)   Gov/Utilitarians like reasonable person standard – forces people to internalize risks; but could argue that this person cannot possibly learn from this  Def/Retributivists like a higher standard to ensure someone is truly blameworthy; but could argue that someone is blameworthy for ignoring the risk  Consider the crime – more serious, higher mens rea – the more regulatory, and the more the acts are sophisticated, the more likely it will be a negligence standard | 1. **If there is a mens rea trigger term [2.02(2)]**    1. Purposely    2. Knowingly  * Positive knowledge + “practically certain” (Voisine) * Inc. WB: awareness of high probability + failure to investigate in order to remain ignorant UNLESS honest belief/ true ignorance (Jewell – weed in compartment) * (Heredia – mother drug dealer driving across border; Kleinfeld Concurrence – must people investigate wrong-doing of others) * **Gray area**: Failure of curiosity can be argued to not qualify (Giovanetti – leasing to gamblers)   1. Recklessly: * Consciously disregard substantial/ unjustifiable risk (Hall) * **Gray area** where def. believes risk is not substantial (Muniz)   1. Negligently * Criminal, NOT civil negligence   1. *Other: Try to equate with MPC term.*  1. **If there is no mens rea trigger term**    1. Plug in Recklessness [2.02(3)] 2. **Should mens rea term travel? [2.02(4)]**    1. YES, unless contrary statutory purpose.   Consider:   * Leg’s intent * Grammar * Purpose |

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| Common Law | MPC |
| 1. **D made MoF**    1. Moral Wrong: only thing that makes this criminal is fact D did not know (Prince – taking unmarried woman)    2. Lesser Crime: was already a crime but fact D did not know makes it worse (Olsen – stat. rape)    3. **Elonis** – S. Ct. mens rea should only be read into element necessary to separate wrongful conduct from innocent conduct (Bennifield; but Cordoba-Hincapie -no) 2. **Further considerations**(p23)    1. Statutory interpretation: necessary mens rea?    2. Statutory Rape: 20 now permit MoF if reasonable; half do not allow any MoF in statutory rape cases    3. Makes argument about how old the victim looks and how the victim acts    4. Legislative history    5. Tender years (statutory rape cases) – societal interest outweighs culpability (Owens)    6. Proportionality + Culpability    7. Reasonable + honest? Reasonable? Honest?    8. Too much power to prosecutors    9. Prince-DISS: reasonable mistake is defense   Gov: Only allow mistake if it is reasonable (negligence)  Def: Allow mistake if it is subjective to def. (reckless) (movement over time in S. Ct. from reasonable to honest mistake; used to be honest 200 years ago and moved to reasonable)  Def: Argue that there is not adequate notice for moral wrongs that aren’t legally enshrined; people can be punished for crimes they did not intend to commit  Gov: Already crossed the threshold, there is sufficient notice; deterrence to stop people from committing wrongs | 1. **D made MoF [2.04(1-2)]**    1. Defense if:  * mistake negatives necessary mens rea of offense; OR * law provides this defense expressly;   OR   * 1. NOT defense if: * under facts as D believed them, <this> would be different or lesser crime (sentencing should be for that crime) |

**Mistake of Fact**

**Mistake of Law**

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| Common Law | MPC |
| 1. **MoL is no defense. (Marrero – corrections officer gun read statute incorrectly)** 2. **Exceptions - MoL is defense if:**    1. Statute not available to public    2. Leg meant to allow defense by  * Expressly making it element of offense; (Smith – stereo – own property; Varszegi – tenant removed lessee’s property) * Police officers can offer reasonable mistake of law (Heien – seizure after unlawful stop) * “Knowingly or willfully”: DEF-Just knowing own conduct not enough, D would have to know he was violating the law! Also depends on how complex the scheme is (International Minerals – did not need to know Interstate Commerce for corrosive liquids; Overholt – did not need to know Safe Water Act)   (Liparota – D must know food stamp laws)  (Ansaldi – drug laws do not require knowledge) (Cheek)   * 1. Official statement: if later wrong * Statute itself; * Admin order * Court judgment; (Albertini originally yes; overruled in Qualls; SCOTUS Rogers rejects entirely) * Failure of instruction by judge (Leavitt - yes; Wilson – no) * Interpretation by officer charged with admin’ing partic. statute defining the law ; (Pennsylvania Industrial Chem. Corp – Army Corps of Engineers) (Hopkins – no – county attorney) * MPC’s official reliance defense is widely accepted   1. Constitutional issues * Complicated scheme if not sophisticated actor (Cheek-tax) * Notice (Lambert-failed to register) + no moral wrong cue to put people on notice (Wilson – violent offense) * Would interp’ing like this criminalize hella apparently innocent conduct? Especially if it is a local ordinance that imposes a duty to act (Lambert) * Sex crime is enough notice (Bryant) * *+ DPC, vagueness, notice, entrapment,* (Raley)  1. Only has to be honest (knowledge/ recklessness), but reasonableness (negligence) influences what is honest(Cheek)   Gov: Mistake of law defenses encourage people to avoid knowing the law, retributive argument about harm caused, open to fraudulent claims of mistake  Def: Lack of deterrent value for those who are mistaken, lack of notice based on vagueness, worry about non-sophisticated actors, incentivizes the state to make the law clear | 1. **D made MoL [2.04(3)],** only possible if purposely were required 2. **Exceptions - MoL is defense**   **if:**   * 1. Statute not available to public   2. Official statement: later found wrong in * Statute itself; * Court judgment; * Admin order; * Interpretation by officer charged with admin’ing partic. statute defining the law (can be construed more broadly or narrowly about how is authorized)   -MPC Approach: where there is a **reasonable** belief in legal backing for the action taking and minimal possibility of collusion with state actor, MPC believes there should be a mistake of law defense; for regulatory violations, the first violation should only be penal for evasion or defiance; it is only when violations are repeated that mistake of law defenses should no longer be allowed |

**Strict Liability**

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| **Common Law** |
| 1. **There is no mens rea term at all.**    1. Elonis: Should infer mens rea if none found, always need culpability for elements that defines wrongful conduct    2. X-Citement, Shelton: Statutory silence can imply SL unless accompanied by other evidence - #2 2. **Should this be SL crime? (Discuss all factors then balance!)**    1. Regulatory or Public Welfare Crime (Balint – selling drugs w/o form, Dotterweich – selling drugs w/o labels)  * Widespread harm risk (i.e. post-ind. offenses; Freed - grenade) - maybe SL b/c better position to internalize costs   1. Judicial Pedigree (Morisette – stealing shell casings) * YES - maybe SL b/c new crime || NO - maybe needs mens rea b/c traditionally read in   1. Level of punishment (Staples – automatic gun not inherently dangerous; Shelton – strict liability for delivery drugs) * LOW - maybe SL b/c deterrence || HIGH - maybe mens rea to justify proportionality   1. Sophistication of D * HIGH - maybe SL bc D knows they’re subjected to high amounts of regulation, so we should ease path of prosecution   1. Statutory Rape or Protection of minors (Garnett – no mistake of fact allowed; Owens; Hernandez – should allow mistake of fact defense)   2. Legality Arguments * Lenity, DPC, notice, vagueness * Lambert: statute criminalizing failure to register = unconstitutional (very narrow, not influential ruling – mostly because it required a duty to act)   1. City of Sault Ste. Marie – should allow defense of reasonable care to liability for regulatory crimes   Economic arguments for not having strict liability since the economic activity people are engaged in are not socially evil crimes; it also creates incentives for careful people to select out and incentives people who are less aware of their potential carelessness to select in |
| **MPC** |
| 1. Strict liability only if statutory intent is plainly manifested 2. Strict liability can only apply to violations (where punishment may result in no sentence other than a fine, or a fine and forfeiture or other authorized civil penalty) 3. These guidelines apply to entire penal code as well as to other areas of law since regulatory crimes often do not appear in penal code |
| **Excuses** defeat strict liability crimes |

MENS REA EXAMPLES

**Under the MPC**

**Statute reads:** shall not knowingly dump regulated waste / controlled substance

Statute stipulates a knowing requirement, knowledge that this is illegal by law is required as part of the mens rea because it specifies a controlled substance or regulate waste

**Statue reads:** shall not dump hazardous waste

MPC stipulates a recklessness requirement, issue of knowledge of law is not relevant, only have to have disregarded substantial risk that it is hazardous, but it requires some conscious awareness that it is hazardous.

**Statute reads:**shall not have intercourse with someone under 16

MPC stipulates a recklessness mens rea, so he would have had to disregard a substantial risk that the child was under 16.

If the person knew the person was under 16 and claims that they/he/she didn't know that having sex with someone under 16 was illegal, then their/his/her only defense is from some official reliance (which wouldn't happen).

**Statute reads**: shall not knowingly take another's property

Statute stipulates a knowing requirement that the person knows it is someone else's property.

If someone claims they/he/she did not know that it was illegal to take someone else's property, they/he/she could only base it on official reliance (which wouldn't happen).

**Under the Common Law**

**Statute reads:** shall not willfully dump hazardous waste

Statute stipulates that knowing is part of the mens rea and so knowledge of illegality is required (or at least it could argued whether or not the willfully travels - depends on the sophistication of the scheme or the actor)

**Statute reads**: shall not dump hazardous waste

Statute is strict liability; knowledge of law is irrelevant. DEPENDS ON WHAT THE PENALTY IS/PUBLIC WELFARE ANALYSIS.

