
Purposes of Punishment

I. Retributive

A. Overview: Crime is a moral wrong that confers upon society a duty to punish and to set up institutions to facilitate punishment. The punishment, which must match the crime is an *ipso facto* (by its very nature) moral good.

B. Key Thinkers

1. Immanuel Kant, "The Philosophy of Law"

a) "penal law is a categorical imperative," an absolute, unconditional requirement that asserts its authority in all circumstances, both required and justified as an end in itself. [Wikipedia]

b) "justice would cease to be justice if it were bartered away for any consideration whatever..."

(1) Distinguishes from utilitarians who would be willing to let a criminal go free if s/he would undergo medical experiments

2. Michael S. Moore, "The Moral Worth of Retribution"

a) "We are justified in punishing because and only because offenders deserve it."

b) Moral culpability is both sufficient and necessary for sanctions

c) Moral culpability imposes a duty to punish

3. HLA Hart "Punishment and Responsibility"

a) 3 part model

(1) Punish only if voluntary commission of moral wrong

(2) Punishment must match wickedness

(3) Making someone suffer for a voluntary moral evil is morally good

C. Criticisms of Retribution

1. Two wrongs don't make a right; "moral alchemy" [HLA Hart]

2. Most criminals – by virtue of being poor – don't receive benefits from society, so they owe nothing to society. [Jeffrie Murphy, "Marxism and Retribution"]

3. None of the Justifications Hold [John Mackie, "Retribution: A Test Case for Ethical Objectivity"]

a) Repayment to society? – criminal suffering doesn't make us better off

b) Annulment of crime? – punishment doesn't wipe it out; it still happened

c) Sets criminal to *ex ante*? – but then a \$1 fine for robbing a cripple of a buck?

D. Variations on Retribution

1. Vengeance: Punish based on outrage of society b/c of crime

a) Morally right to hate criminals → inflict punishments on criminals.

- b) Different from retribution, which focuses punishment on personal blame of actor, not reaction of society
- c) “The fact that he has been convicted and punished as a thief stamps a mark upon him for life.”

2. Mixed Theory: Moral blameworthiness sets a CAP on the punishment available [HLA Hart]

E. Social Functions of Retributivism

1. Punishment authoritatively expresses society’s condemnation of moral wickedness [HLA Hart]

- a) Result: punishment must be:
 - (1) b/c of voluntary act
 - (2) proportionate

2. Sustain social cohesion by giving voice to common consciousness [Emile Durkheim]

- a) WME: I don’t think this applies in racially diverse societies with wide range of culpable conduct and some crimes that are (allegedly? actually?) disproportionately committed by members of minority groups

II. Utilitarian

A. Deterrence

1. Basics

- a) “Each individual calculates” [Jeremy Bentham]

2. Criticism of Deterrence

- a) Assigning punishment based on deterrence is a poor choice because:
 - (1) Assumptions of knowledge of the rule, preceiving cost of violation and using this knowledge to drive conduct doesn’t happen
 - (2) Deterrence generates crime in odd ways
 - (3) [Robinson and Darley]

- b) It is a false assumption that career criminals choose that route in light of the social dysfunction of their backgrounds [Mark Fleisher]

3. Certainty vs. Severity: Former has a greater deterrent effect than the latter [Reiss and Roth, “Understanding and Preventing Violence”]

B. Law and Moral Weight

1. People obey the law b/c they fear social disapproval and see themselves as moral beings who want to do the right thing [Robinson and Darley]

- a) Especially important in diverse society, which is less cohesive

III. Rehabilitation

A. Basic Idea: We lock criminals up to make them no longer criminal.

B. Two Different Ideals [Michael Moore]

1. Us-focused: Make criminals safe to return to the streets

- a) Punishment is justified to protect us by turning criminals into good people

2. Them focused: Rehabilitate criminals to lead successful/productive lives

- a) Punishment justified as in the criminal’s own interest
- b) 3 problems with the second theory

- (1) Allocates resources away from deserving groups
- (2) Paternalistic justification for taking away liberty
- (3) Makes punishment easier by recasting it as humanitarian

C. Does it work?

- 1. No impact on recidivism [Martinson, "What Works?"]
 - a) Two problems w/ article [George Mair]
 - (1) Relies only on recidivism
 - (2) Does not address how sentences operate in practice
 - (a) Did he look at whether the programs were starved of resources or poorly staffed?
 - b) Solution: pay attention to social science to figure out who can be 'saved'

D. Combined with Retributivism

- 1. Use seriousness of conduct to set upper/lower bound and then set punishment within that using retributivism [von Hirsch and Maher]

IV. Incapacitation

A. Basic Idea: locking crooks up prevents crimes they would have committed, had they been free.

B. John Diulio: with the exception of low-level first time drug offenders, prison is useful b/c it prevents career criminals from committing more crimes.