**Statute reads:**shall not have intercourse with someone under 16

Statute is strict liability; knowledge of fact of age is irrelevant(unless in jurisdiction where reasonable mistake is allowed OR IF COULD TRY TO ARGUE THAT THE PENALTY IS TOO HIGH FOR THIS TO BE A STRICT LIABILITY ELEMENT); If someone claims they/he/she did not know that it was illegal to have sex with someone under 16, they/he/she has no defense unless they had an official reliance  (which wouldn't happen in this case)

**Statute reads**: shall not knowingly take another's property

Statute stipulates a knowing requirement that it is someone else's property

If someone claims they/he/she did not know that it was illegal to take someone else's property, they/he/she has no defense unless they had an official reliance (which wouldn't happen in this case).

**Causation**

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| Factual Cause |
| BUT-FOR CAUSE  **1. No liability w/out BFC**  a. Muro (beaten daughter), Montoya (left for dead, already dying): 50% not enough (p52-53)  b. Burrage-SCOTUS (Drug has to be sufficiently independent cause of death): uncertainty cannot be squared w/beyond-reas-doubt standard  **2. But for <D’s> conduct would <result> have happened?**  a. YES à Move on to PC. || NO à fail causation, person not liable.  Can have multiple but-for causes; has to have some relationship to result; split on increased risk vs. but for |
| Proximate Cause |
| **1. Felony Murder**  a. Agency Theory Jdx: was killer felon/co-felon? (Canola-jewel store)  § YES à good causation, person liable. || NO à fail causation, person not liable.  b. Proximate Cause Theory Jdx: SEE #2.  **2. Others: Was <result> foreseeable or direct?**  a. GOV: Harm w/in direct gen range (Acosta - helicopters /Arzon – Arson, other fire)  DEF: Whole chain of events must be foreseeable (Warner-Lambert; often only in commercial contexts)   * Objective, RP standard * Take vic as you find them (Stamp – heart attack) * MedMal = foreseeable (Shabazz) * Officer Failure = possible foreseeable (Main – left victim in car, obstructed breathing) * Rule out other causes! (Kibbe – robbed and left man, hit by truck – reasonably related)   b. MPC §2.03(2)(a): Transfer: D’s intent to harm one vic can transfer to other(s) (Elmi – attempted murder of wife, intent to assault children)  **3. Breaking the Chain: Intervening Human**  a. Intentional AND Voluntary: suicide might break chain (Campbell – left him gun to kill himself, hoped that he would; Blaue – JW refuses blood transfusion)  *BUT SEE* Carter; Stephenson – rape/kidnap; Carlson – life support)  b. Unintentional AND Voluntary: reckless or negligent actor might break chain   * Direct Causal Connection (Root – drag race): D must be direct cause * Aid/Abet (McFadden – drag race; Atencio – Russian roulette): 1+ person can play part in risk creation/cause (These two approaches are diametrically opposed)   c. Involuntary: reckless acts by duty, duress, emergency will not break chain. (Matos – police officer died chasing felon; Kerr – race assault led to jumping in middle of road)  d. Most courts are willing to find drug suppliers liable for subsequent usage deaths; case gets stronger if selling to an addict (b/c not a voluntary action) (Pena) |

**Attempt vs. Accomplice Liability Under MPC**

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|  | **Conduct**  (action or omission, 1.13(5)) | **Attendant Circumstances** | **Results** |
| Attempt | **Purposely** engages in conduct  that would constitute crime if  circumstances were  as deft believes them 5.01(1)(a)  (completed attempt)  OR  **Purposely** engages in  an act or omission constituting  subst’l step in a course of  conduct 5.01(1)(c)  (incomplete attempt)  -most states have rejected attempted felony-murder  -no such thing as attempted involuntary manslaughter | **Same** **mens**  **rea as**  **underlying**  **offense**  5.01  (CL is usually the  same but could argue  – for some  crimes, like stat.  rape, if you can’t  see the victim, how  can you be liable for  the attempt) | **Purpose or Belief** will occur  (so **cannot attempt an**  **unintentional crime**)  5.01(1)(b) |
| Accom-  plice  Liability | **Purpose** to facilitate  “commission of the offense”/  conduct 2.06(3)(a); cf. Hicks  (need to intend to  encourage or abet  the criminal conduct)  some non-MPC lowers to knowledge standard for more serious crimes (*Fountain*) | **Ambiguous**  See note 4,  p.717 | **Same mens rea** as  underlying offense (so **can**  **be an accomplice to an**  **unintentional crime**)  2.06(4);  see McVay (p.714);  Roebuck (p. 715)  (some non-MPC jurisdictions say there cannot be an accomplice to negligent/reckless crimes)  or based on natural and probable consequences test (Luparello) |

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| Attempting to be an Accomplice | |
| Common Law | MPC |
| You have to actually help/encourage in some way | You can be liable for attempting to be an accomplice |
| An Accomplice to a Non-Guilty Principal | |
| Common Law | MPC |
| Can’t be an accomplice to help a non-guilty principal (although can attempt to help a guilty principal who has a defense) | Can be an accomplice to a non-guilty principal |
| An Accomplice to an Unintentional Crime | |
| Common Law | MPC |
| Accomplice to an unintentional crime if same mens rea as to result  Minority jxs find that you cannot be an accomplice to an unintentional crime | Same as CL |
| Attempting an Unintentional Crime | |
| Common Law | MPC |
| Cannot charge attempt to unintentional crime since you need purpose | Same as CL |
| Accomplice to an Attempt | |
| Common Law | MPC |
| As long as purpose for conduct is there and same mens rea for result;  If Luparello, then purpose for conduct and natural and probable consequences for result | As long as purpose for conduct is there and same mens rea for result |
| Accomplice to an Attempt (where the principal is not found to have attempted) | |
| Common Law | MPC |
| Cannot be an accomplice to an attempt if principal is not guilty | Can be an accomplice even if principal is not guilty |
| Accomplice to Felony-Murder | |
| Common Law | MPC |
| Purpose for conduct (felony)  Same Mens rea for result (usually strict liability) | Purpose for conduct (felony)  Recklessness presumed, but rebuttable (so can show that you were being careful) |
| Accomplice Liability under Luparello | |
| CL | MPC |
| Purpose for object crime  Natural and Probable Consequence for Result  Aid Crime Y, But X Results, if it was natural and probably consequence (more expansive felony-murder doctrine); e.g. assault led to arson | N/A |

Attempt/Accomplice Issues

All conspirators are accomplices, but not all accomplices are conspirators.

If you have Luparello, you do not need Pinkerton.

**Attempt**

**Note**: Check the mens rea for each element of the crime (remember that some are okay with reckless for the result). Then, check the actus reus and consider each of the four tests.

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| Common Law | MPC |
| 1. Actus Reus  * **Last Act** (Eagleton) * **Proximity Test** (Reasonable likelihood of success – Rizzo – looking to rob person; Bell –child sex sting; child was never near – some carved out exceptions) * **Equivocality Test** - the criminal does not have to commit the last act, but an “unequivocal” act must demonstrate that the crime is about to be committed unless frustrated by intervening circumstances (Miller – loaded gun, but never aimed to fire) * **Substantial Step** (can include omissions, e.g. not providing medical care) (Harper – waiting for ATM techs, no; Joyce refused to opened the cocaine – no; Howard – didn’t book flight to see underage girls (really cops) but asked them to do sex acts – yes) * Some crimes are preparatory behavior themselves (burglary tools; firearm with intent to do hostile act; burglary, before you even steal; assault can be putting someone in fear of a battery, loitering) * Difficult case of stalking – usually allowed if a reasonable person would feel fear or emotional distress (Rucker); some require credible threat, but that takes into account intent since threat can be misinterpreted  1. Mens Rea  * Need purpose to commit crime even when lesser mens rea would satisfy result (Smallwood – HIV sex -act not enough; Hinkhouse – talked of intent) * Minority allow different mens rea for result (Thomas – reckless for shooting at fleeing rapist; Rubio – depraved heart for shooting at unoccupied car) * Attempted voluntary manslaughter mitigation (Holbron) * No attempted felony-murder (except Arkansas) * No attempted involuntary manslaughter * Attendant circumstances – vary (Khan – doesn’t matter about penetration; Dunne – strict liability for stat. rape kept)  1. Defense: Complete and voluntary renunciation; not allowed if crime is frustrated (Johnston – not enough money; McNeal – persuaded not to rape not enough; Ross – persuaded not rape enough here)   **Arguments for Proximity**: Gives defs’ autonomy a chance to repent, prevents abandonment defense  **Arguments against Proximity**: Creates perverse incentives for police to catch defs in the act | 1. Actus Reus  * **Substantial step** (Jackson firmness of criminal attempt by parking at bank)  1. Mens Rea – purpose is required for conduct and result  * Attendant circumstances – same as crime’s mens rea (so strict liability if stat. rape has strict liability for attendant circumstance) |
| Gov will argue that reckless behavior can be evidence of intent (e.g. having sex with HIV)  Defense cannot be frustrated purpose or fear of getting caught | |

**Accomplice**

**Note: Not a separate crime except for accessory after the fact (or criminal facilitation under MPC); also remember to argue the different sides of “encouragement”**

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| Common Law | MPC |
| 1. Actus Reus  * Encouraging words or acts (Hicks – killing after NA dance; Wilcox – onlooker support for illegal jazz; Tally – preventing telegram about honor killing) * Can include omissions; parents can be accomplices when failing to protect their children (Stanciel – let boyfriend murder child; Staples – parent-like relationship) * Must actually aid and encourage * No liability for attempted accomplice, but can be accomplice to attempt crime  1. Luparello: accomplices can be liable for crimes for which were not intended but were the “natural and probable consequences” of the original crime (more subjective) or in others “reasonably foreseeable” (more objective) and be an accomplice to underlying first crime (Chiu – not to first degree premeditated murder; Roy – referral for illegal sale does not presage robbery) 2. Mens Rea   **Conduct**   * Majority: need purpose to encourage/help someone commit crime, not just knowledge (Gladstone – just knowledge; McKeown – called dealer; Wilson, touted product) * Minority: Purpose for lesser offenses, knowledge for felonies (Fountain – inmate, knife) * Use Lauria factors to infer intent   **Result**   * Same mens rea as principal for underlying offense (McVay – negligent steamship); some say cannot be acc. to unintentional crimes   Attendant Circumstances   * Ambiguous – culpability vs. public policy, esp. on strict liability: stat rape (Bowman – no, Harris - yes); felony possession (Gardner – no, Cannon – yes)   Renunciation | 1. Actus Reus  * Encouraging words or acts * Only needs the intention to aid and encourage * Can include omissions if legal duty exists to prevent and is not done for facilitation of crime * Liability for attempted accomplice  1. Mens Rea   **Conduct**   * Purpose to promote or facilitate the commission of the crime   **Result**   * Same mens rea as principal for underlying offense (McVay – negligent steamship; Roebuck - ambush to assault, reckless manslaughter) – can be accomplice to unintentional crime   **Attendant Circumstances**   * Ambiguous – culpability vs. public policy, esp. on strict liability: stat rape (Bowman – no, Harris - yes); possession (Gardner – no, Cannon – yes)   Renunciation  Can only renounce by frustrating effort or calling authorities |
| **Defenses**   1. If principal not actually committing crime, then accomplice not guilty (Hayes – burglary bacon), but inconsistent convictions ok (Standefer) 2. Principal defense might not transfer (excuses – no, justifications – yes, but law enforcement justification or necessity defense are in gray area) (Vaden – Foxes) 3. Entrapment – only if gov’t agent is accomplice and induced someone not predisposed to crime (Jacobson – child pornography mailings for months)   MPC 2.06(6)(c) – a person is not an accomplice to object crime if you **wholly deprive it of its effectiveness** or **give timely warning** to law enforcement or otherwise makes proper effort to prevent the commission of the crime | |

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| **Common Law** | **MPC** |
| * Charged as separate crime (some felony – even for misdemeanors) * Traditional Approach: separate crime length unrelated to object crime * Maryland Approach: cannot exceed maximum punishment for object crime * Federal Approach: cannot exceed maximum punishment for object crime for misdemeanors   Actus Reus   * Agreement; can be direct or inferred (Perry – child sexual abuse) * Can be tacit agreement (Griffin – pushing down police officer); working in parallel not (Garcia – gang members); not for parallelism in anti-trust (Twombly) * Traditionally do not require overt-act (Mulcahy – Irish rebellion) Most require overt-act (Bertling – telephone call provided agreement and overt act) * Ohio requires more substantial overt-act; Maine requires a “substantial step” * Whitfield – SCOTUS – no requirement of an overt act; Yates requires overt act when it is required to show “conspiracy is still at work”   **Mens Rea**   * Most states require purpose to agree and to commit underlying offense * Purpose for conduct and result * Lauria factors:   + D’s special stake in venture (Morse)   + No leg. use of goods and services   + Volume is disproportionate or most of D’s business   + Aggravated crime – knowledge = purpose * A few are fine with knowledge (Camerano – growing marijuana; Scotti – extortionate debt) * No conspiracy to commit unintentional crimes * Attendant Circumstances varies; mistake of fact not allowed for facts that increase gravity of crime (Freed – handguns); mistake of fact for criminality varies – arguments both ways on policies determining mens rea for attendant circumstance (SL – important policy reasons; defense – how can you agree to something you didn’t know) * Powell Doctrine – mistake of law allowed where no corrupt motive (most do not have) | * Charged as separate crime * MPC 5.01 says same as object crime except for serious felonies   **Actus Reus**   * Agreement to aid in planning, commission, or conduct * Overt act (can be very small – keep talking) * No overt act for crimes of 1st and 2nd degree (MPC 5.03(5))   **Mens** **Rea**   * Requires purpose to agree and to commit underlying offense (MPC 5.03(1)) * Purpose for conduct and result * Lauria factors:   + D’s special stake in venture (Morse)   + No leg. use of goods and services   + Volume is disproportionate or most of D’s business   + Aggravated crime – knowledge = purpose * No conspiracy to commit unintentional crimes * Attendant Circumstances varies; mistake of fact not allowed for facts that increase gravity of crime (Freed – handguns); mistake of fact for criminality varies – arguments both ways on policies determining mens rea for attendant circumstance (SL – important policy reasons; defense – how can you agree to something you didn’t know) * No Powell doctrine |

**Conspiracy**

**Conspiracy – Pinkerton Liability and Defenses**

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| Common Law | MPC |
| **Duration and Extent**  1. Kissel - conspiracies are viewed as in effect until they are officially abandoned or have been completed  2. Grunewald – cover-up is not part of conspiracy unless explicitly agreed  3. Krulewitch – conspiracies to do anything unlawful covered  4. Shaw – some states allow for conspiracies to hurt public morals  5. Jimenez-Recio – conspiracy not terminated even if impossible to achieve because of government  **Pinkerton Liability**   1. 1) Objective standard of reasonable foreseeability 2) done in furtherance of agreement (purpose – even if bad decision) (Pinkerton – brother guilty even while in jail; Bridges – murder foreseeable from fight) 2. Not liable for crimes from before joining conspiracy (Blackmon) 3. In drug conspiracy, the quantities are aggregated, resulting in higher drug crime liability 4. Expansive: possession of one goes to another (Newman) and even if told others not to do it (Brigham)  * Some jurisdictions maintain Pinkerton standard (Connecticut) * Some jurisdictions require same mens rea as accomplice liability (Washington) * Nevada split the difference, requiring same mens rea for specific intent crimes while ignoring mens rea for general intent crimes   **Abandonment and Withdrawal**   * Long period of inactivity does not withdraw a member (Randall) * Defendant bears burden of proof in proving withdrawal (Smith) * Defendant’s affirmative acts inconsistent with object of conspiracy and communicated in a manner reasonable calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment; (U.S. Gypsum) * Usually it is required to communicate with law enforcement or make it known to co-conspirators, but it must be direct communication   **Complete Defense for Conspiracy**   1. Same as MPC; or some states only require substantial effort instead of actual prevention   **Defense for Object Crime**  MPC 2.06(6)(c) – a person is not an accomplice to conspiracy object crime if you wholly deprive it of its effectiveness or give timely warning to law enforcement otherwise makes proper effort to prevent the commission of the crime  **Punishment**  -when conspirators have committed object crimes, the traditional view permits separate punishments with consecutive sentences – Callahan – each justifies its own deterrence  -Federal sentencing guidelines rejected separate punishment for conspiracy and object offense; however, conspiracy-like statutory offenses such as RICO and CCE allow separate punishment to stack one act with several different crimes | **Duration and Extent**  -See Common Law  **Pinkerton Liability**  1. No Pinkerton liability  **Abandonment and Withdrawal**  1. If conspirators stop actively engaging in conspiracy and inactivity continues for a period equal to the statute of limitations, prosecution will be barred – MPC 5.03(7)(b)  2. MPC 5.03(7)(c) – individual withdrawal – communicates abandonment or informs police officer and of his participation  **Complete Defense for Conspiracy**  1. 5.03(6) -Manifest renunciation of agreement and criminal purpose and must prevent commission of crime  **Defense for Object Crime**  MPC 2.06(6)(c) – a person is not an accomplice to conspiracy object crime if you wholly deprive it of its effectiveness or give timely warning to law enforcement otherwise makes proper effort to prevent the commission of the crime  **Punishment**  MPC Section 1.07(1)(b) does not allow conviction of more than one offense if one offense only consists of preparation or conspiracy; not the case when the agreement is not limited to one crime but various criminal objectives section 5.03 |

**Corporate Criminal Liability**

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| **Common Law** | **MPC** |
| 1. Actus Reus (Hilton – collusion – doesn’t matter if discouraged by company)    1. commits a crime    2. within scope of employment (can be found through supervisory approval) 2. Mens Rea    1. with intent to benefit corporation) (can be found through supervisory approval) (doesn’t have to actually benefit) (Sun-Diamond)    2. collective knowledge is an rare exception (Bank of New England), but you would have to prove single person | 1. Actus Reus   * 2.07(1)(a): only applies to violations (only be a fine, no prison time attached to it) committed by agent in scope of employment acting in behalf of the company * 2.07(1)(b): omission of duties specifically imposed on corporations (law will specifically apply to corporations in statutes) * 2.07(1)(c): commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a **high managerial agent** acting in behalf of the corporation within the scope of this office or employment (person is high enough up and has authority to be in control of things – varies by state) (Community Alternatives – lead staff person on site was HMA; Beneficial Finance - agent has been placed with enough authority and responsibility to act for and in behalf of the corporation in handling the particular corporate business, operation or project)   2. Mens Rea   * MPC Default rules   Defense: HMA can show due diligence by preponderance of evidence except in strict liability or leg. purpose |
| 1. Prosecutorial Discretion  * sometimes, where corporation is primary victim, prosecutors do not bring charges (Arthur Anderson) - adversely impacts a large number of people – employees, shareholder, give incentives for companies to do their own investigations to avoid criminal liability. * Other considerations by prosecutor’s offices (Holder Memo) can include pervasiveness within the company, the effort to and condemnation of criminal practices as well as collateral consequences * Thompson Memo also focused on corporation’s cooperation with authorities, including the waiver of attorney-client, work production privilege, and attorney’s fees for employees; however, this also sometimes went too far if refusing to pay legal fees of employees violated the 6th amendment * Yates Memo - should turn on “disclosure of relevant facts” related to individual crimes * now, after Arthur Andersen, it is a world of NPAs (non – retains the right to prosecute later) and DPAs (deferred – charges dismissed once company fulfills the terms) – agree to fines, but then the companies have to agree to conditions (often including monitors, agreeing to fire people) * people on both sides do not like NPAs and DPAs – some think this allows corporations to violate laws repeatedly whereas corporations feel restrictions are imposed by prosecutors who do not understand business; others like collateral consequences can be avoided but still provides incentives * DOJ sentencing guidelines do take private civil actions and federal regulatory actions into account and sometimes DOJ and federal regulatory agencies coordinate | |