C. Criticisms

- 1. Common error: to assume that prisoners are released randomly; in fact, it's the less serious ones who get released
- 2. Crimes committed by gangs → incapacitation is no use
 - a) Low recruiting costs, so the incapacitated member is simply replaced

D. Selective Incapacitation

- 1. Target offenders who will likely commit serious crimes early in their careers and hold them at high rates
- 2. Requires ability to ID career criminals early

Evidence, Reasonable Doubt, Trial Procedure and Sentencing

V. Trial Procedure

A. Jury Selection

- 1. *Venire*: panel of prospective jurors
- 2. Judge describes the case and the parties; those personally involved are excused
- 3. *Voir Dire*: Judge or counsel questions jurors for bias
 - a) Some jurors are excused for cause
 - b) Some jurors are excused for peremptory challenges
- 4. 12 jurors are selected and the panel is sworn

- B. Indictment is read
- C. Opening Statements
 - 1. Order
 - a) Prosecutor
 - b) Defense
 - 2. Not evidence: rather a framing of the evidence that is about to be introduced
- D. Prosecution witnesses: rules of evidence govern testimony
- E. Defense may stand on the presumption of innocence and move for:
 - 1. a directed verdict or
 - 2. judgment of acquittal on the grounds of failure to prove beyond a reasonable doubt
- F. Defense Witnesses
- G. Prosecution's Rebuttal
- H. Closing arguments
 - 1. Prosecution
 - 2. Defense
 - 3. Prosecution rebuttal
- I. Judge's instructions to the Jury
 - 1. Neutral on fact
 - 2. Heavy on law
- J. Jury deliberation and verdict
 - 1. Guilty → appeal possible
 - 2. Not Guilty → non-reviewable
 - 3. Hung Jury → mistrial

VI. Presentation of Evidence

- A. Order of Proof
 - 1. Prosecution
 - 2. Defense
 - a) Refute case-in-chief
 - b) Offer affirmative defense
 - 3. Prosecution's rebuttal
 - a) May recall witnesses or call new ones
 - 4. Defense's rejoinder
- B. Examining Witnesses (for eitherside)
 - 1. Direct examination by party that calls
 - 2. Cross examination
 - 3. Re-direct
 - 4. Re-cross
- C. Burden of Production vs Burden of Persuasion
 - 1. Burden of Production: bringing forward enough evidence to put a fact in doubt
 - 2. Burden of Persuasion: the duty of convincing a trier of fact that your version of the fact is correct
 - 3. Burdens in Criminal Trials

- a) Default: both borne by prosecution
- b) Affirmative defense: burden of production borne by defense
 - (1) i.e. presumption of absence of affirmative defense

D. MPC Section 1.12: Reasonable Doubt; Affirmative Defenses; Non-Offense Facts;

Presumptions

- (1) Element of an offense → must be proven beyond a reasonable doubt. ELSE, innocence is assumed.
 - (2) EXCEPTIONS
 - Affirmative defense need not be disproven unless and until issue is raised
 - Code or other statute requires defendant to prove by preponderance of evidence
 - (3) Affirmative defenses are one of the following
 - Code established
 - Provided by other statute
 - Is an excuse or justification “peculiarly within the knowledge” of D such that D can “fairly” be required to prove
- (4) Facts that are NOT an element of an offense →
 - Burden on who is helped by finding of the fact AND
 - Fact must be proved to satisfaction of court or jury “as case may be”
- (5) Consequences of presumption:
 - Evidence of fact giving rise to presumption → existence of fact to jury, jury may regard evidence as establishing presumed fact, b/c it’s a presumed fact

E. Admissible Evidence

1. Relevant evidence → usually admissible
2. Probative + Material → relevant
 - a) Probative: ONLY IF tends to establish the proposition for which it was offered
 - (1) i.e. proposition is more likely to be true with evidence than without
 - (2) Ex: motive is probative, but not dispositive
 - b) Material: the proposition that the evidence is to prove must affect the outcome of the case
3. Rule of Evidence 401: Relevant “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”
4. Rule of Evidence 402: all relevant evidence is admissible, except as otherwise provided ... evidence which is not relevant is not admissible

F. Inadmissible Evidence (Privilege and Prejudice)

1. Self-incrimination: 5th amendment → gov’t CANNOT:
 - a) require a criminal defendant to take the witness stand
 - b) invite a jury to draw adverse inferences from a refusal to testify
 - c) compel the defendant to disclose potentially incriminating facts