**Homicide**

**Intentional Killing**

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| Common Law | MPC |
| * Majority believe any intention constitutions premeditation (Carroll – shot wife to protect children in bed) * Minority distinguish if there is a cooling off period (Guthrie – nose case) * Premeditation separates 1st degree from 2nd degree in some jurisdictions * Anderson (stabbed girl 60 times) Criteria for Premeditation: planning activity, motive, preconceived design | * Committed purposely or knowingly (including willful blindness) |

**Provocation Defense**

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| Common Law | MPC |
| **Voluntary Manslaughter**   * Adequate provocation – catching adultery, substantial physical assault, illegal arrest * Can be no cooling time generally (Bordeaux – found out about mother’s rape earlier in the day) but a minority have found that time can aggravate (Berry – waited in apartment 20 hours ) * Girouard (learns of infidelity, wife provokes with words) – only typical provocation defenses are allowed * Maher (finds out from someone else about wife’s infidelity) – examine on a case-by-case basis, expanded categories (words, information from another) * Some jurisdictions are in between Girouard and Maher perhaps allowing words * Killing non-victim, mistaking it for victim (Scriva) or in continued rage (Spurlin) do not get provocation defense – depends if treats as justification (no) or excuse (yes)\_ * **Imperfect self-defense** as a defense to murder that downgrades it to voluntary manslaughter. Used when the defendant is the initial aggressor but victim disproportionately escalates but defendant has to try to use other means to escape first * **Imperfect Self-Defense mitigation:** Some states have a doctrine of “imperfect self-defense” mitigation that lowers killing to voluntary manslaughter when a person genuinely believes that they are in danger **but on unreasonable grounds** | **Manslaughter (mitigation)**   * EED (210.3(1)(b)) – “under the influence of **extreme mental or emotional disturbance** for which there is **reasonable explanation or excuse” -** No cooling period required; it is both subjective and objective – some qualities are ascribed to the person (physical characteristics, age, gender) but most are left out; many jurisdictions just adopted the reasonable person part and left out the “actor’s situation” language (Casassa – enraged at ex-gf dating) * Words, including epithets, can be included * Can consider cumulative effects * Battered women usually don’t get EED (McClain, Felton) but sometimes get EED (Vigilante) * Mental Illness normally not entered for EED (Klimas, Steele) * EED reasonable explanation can expand beyond non-perpetrators |

**Unintentional Killing**

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| Common Law | MPC |
| * Depraved Heart **Murder** (those who know their actions will create a great risk to human life)   + Malone – boys playing with guns   + Fleming – awareness of danger of drunk driving and extreme recklessness   + Intent to inflict grievous bodily harm   + No social purpose   + Presumption of causing harm with assault with a deadly weapon * Felony **Murder** (see below) * Involuntary **Manslaughter**   + Recklessness/wanton   + Criminal negligence (assume this if no term)   + Civil negligence (Williams) * **Imperfect Self-Defense Mitigation:** Some states also mitigate self-defense to involuntary manslaughter when belief is unreasonable since the argument is that the culpability is similar to a negligence standard | * Extreme Indifference **Murder** – 210.2(b) – “**extreme indifference to the value of human life”** (such recklessness need not be shown if the defendant was aware of the risk because of voluntarily intoxication – but the driving also has to be extreme) (Fleming)   + Inhuman cruelty (Taylor)   + Must be consciously aware of the risk of death   + Does not include accidental risk creation * Felony Murder (see below) * Reckless Manslaughter (Hall - skier) * Negligent Homicide – (Williams - NA parents) - judged by objective standard (heredity, intelligence, or temperament would not be held material in judging negligence – leaves to courts appropriate degree of individualization) – gross deviation from reasonable standard of care * **Self-Defense:** When the actor believes force is necessary but the actor is reckless or negligent in having such belief . . . the justification is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability 3.09(2) |
| Substantial risk can be argued both ways. It can be argued that it was a quantitative risk (high probability of it happening) or qualitative risk (the fact that it could be a result is sufficient to not do it) | |

**Felony Murder**

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| Common Law | MPC |
| * Furtherance (can be stretched more liberally or more strictly – make arguments) * Strict liability for deaths during felony-murder (Stamp – heart attack while being robbed) – lesser-crime principle of Olsen (**but some have limitations that require negligence and some specify that only certain felonies count**); English law requires mens rea for killings, even negligence (Serne – arson, killed child) * MUST PROVE (actus reus and causation) – usually the felony is “but for” and the result is natural and probable consequences * Rationale: hold felons to not being negligent when they are involved in act, deter them from felonies * Can’t use people (even co-felons) as shields (Taylor) * **Misdemeanor-Manslaughter Rule** (“Unlawful act doctrine”) – killing in commission of an unlawful act or natural consequence of lawful act; most require criminal negligence, a few are strict-liability   **Limitations** in jxs that keep unlawful act doctrine   * + needs proximate Cause (Williams – expired license not cause of death)   + only malum in se, not malum prohibitum   + only criminal negligence or disregard of safety of others * Statutory Reform: limiting list of eligible felonies, grading, requiring mens rea, affirmative defenses * **Drug sales** have been found to be inherently dangerous by some jxs, but others have found that there lacks a casual relationship and so no actus reus * No attempted felony-murder   **Not in furtherance**   * Parse the line whether the act has ended or if the person is still fleeing in furtherance * Remember to determine for accomplices if killing was in furtherance of felony * Agency Theory – only if the act of killing is done by a co-felon or someone acting in concert with a co-felon will the felony-murder rule apply (**majority** of American jurisdictions) (Canola – jewelry store owner kills co-felon; felon not liable) * Proximate Cause Theory – felony-murder if killing is within foreseeable risk (innocent victims, police officers) (Hernandez – police officer killed fellow officer) * Affirmative defense if co-felon can prove death was not foreseeable; disagreement about whether arrest of one creates “at rest” or whether all have to be arrested * During highly dangerous felony, felons could be held liable under “depraved heart” theory as they were taken with a conscious disregard for human life and the deaths (of innocents, co-felons as a result of defensive fire) (Johnson – armed but then victims killed co-felons)   Some will argue part-justification for deaths of co-felons as to why felons aren’t responsible for death of co-felon (Redline, Williams), but other cases have argued that co-felons should be included b/c of value of life (Martinez – co-felon was killed by bombs that co-felons made) | * During highly dangerous felonies (rebuttable presumption for robbery, rape, arson, burglary, kidnapping, or felonious escape), felons could be held liable under “extreme indifference to human life” theory as the acts were taken with a conscious disregard for human life (of innocents, co-felons as a result of defensive fire) (not adopted by many) * Defense can rebut presumption if argues it was really careful and attentive to human life, which forces prosecution to prove mens rea |

**Sexual Assault**

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| Common Law |
| **Force Requirement**   1. Most jxs have force requirement of some kind for felonious penetration 2. Some jxs don’t have force req. but then define consent in terms of force and resistance 3. Victim’s age, strength, and other circumstances are often factored to determine whether force is required 4. 19 states have eliminated force req. 5. Implied threats based on circumstances or prior statements/abuse can count as force – sometimes, pinning down body or pushing apart legs is enough to constitute force 6. Implicit threats not enough without true force in some jxs (Alston – told victim to have sex one more time; Thompson – principal, graduation threat) 7. Arguments about def. of forcible (Mlinarich – foster parent, no force) 8. Some require the defendant to compel the victim though coercion does not always require proof of a specific act or threat 9. Laws often say it creates a situation “against the will” 10. Some relationships (such as a police officers or guardians) create a sense of implied force 11. Threats to kidnap or damage property can also be found as implied force 12. Proxies for force can include size differentials as well as isolation 13. Victim’s sense of intimidation and fear are also factored in when considering whether the victim feared bodily injury 14. psychological or exploitative threats: humiliation, extortion, threats of financial loss   **Resistance Requirement**   1. Under the common law, victim had to show some resistance, often to the “utmost” – physical resistance of some kind was required, verbal resistance was not sufficient 2. 16 states now stipulate that resistance is not required 3. Resistance also provides instructive data about mens rea, force, and non-consent 4. 8 states retain a formal resistance requirement that **require resistance unless it is futile or causes bodily injury** 5. Mistake of fact defense allowed where d was confused about consent and there was no resistance (McFadden – anal massage; no verbal resistance prior to act)   **Duress**   1. Some jxs ban sex under duress (Penn. includes psych. manip.) 2. Trafficking Victims Protection Act overruled Kozminski to include financial and reputational extortion, isolation, reliance on addiction, denial of sleep and punishments   (Monsalve – threatened to deport lured trafficking victims)  **Consent**   1. Traditional statues required force and non-consent (usually physical) 2. Most statues that require consent **still take into account implied consent and looks at the totality of the circumstances** (Gangahar – police officer’s no’s didn’t mean it) 3. Defective Consent: minors, drugs, alcohol (levels vary, depends if engaged voluntarily)(Haddock – vic. drank voluntarily) (Giardino – consent should be measured based on effect on judgment rather than a fixed level; Al-Hamdani – expert testified that a level of .15 was sufficient to take away consent) 4. Consider consent mid-act   **Deception**   1. The only false representations that are usually convicted are when doctors convince a sex act is needed for a medical procedure or when someone pretends to be someone’s husband (Morales – boyfriend not enough); other deceptions are allowed (Evans – victim misinterpreted, Boro – doctor)   **Mens Rea**   1. Most allow reasonable mistake 2. Few like Penn. and Mass. have strict liability but usually still require force (Lopez) 3. Alaska has recklessness, but dispensed with resistance requirement (Reynolds) 4. Problem with honest standard is that men often misinterpret women’s signals; reasonable is necessary to protect victims from “honest” mistakes that are misinformed.   **Mistake**   1. No mistake of fact when force used (Simcock)   **MPC** standard is “gross sexual imposition” that would prevent resistance by a woman of “ordinary resolution” – excludes economic duress (not particularly influential) |

**Blackmail**

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| Common Law | MPC |
| 1. Look at statute specifications first for actus reus and mens rea. 2. Some things are almost always found in extortion statutes. Threats of personal or property injury or to accuse of a crime are always enough. Sometimes it is also includes threats to defame the victim. Some statutes include threats to reveal any secret, even if true. (Harrington – used both adultery secret and IRS claims to get settlement) 3. Litigation is sometimes covered when in bad faith and conveys no actual advantage (Hynes)and sometimes not (Rendelmen) 4. Some blackmail statutes only cover threats to obtain something of value and leave other statutes to cover other types of coercive threats. Some statutes cover both and include provisions such as forcing someone to do something “against their will” or forbear doing a lawful act.   **Defense:** A few states will allow defense if amount extorted try to recompense what was taken (Fichtener – store’s deal with thief) | 1. Mens Rea: Recklessness 2. Actus Reus: obtain property by threat to  * Injure; accuse of crime; expose secret; take or withhold official action; strike/boycott for personal gain; testify or refuse to testify; provide/withhold evidence in a legal case; OR * Any harm that does NOT benefit actor  1. **Affirmative defense** if was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services. |

**Justification Defenses**

**Self-Defense**

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| Common Law | MPC |
| * **Nondeadly Force**: an actor is justified in using force upon another if he/she **reasonably** believes such force is necessary to protect himself/herself from **imminent** use of unlawful force by the other person (Goetz) * **Deadly Force**: justified if an actor **reasonably** **believes** that its use is **necessary** to prevent **imminent** and unlawful use of **deadly force** by the aggressor   Some states have a doctrine of “imperfect self-defense” mitigation that lowers killing to voluntary manslaughter when a person genuinely believes that they are in danger **but on unreasonable grounds; some** states also mitigate to involuntary manslaughter since the argument is that the culpability is similar to a negligence standard  **Deadly Force**   * USED FOR SELF DEFENSE: Force likely or reasonably expected to cause death or serious bodily injury   + Shooting in direction of person qualifies * THREATS OF DEADLY FORCE: Typically any threat to inflict great bodily harm; sometimes list of offenses   **Imminent**   * Victim cannot be sleeping (Norman) * Must be overt act of imminent danger (Sands – repeated abuse of wife) * Sometimes jury can decide if no possibility of escape for BWS (Nemeth) * History of abuse usually doesn’t count (Jhanke) * Inevitable harm is different from imminent harm (Ha) * Imminent can’t be something to come later (Schroeder)   In most cases, prosecution must disprove self-defense beyond a reasonable doubt (except Ohio)  **Retreat**   * Majority of jurisdictions follow “true man” rule   Stand your ground laws – can meet force with force even in public places (Smiley – cab driver killed retreating man)   * Minority require retreat; honest belief that you can retreat safely * Never need to retreat before using nondeadly force * Even those who require retreat have a castle exception: no retreat required from your home   + Most believe co-occupants as well (Tomlins – yes; Gartland – no- flee is possible)   + Most say yes to guests   **Initial Aggressor**   * Initial aggressor cannot claim self-defense (Peterson – threatens in car and then kills when approaches) * “an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences” loses self-defense * “free from fault” requirement - even pursuit can count (Allen – gf fight); or knew would provoke victim (Bigelow – brother mad about bf); or any initial crime even it doesn’t provoke defense (Mayes – unlicensed handgun) * 3rd party - you can’t defend even if you don’t know in some; most places will allow a 3rd party if that person was initial aggressor as long as it was reasonable that they thought they should do it * Some allow **imperfect self-defense** as a defense to murder that downgrades it to voluntary manslaughter. Used when the defendant is the initial aggressor but victim disproportionately escalates, but defendant has to try to use other means to escape first   **Transfer & Third Parties**   * 3rd Person can use self-defense if person is in imminent danger of grievous bodily harm * Defense transfer if you accidentally kill someone else | * **Nondeadly force**: justifiable when the actor **believes** such force is **immediately** necessary for the purpose of protecting himself against the use of unlawful force 3.04(1) * **Deadly force**: not justifiable unless the actor **believes** such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat 3.04(2)(b) * When the actor believes force is necessary but the actor is reckless or negligent in having such belief . . . the justification is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability 3.09(2)   Hypo: defendant sees pink, plastic gun and kills for fear of death; if the charge is murder, this is not voluntary, and so she cannot be charged since at least a knowledge standard is required; but if the charge is involuntary, a reckless killing, she cannot use defense because she ignored a substantial risk that the weapon was fake  **Deadly Force**   * USED FOR SELF DEFENSE: Force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm.   + Purposely firing a firearm in their direction counts (even perhaps in air) * THREATS OF DEADLY FORCE: Threats of death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat   **Immediate**   * Allows more time than imminent (Schroeder might have been permitted – cell inmate alluded to raping him that night)   Prosecution must disprove self-defense beyond a reasonable doubt  **Retreat**   * MPC § 3.04(2)(b) requires safe retreat (Abbott – neighbors, driveway) – honest belief you can retreat safely * Never need to retreat before using nondeadly force * Castle exception: no retreat required from your home MPC §3.04(2)(b)(ii)(1)   + Co-occupants, Guests as well   **Initial Aggressor**   * If you know the defendant is the initial aggressor, you can’t defend the person in 3rd party defense; if you don’t know that, b/c it’s circumstances as you believe them to be, you can do it * MPC § 304(2)(b)(i): “actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter” loses self-defense claim – can only retreat * MPC § 304(2)(b)(i) allows for self-defense if initial force was nondeadly and response is deadly force -**complete defense**   **Transfer & Third Parties**   * 3rd Person can use self-defense if person is in imminent danger of grievous bodily harm 3.05 * Defense transfers if you accidentally kill someone else unless you were reckless or negligent |

**Defense of Property**

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| Common Law | MPC |
| Cannot use deadly force to protect personal property, but can use nondeadly force if reasonably believe necessary to prevent imminent dispossession of property (Sydnor – stole gold chain and was fleeing)  If protecting one’s home   * Traditional approach: deadly force can be used if reasonably believe it is necessary to prevent an imminent and unlawful entry of a dwelling (Florida – even covers attempt and reason to believe) * Modified approach: deadly force can be used if reasonably believe it is necessary to prevent an imminent and unlawful entry of a dwelling; the intruder intends to commit a felony or cause an injury; and deadly force is necessary to repel the intrusion * Even stricter modified approach: the felony the intruder intends to commit must be a forcible one * Death traps are not permissible (Ceballos) | Cannot use deadly force to defend property except in two situations (really broad and inclusive)   1. Person the force is being used against is attempting to dispossess the actor of his dwelling and intruder has no claim of right OR 2. Person the force is being used against is attempting to commit or consummate arson, burglary, robbery, or other felonious theft or property destruction AND either   has employed or threatened deadly force against or in the presence of the actor;  or  the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger or serious bodily harm  3) Death traps are not permissible (Ceballos) |

**Law-Enforcement Defense**

**Misdemeanors**: cannot use deadly force against a person who commits a misdemeanor who is fleeing UNLESS they have probable cause to believe the person poses a threat of serious physical harm to the officer or to others (Plumhoff v. Rickhard; Scott v. Harris). Can also use deadly force if suspect resists arrest and officer reasonably believes the suspect poses a threat of death or serious bodily harm.

**Felonies**: can use deadly force against a person who commits a felony who is fleeing, if officer has probable cause (Tennessee v. Garner – 4th Amendment Limit) to believe the suspect poses a threat of serious physical harm, either to the officer or others. Can also use deadly force if suspect resists arrest and officer reasonably believes the suspect poses a threat of death or serious bodily harm.

-No notion that minimal forms of force must be used force – no sense of “necessary” in this standard

Common law: a peace officer was allowed to use deadly force to prevent any felony and to make a felony arrest – this has been diluted over time so that courts only enforce involving “forcible and atrocious crime.”

MPC 3.07(2)(b)(iv), 3.07(5)(a)(i) & (ii) stipulate that deadly force can only be used to prevent a felony when the crime includes the use or threatened use of deadly force or when there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Tasers have been found not to constitute deadly force – Rodriguez v. Panarello (E.D. Pa. 2015)

Using tasers against nonviolent offers in minor offenses is excessive if there is no reasonable fear of threat to personal safety – Brown v. City of Golden Valley (8th Cir. 2009)

Police officers cannot use tasers if a defendant’s behavior is erratic or if they are resisting arrest in nonviolent ways – Bryan v. MacPherson (9th Cir. 2010)

**Necessity**

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| Common Law (typically) | MPC 3.02 |
| -Imminent threat  -Not allowed in homicide cases  -Cannot use the defense in cases of economic necessity (Fontes – starving children)  -Some places emergency must be created by natural and not human forces  -Legislature cannot have decided differently (needle exchange, Hutchins - medical marijuana)  -Defendant cannot have created the emergency  CL – varies if threat needs to be greater, some also require greater, others require that the defendant have the honest and reasonable belief that it be greater | -No specific imminence required  -Allowed in homicide cases  -Can use the defense in cases of economic necessity  -MPC does not require the emergency to be created by natural forces  -Legislature cannot have decided differently 3.02(1)(b), (c)  -If defendant recklessly created the situation, not a defense if reckless crime; if defendant negligently created emergency, not a defense if negligent crime 3.02(2)  Defense will use to argue against higher mens rea than the crime charged  MPC – the threat has to be greater than the object crime |

Hypo: Someone who is homeless and the shelters are all full. They went inside a vestibule of a building and slept there. Prosecuted for criminal trespass. The defendant wants to make an argument based on necessity.

MPC: DEF Economic necessity is allowed as a defense; potential harm of death in inclement weather; GOV if necessity defense prevails, slippery slope that allows criminality – fear of using this defense; in this weighing, this harm has to be greater in fact (unclear if this needs to be decided by judge or jury) – balancing of harms to yourself and society

Common Law: Economic necessity cannot be used; if it is about physical health, defendant cannot have created the emergency, so questions will go to why person is homeless

- third party helpers might translate – justification defenses can transfer, excuse defenses cannot

**Excuse Defenses**

**Duress**

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| Common Law (typically) | MPC 2.09 |
| -imminent threat  -threat must be of serious bodily injury or death  -to defendant or family member  -man of ordinary fortitude and courage might justly yield  -can’t use in homicides  -defendant cannot be at fault in creating the situation | -no imminence required  -threat to use unlawful force  -to defendant or person of another  -person of **reasonable** firmness in his situation would be unable to resist -matters of size, strength, age, or health would be considered for the “reasonable person in his situation”; matters of temperament would not; mental disability (no – Johnson; Demarco-yes); immaturity (Heinemann - no); BSW (Dixon – no; Dando v. Yukins - yes)  -can use in homicides  -defendant cannot have recklessly placed himself in situation; if negligently did so, not a defense in action based on negligence |

-courts are less sympathetic when the harm is on innocent third parties that are involved in duress – less sympathetic to victims of abuse who do things to third parties (especially children)

-duress defenses are personal to the person claiming it – third party helpers do not translate (necessity might) – justification defenses can transfer, excuse defenses cannot

**Insanity Defense**

-Mental incapacity can be a defense for a criminal charge, or it can preclude a guilty plea, trial, sentencing, execution of a defendant.

-Extremely hard to bring successfully (Green – hearing voices; Yates – hearing voices; neither successful)

-Insanity – legal term – mental state sufficient to preclude criminal responsibility

-Incompetence – legal term – a person who lacks sufficient mental capacity is deemed incompetent to stand trial, enter a guilty plea, be sentenced, or even be executed

-insanity is the mental state at the time of the crime; incompetent is the mental state during proceedings post-crime

-defense is required to raise the defense (e.g. Frendak v. United States (D.C. 1979); competent defendant can plead insanity against advice of attorney (e.g. Commonwealth v. Federici (Mass. 1998)

|  |  |
| --- | --- |
| Common Law | MPC 4.01 |
| M’Naghten Test (most common test)   * **(i) at time of act, person was acting under** * **(ii) disease of the mind** * **(iii) did not know the nature and quality of the act OR did not know that it was wrong**   -usually unaware of reality around them and have distorted perception (e.g. thinking that you are squeezing a lemon when you are strangling a person)  Federal Standard   * **(i) at the time of the act** * **(ii) as a result of a severe mental disease or defect** * **(iii) defendant was unable to appreciate the nature and quality of the wrongfulness of his acts**   In jurisdictions without the volitional prong, defense lawyers will try to shoehorn compulsions into the cannot appreciate the nature and quality of the wrongfulness  Competence to Stand Trial  -competence to stand trial – someone has to be competent to stand trial constitutionally  -Dusky v. United States (1960) – “whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he had a rational as well as factual understanding of the proceedings against him” – Dusky test remains in widespread use  -Can be medicated to stand trial in some cases (Sell)  -Most find competent for amnesia (Minter, Decato – yes; McClendon -no) | * **(i) at time of act** * **(ii) as a result of mental disease or defect** * **(iii) defendant lacked substantial capacity to appreciate the criminality/wrongfulness of his conduct OR to conform his conduct to the requirements of the law (does not require complete impairment)**   -psychopaths not included (Werlein)  -some MPC jxs withdrew volitional prong (Lyons – narcotics addict)  Competence to Stand Trial  -competence to stand trial – someone has to be competent to stand trial constitutionally  - MPC 4.04 states the generally accepted test for competency: “No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures” |

**Death Penalty**

-mental health issues can come up as mitigating factors in sentencing (but it is unclear how helpful it is because sometimes juries view it as aggravating)

-while waiting on death row, if someone develops a mental illness that prevents them from understanding their execution, it is unconstitutional to execute someone (Ford v. Wainwright)

-Panetti v. Quarterman – court requires at a minimum that defendant have a “rational understanding”

-some states have stricter tests sanity requires that the prisoner not only understand the nature of the death penalty and why it is being imposed, but also have the ability to communicate rationally with defense counsel; Singleton v. State (S.C. 1993), State v. Harris (Wash. 1990)

-test for mental capacity to understand right and wrong usually comes in through experts (usually voices or deities or demons telling them that this was the right thing to do)

-S. Ct. undecided on constitutionality of forcibly medicating a prisoner in order to render him competent to be executed; Singleton v. State (S.C. 1993), State v. Perry (La. 1992) declares that you cannot do so

-Atkins v. Virginia (2002) forbids execution of persons with “mental retardation” as an excuse for the defendant’s culpability

**Civil Commitment**

-Civil Commitment – requires compliance with procedural and substantive standards for any mentally disturbed person; constitutional restrictions on civil commitment; the standard of proof is high – clear and convincing evidence of mental illness and dangerousness – Addington v. Texas (1979); some states make the factual findings only a preponderance of evidence

-Jones v. United States (1983) – S. Ct. upheld mandatory commitment constitutionality; the court required that a committed person is able to get a hearing to demonstrate his recovery within 50 days of commitment; a defendant can be committed indefinitely even when the period exceeded the maximum sentence, even for nonviolent acts, court believes dangerousness could be proved by nonviolent acts

-in a dozen states, after the end of the maximum confinement if guilty, it reverts to a civil commitment standards – Wood v Main (D.N.J. 2011)

**Guilty but mentally ill**

-in a dozen states, courts can find someone guilty, but mentally ill instead of just guilty; if convicted, receives the same punishment as guilty but also receives psychiatric treatment

SCOTUS held that juries should not be informed of the mandatory commitment provisions applicable under federal law – Shannon v. United States (1994)

**Burden of Proof for Competence / Insanity**

-People v. Hill (Colo. 1997) – only “some evidence” is required to eliminate presumption

-Jamezic v. State (Ala. 1996) – reasonable doubt about sanity is required

-dozen states adhere to the prosecution needs to prove competence beyond a reasonable doubt – Commonwealth v. Keita (Mass. 1999)

-3/4 of states now place the burden of proof of insanity on the defense; most place the burden at preponderance of evidence; some states are more demanding – Fla. uses clear and convincing evidence and Wis. uses “to a reasonable certainty”; in fed. courts, on defense by clear and convincing evidence

**Constitutionality and Insanity Defense**

-Five states ban the insanity defense but they allow mental defect to be introduced as regards mens rea and some also authorized committing defendants at sentencing not to exceed maximum sentence if found to have mental defect

-Court has never ruled about constitutionality of banning the insanity defense – Clark v. Arizona (2006), the court rejected a due process challenge to Arizona’s law, which only included half of the M’Naghten test defining insanity solely in terms of the defendant’s capacity to tell whether the criminal act was right or wrong (not in terms of the defendant’s capacity to know the nature or quality of the act committed) – Court found no history of deference to M’Naghten test to elevate it to fundamental principle

**XXVII: Constitutionality and Status**

-Kansas v. Crane (2002) SCOTUS recognized SVP (sexually violent predator statutes) status where confinement was constitutional for those who could not control behavior

Jones v. City of Los Angeles (9th Cir. 2006) – homelessness cannot be criminalized

People v. Kellogg (Cal. 2004) – intoxication while being homeless has been held up as constitutional

Robinson (1962) – unconstitutional to punish status of addiction; largely okay with rehabilitation apparatus taking into account past actions and behavior but with criminal apparatus, can only focus on choice (even if might be involuntary)

-Powell - Disagrees that Robinson applies since it is not punishing a status and not for behavior in the defendant’s own home. Worries about power it would grant Supreme Court to be arbiter of criminality under Cruel and Unusual Punishment standard. Worries about granting constitutional protection to anyone with a compulsion. Says there is no constitutional doctrine of mens rea. Declines to grant constitutional test for insanity, saying the common law needs to interact with states to produce a result for longer.

United Stats v. Moore (D.C. Cir. 1973).

Court affirms on grounds that denying criminality to absence of free will would excuse most criminal behavior.

Leventhal Concurrence – Insanity defense shouldn’t be extended to those without mental defect. Criminal law should reach the majority of people – it should especially reach those who have low self-control so as to deter them, but acknowledges they can be weighed in sentencing.

Wright dissent: Addicts using for themselves should not be criminalized. Believes there is no moral blameworthiness that needs societal expression against addicts. Feels that deterrence serves no function with addicts. Believes it needs to involve civil commitment, not criminal punishment. Thinks statutes go far enough to criminalize any harm caused by addict except on himself. Goes to MPC’s lacking in substantial capacity to conform standard.

**Blackletter law**

the law does not care about your experience before the crime

Robinson says no to status – you can’t criminalize status

But if you commit the act, the only way out is a limited set of justifications or excuses or no mens rea or no actus reus; states are free to introduce new defenses, but the Court doesn’t say that they are required

Potential Alternative Policy: Use drug courts, child support courts, etc. rather than incarcerate.

XXVIII: Sentencing

**Discretionary Sentencing**

* Williams v. New York – Strong Common Law tradition of judges using hearsay, acquitted crimes, and other information to make sentencing decisions that is non-reviewable by def.
* Arguments for this regime: proportionality (matching the sentence with their culpability), utilitarian (necessity for incapacitation), retributive (necessity for punishment for repeated acts); arguments for hearsay and preponderance of evidence rest on judicial efficiency (especially since this would include plea bargains)

**Mandatory Minimums**

* Mandatory Minimums introduced to be more fair and to avoid leniency; states have begun to roll back, still very prevalent in the federal government; prosecutors continue to like because they can leverage to extract more information
* United States v. Vasquez (Reason for Sentencing): Conspiracy charge thrown on as sentence enhancing to make distribution of heroin carry a mandatory minimum of ten and then only agreed to plead it down to five years
* at the federal level, mandatory minimums are usually for career criminal offenses, firearms, child pornography, and drug crimes – not for ones such as homicide and rape – so they come in for crimes where the legislatures have felt that judges are too soft on these crimes (whereas they take homicide more seriously)

**Federal Sentencing Guidelines**

* If inside “heartland” of typical cases, Court will look at 3553(a)(2) factors to decide sentence based on purposes of punishment (Deegan)
* If outside of “heartland,” Court can depart from guidelines and consider extreme aggravating or mitigating circumstances
* 18 USC 3553(a) – the judge has to consider the four purposes of punishment (retribution, deterrence, incapacitation, rehabilitation) and can consider personal factors
* Tthe only place in which personal factors could come in was when the judges choose between the ranges given in the sentencing guidelines
* There is a Chapter 1 *base offense level* and it can be added to by a set of Chapter 2 *specific offense characteristics* (greater amount, injury, theft) and then Chapter 3 *additional adjustments*.
* Chapter 3 adjustments take into account defendant’s conduct related to offense but also foreseeable conduct of criminal partners as well as uncharged, dismissed, and acquitted conduct undertaken as part of the same transaction or common scheme or plan as the offense of conviction -the rationale for other conduct is to get around charge bargaining
* United States v. Watts (1997) – sentencing can include acquittal information since sentencing is based on preponderance of evidence rather than reasonable doubt
* Limits judicial discretion but ups sentence length and doesn’t eliminate distributive effects from pros.
* Woodson v. North Carolina (1976) – in capital cases, individual circumstances must be taken into account – why should federal sentencing guidelines be different?
* **Major Culpability Issue**: all sentencing guideline systems will privilege certain factors: a mechanistic system will favor more quantitative inputs (such as dollar amounts or drug amounts) over qualitative data (such as family situation) for consistency and to avoid subjectivity, but the result will be that sometimes people are not getting their proper sentence based on their circumstances
* In United States v. Booker (2005), court found that mandatory guideline violated right to jury trial because it allowed judges to find facts that the law “makes essential” for sentencing; Court distinguished facts that are necessary as a matter of law to authorize a new sentence from those that had no predetermined legal significance; the federal guidelines then became advisory and to allow an appellate court to set aside the decision of a sentencing judge only when “unreasonable” even when they were outside the guidelines
* Deegan – NA baby-killing – cruelty of the mandatory sentencing guidelines.
* Only in 2010, were age, mental and emotional conditions, physical condition, and military service deemed relevant but they must be present to an unusual degree and distinguish it from typical cases
* 2 **mitigating factors** are substantial assistance to the government and acceptance of responsibility (but this requires a guilty plea)

XXIX: Proportionality



XXX: Theories of Punishment

* Utilitarian
  + Benefits: Deters future behavior, adjusts punishment to maximize societal good
  + Drawbacks: Utilitarianism can misalign the punishment with the moral blame of the crime b/c of its effect on society (too harsh b/c of social benefit or too lenient because of lack of societal good); weak link between length of sentence and commission of crime (certainty of prosecution is a better indicator); longer punishments can increase crime because offenders have a harder time reintegrating into society
* Rehabilitation
  + Felt out of favor as people were increasingly kept in terrible institutions and kept longer than conviction based on retributivist principles
  + Tapia v United States 564 U.S. 319, 334 (2011) – federal judges cannot extend sentences in the same of rehabilitation; however, diversionary programming is coming into some favor, but there are still objections
* Incapacitation
  + Reduced sentences for those who will not cause greater danger to society
  + Predictive Behavior can produce a lot of false positives; unjust to give two different sentences for same act
  + Saturation point when too much incapacitation prevents real corrections work
* Positive Retributivist
  + Benefits: Condemns immoral behavior, allows for society to express outrage, gives proportional justice to the crime
  + Drawbacks: Could unnecessarily punish for behavior that won’t occur; incurs high costs but actually makes society worse; longer punishments can increase crime because offenders have a harder time reintegrating into society
* Negative Retributivist
  + Benefits: Fixes an upper limit on punishment and allows for discretion
  + Drawbacks: Desert claims can shield statutes from scrutiny but at the same time the opacity of desert claims can lead to prejudice and bias; discretion can be arbitrary; longer punishments can increase crime because offenders have a harder time reintegrating into society
* Mixed Theories – HLA Hart argued for a utilitarian aim but a retributive limit - the punishment should be socially useful but also match the moral blame;

XXXI: Criminal Justice in America

* Only small deterrent effect for harsher sentences; recidivism decreases with age; longer sentences become more criminogenic given how much more difficult it becomes to readjust to civilian life with increased prison time
* Mass production required in criminal justice system given high volume of cases and limited resources, creating a high degree of selectivity
* Historical increase of criminal justice laws in response to Reconstruction and freed African-Americans
* Historical discrimination against people with mental illness and poverty
* Criminal law is often first resort instead of last resort for America’s societal problems
* Crime coverage in robust press emphasizes crime even if crime drops
* Highly politicized nature of criminal justice means that there is incentive for elected officials (sheriffs, DAs, judges) to be “tough on crime” - this is coupled with a broad degree of discretion (often without review) given to police officers and prosecutors
* Criminal justice is largely local: Our system sacrifices efficiency for local autonomy and individual liberty (to avoid one organization from having too much power); hard to reform system though because changing only one segment might be overwhelmed by the habits of the others; DAs and Sheriffs are elected officials

Criminal Justice Procedures

1. Initial Stages
   1. Investigation - pretty low clearance rate for violent crimes (47%), property crimes (20%)
   2. Dismissal and Diversion - some are given the chance to attend a diversion program for relatively minor crimes
   3. Pretrial Release - bail is usually used for guaranteeing a court appearance

United States v Salerno - constitutionality of Bail Reform Act of 1984, which authorizes preventive detention for federal crimes

1. The guilty plea
2. 94% of convictions in felony cases in state courts
3. Guilty pleas are often bids for leniency to avoid harsher sentences
4. The trial
   1. Only about 4% reach trial
5. Sentencing
   1. Can often be much more informal than the burden to prove guilt

XXXII: Prosecutorial Discretion

* Severity and volume of crimes has increased, so a prosecutor has discretion which crime to pick that will produce the desired sentence
* Criminal laws are easy to pass in broad terms and almost impossible to repeal

**Decision to Charge**

* Standard is sufficient evidence for a jury to convict
* Some claims for dropping charges even beyond a reasonable doubt is because of “individualized justice” and “limited available enforcement resources”; others worry about distributive effects if no standard for charging
* Is prosecutorial discretion a desired feature of an ideal criminal justice system? US law gives very broad discretion – other countries produce more standards for prosecutorial discretion
* If prosecutor’s offices create guidelines, should they be transparent? Does that allow for loopholes or does it make it clear to all what the priorities and rationales are? Should “guidance” be provided ahead of time by offices for matters of unclear law?
* Is their supervisory review of prosecutor’s charging decisions? Or are they just given broad latitude? Can they be objective if they are the same prosecutor who investigated the case? Sometime departments do not do charging review because their other reviews resources are already exhausted; when more senior attorneys review charges, they are dismissed more easily
* Problem of poor data throughout criminal system because no national database
* Diversionary programs can drag things out and are usually limited opportunities

**Review of Charging**

* Attica – Judiciary cannot review prosecutor’s decision not to charge
* Question of conflict of interest for certain state prosecutors – should special prosecutors be appointed, especially for police cases?
* Ethics in Government Act allows for appointment of special counsel by a panel of three federal judges – upheld constitutionally in Morrison v Olson, but the statute lapsed
* Prosecution initiated by judges and victims – Wisconsin did pass law, but the state supreme court reversed – State ex rel. Unnamed Petitioners v Connors (Wis. 1987)
* In US, private parties cannot initiate criminal proceedings

Role of Victims

* Victim participation in the prosecutor’s charging decision – Crime Victims’ Rights Act of 2004 (CRVA) – allows victims to be informed about the progress of a trial – do victims rights begin at complaint or pre-complaint – the court said pre-complaint in federal cases in Doe v United States (S.D. Fla. 2013); states vary – what should the influence of victims be?
* Domestic violence cases – many statutes passed that are no-drop so that victims cannot be pressured to drop charges – but it happens sometimes against the victim’s consent – but sometimes this prevents women from reporting; agreement that it should go forward if victim wants to, but disagreement if victim disagrees – should they get more options than just criminalization?

**Alternatives Options When Prosecutors Choose Not To Prosecute**

* Media coverage to force prosecutor
* Election pressure – voting out prosecutor
* Other jurisdictions that have authority (state/federal instead of local)
* Force appointment of special prosecutor by statute
* Legislature could set guidelines by statute (potential sep. of powers issue)
* Legislature could incentivize behavior: mandatory reports, re-allocate funding, launch own investigation
* Legislature could change laws to make it easier to prosecute
* Civil suit instead of criminal prosecution

Reasons for Criminal Prosecution

* Victimless Crimes
* Bigger stigma for deterrence
* State represents those who do not have means to sue
* State represents public interests, not just victim

**XXXIII: Selective Prosecution and Plea Bargaining**

* Armstrong **-** To establish a selective-prosecution claim, the prosecution must have had a discriminatory effect and a discriminatory motivation. In the case of race, it must show that “similarly situated individuals” of a different race were not prosecuted.
  + The Court said that the defense had not produced evidence of similarly situated individuals who were prosecuted by state courts but not by federal courts. They also found no substantiation for claims that all races use the same drugs equally. They found the defense studies were based on hearsay and “personal conclusions based on anecdotal evidence.”
  + Stevens dissented – cited the disparity in sentencing between crack cocaine and cocaine and between federal and state laws. Stevens believes there is a “special concern” given the disparity between usage percentages and sentencing percentages.
  + Also, sometimes courts can construe “similarly situated” so narrowly that it is impossible to prove comparison. In United States v. Lewis, 517 F.3d 30 (1st Cir. 2008), the court made similarly situated so narrow that it was impossible to find – “a non-white or non-Muslim who posed a danger of violence or may have had links to terrorism.”
* Brady – plea bargaining is not coercive; A waiver of constitutional rights must be “knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences”; huge gaps in trial penalty okay; would consider if evidence of wide-number of people falsely condemning themselves
  + Consequences – in Brady, defendants need to be notified of direct consequences, but not “collateral consequences” such as loss of federal benefits
  + Defense Counsel – Missouri v. Frye – defense counsel must inform defendant of different consequences of plea bargains (including favorable plea bargains and deportations) – Lafler v. Cooper – trial courts have discretion with how to remedy inadequate counsel after a verdict has already been rendered (re-offer plea deal, stick with sentence, adjust sentence accordingly)
* Guilty Plea Procedure – knowing, intelligent, and voluntary - the judge walks the defendant through the waving of 3 rights: the right to self-incrimination, the right to trial, and the right to confront accusers
* *Santobello v. New York* - if the prosecution does not honor promise, defendant can withdraw; start fresh if judge does not accept plea deal; trial judge can become part of the negotiations if asked, and must explicitly accept or reject agreements and “must inform parties if he/she will be found by it”
* Scott v. United States – there is a “price” on the exercise of a right to trial – different when it comes to the effort by a prosecutor to deter trials through plea bargains – it has to be in the pursuit of scarcity of resources, not deterrence for a trial
* Attorneys like mandatory-minimums because they induce defendants to cooperate – does cooperation creates incentives to lie? Often low-level offenders get harsher sentences than those higher up the food chain because they know less? Does the comport with just desert?
* Do prosecutors and defense attorneys (financial pressure to settle given no fee for additional time) have different incentives than their clients (the defendant and the public); trial tax is much higher now and sometimes leniency is not given in plea deals
* Costs of cash bail system – and the incentive for the innocent to plead to minor crimes to avoid costs of pre-trial detention
* Bordenkircher v. Hayes: the prosecutor retains discretion for selective prosecution even if there is a possibility of vindictiveness; only needs probable cause to believe the defendant has committed crime; fear of restricting plea bargaining going underground
  + Justice Blackmun’s dissent suggests that prosecutors should locked in their bargain earlier in the process so that they cannot use verbal warnings as threats at the end.
* Most U.S. Attorney’s offices have plea agreement guidelines and have some supervisory review; most district attorneys do not
* Exculpatory evidence does not need to be handed over during plea-bargaining, just trial
* Gerard E. Lynch – the plea bargain process resembles more of an administrative or inquisitorial process rather than an adversarial or judicial system; no rationale needed to be given
* Is it a violation of sep. of powers for judiciary to review plea bargaining decisions?

**Potential Solutions**

* Require prosecutors to prove a similar pattern of sentencing for similar cases (though that could just make every sentence harsh)
* Give judges sentencing discretion
* Fund more prosecutors (usually just drives up number of trials)
* Train prosecutors to be more independent, with supervision
* Elect progressive prosecutors
* Make laws have different standards of proof, mens rea

**XXXIV: The Role of the Jury**

**Constitutional Provisions and Limits**

* Duncan: Jury trials required for anything beyond petty offenses
* 6-member juries have also been allowed in states.
* Baldwin v. New York – a crime that carries a penalty of imprisonment for more than six months cannot be deemed petty
* Taylor v. Louisiana – venire - a jury trial must reflect “a fair cross section of the community” – this has been in the name of impartiality, not representation
* Jury members can be removed “for cause” if they have a conflict of interest; attorneys are allowed preemptory challenges (removal w/o explanation)
* Batson v. Kentucky– preemptory challenges cannot be used on the basis of race or gender (but hard to prove – passes muster with a race-neutral explanation)
* Common law has a strong method of excluding evidence so that jurors are not influenced by inappropriate things (even though attorneys might indirectly allude to them)
* Judges must formulate the legal rules for the jury
* Dougherty – jury nullification instructions are not allowed
* United States v. Thomas– removed a juror for nullification (reversed, but due to facts, not law) which was upheld as practice – you can’t remove a juror if there is a “reasonable possibility” that they are following the judge’s orders – SCOTUS upheld removal of a defendant who won’t acknowledge “a demonstrable reality” Johnson v. Williams
* Connecticut v. Johnson, 460 U.S. 73 (1983) – in criminal cases, judges cannot enter a directed judgment n.o.v. (notwithstanding the verdict)
* Jury is not told punishment possibility

**Reasons for Jury Trials**

* Collective wisdom of 12; fresh, unbiased lens
* Unelected, unlike judges
* Civic education, provides legitimacy to criminal prosecution
* Power of jury nullification

**Drawbacks to Jury Trials**

* No explanation required
* Nullification of gender and race cases
* Capacity of jury vs. judge
* Influenced by appeals outside of the law

**XXXV: Legality**

**Judge-Created Crimes**

* Commonwealth v. Mochan – charged person making lewd comments with crime under Common Law even though did not violate a statute
* Most states have banned Common Law finding new crimes
* Rogers v. Tennessee – no SCOTUS ban on judge-created crimes by states; permissible in some instances
* United States v. Wiltberger – federal judges cannot make new crimes under Common Law

**Statutory Interpretation**

* McBoyle: It is illegal to convict a person if the wording of a statement is so narrow and tailored to rule out another category.
* Yates: Conflict that legislature might want judiciary to interpret in favor of the government, but might violate rule of lenity
* **Rule of Lenity**: two rule of lenity doctrines – the first is it comes in at the outset to narrow a justice’s ruling; the second is that it is used as a “last resort” when other methods of interpretation have failed. The 2nd approach is more accepted today. (but isn’t there not fair warning anyway if you have to work so hard to find an interpretation?)

**Vagueness (**little force/effect – no one acknowledges Papachristou**)**

* City of Chicago v. Morales– insufficient notice to reasonable person; hard to overturn statute on vagueness grounds (easily rescued by mens rea or reasonable person test); for discriminatory enforcement, needs something that will limit scope (a particular area or particular gang members)

The definition of loitering in the statute is vague and therefore there is no fair warning of what the prohibited behavior is. Just b/c there is warning does not make it constitutional (if the law is wrong, that just makes it an unjust violation of liberty). There is no clear guidance for when an officer determines that a gang member has “no apparent purpose.” Innocent people who are “loitering” could be swept up in this. It is also noted that it does not call for any detrimental purpose, so it really does not cover the noxious things gang members might do – in that sense, it just gives discretion for police to arrest anybody.

* mixed law about defendant’s intent – United States v. Ragen criminalizes an unreasonable deduction – essentially to be decided at someone’s discretion, but in State v Pomianek anti-bias statute was struck down because it relied too much on the effect and did not take into account the defendant’s intent, so that it was hard to predict what would be criminal behavior
* Johnson v. United States – struck down residual clause as too unpredictable b/c “violent felony”

**Discriminatory Enforcement**

* Floyd v. City of New York – 14th amendment prohibits race-based classification of general wrong-doing to police neighborhoods (Stop and Frisk)
* Terry v. Ohio – police officer can stop someone based on reasonable suspicion of a crime
* Clear laws can be enforced in a discriminatory way (jaywalking, motor vehicle problems)