2. The exclusionary rule: no evidence is admissible if obtained through illegal search
3. Prejudicial Effect: probative value must outweigh prejudicial effect.
 - a) Prejudice: allows jury to overvalue some evidence or become hostile to the witness
 - b) People v. Zackowitz (NY Ct. App., 1930, Cardozo): Evidence of a murder defendant's weapons collection was inadmissible because it painted him as "man of vicious and dangerous propensities" in an attempt to "generate an atmosphere of professional criminality."
4. Impeaching Defendant's Testimony → Admissible
 - a) Other crimes evidence is admissible in cross examination b/c criminals are thought to be more likely to offer false testimony
5. Other Crimes Evidence
 - a) Basic Rule: Other crimes evidence is not admissible, because it will "overpersuade" the jury so they prejudge defendant [*Michelson*] and subordinate reason to emotion in factfinding [*Queen*].
 - (1) Rules!
 - (a) Rule of Evidence 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." (p. 23)
 - (b) Rule of Evidence 404: Other crimes evidence is not admissible for character impeachment but may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident."
 - (2) Cases
 - (a) Michelson v. United States (SCOTUS, 1948): character inquiry is relevant, but is inadmissible because it "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."
 - (b) United States v. Queen (4th Cir., 1997): Even relevant evidence must be excluded when it "tends to subordinate reason to emotion in the factfinding process."
 - (c) Old Chief v. United States (SCOTUS, 1997): other crimes evidence is BOTH relevant AND inflammatory → judge must consider ways to present facts in non-prejudicial ways.
 - b) Sex Crimes Evidence is Admissible, but must be more probative than prejudicial.
 - (1) Rule of Evidence 413(a) [SEX CRIMES]: criminal case + defendant accused of sexual assault → previous commission of sex crime is admissible for bearing on any relevant matter

(a) United States v. Guardia (10th Cir., 1998): Rule 403 balancing (probative v. prejudicial) applies to 413's sex crimes provision.

c) Jury Instructions and Other Crimes Evidence

(1) Spencer v. Texas (SCOTUS, 1967): Court has faith in "the ability of juries to approach their task responsibly."

(2) Dunn v. US (5th Cir. 1962): "if you throw a skunk into the jury box, you can't instruct the jury not to smell it."

G. Evidentiary Standards: Reasonable Doubt

1. Basic Rule: In a criminal trial, you must prove the case beyond a reasonable doubt.

2. In Re Winship (SCOTUS, 1970, Brennan): Juvenile delinquency cases may not impose evidentiary standards below criminal trials. Defendants have a Due Process right to the reasonable doubt standard in criminal cases.

a) Harlan (concurrency): Evidentiary standards are based on the "comparative social disutility" of mistakes.

VII. Civil Commitment

A. Definition: A commitment of a person who is ill, incompetent, drug-addicted, or the like, as contrasted with a criminal sentence. [Black's]

B. Distinguishing Factors

1. Kennedy v. Mendoza-Martinez (SCOTUS, 1963)

a) Does the sanction involve an affirmative disability or restraint

b) Historically regarded as punishment

c) Does it require *scienter* (i.e. *mens rea*)

d) Promote the traditional aims of punishment?

e) Conduct already a crime?

f) Is there an alternative purpose that can be rationally assigned to it?

g) Is it excessive in relation to the alternate purpose?

C. Consequences of Labeling an Action Civil Commitment

1. Lower burden of proof

2. Fewer safeguards than in criminal law

a) No double jeopardy protection

b) Applied retroactively after law is passed

c) Indefinite commitment

D. Examples of Civil Commitment

1. Mentally ill

a) Justification: protect themselves or others

b) Rights: treatment, release when 'cured'

2. Sexually Violent Predators

a) (mental abnormality OR personality disorder) + likely to engage predatory sexual violence → indefinite commitment

b) Kansas v. Hendricks (SCOTUS, 1997): Sex offender statute mandated civil detention, not criminal.

VIII. Plea Bargains

A. Requirements of Guilty Plea

1. Must be voluntary b/c waiving three rights:
 - a) Self-incrimination
 - b) Right to jury trial
 - c) Right to confront accusers

B. Scholarly Perspectives

1. Arnold Enker: counsel can anticipate the jury result → process is accurate and makes sense
 - a) Additionally, more 'intelligent' results can come from the ability to modulate the plea based on the degree of fault, whereas the jury simply has the option to choose between guilty and innocent.
2. Arlen Specter: Given variable guilt, plea bargains allow the DA and the defense lawyer "to bargain on the middle ground of what experience has shown to be 'justice' ..."
 - a) Identical facts → variety of verdicts are returned → "conclusion of variable guilt"
3. Albert Alschuler: If the variable outcomes in the homicide code "prove too fine for workable, everyday application," then **CHANGE THE DAMN CODE.**
 - a) "Juries may react differently to the circumstances of indistinguishable crimes, but at least they react to the circumstances of the crimes."
4. Stephanos Bibas: Behavioral economics says bargaining isn't in shadow of trial → sentencing based on "wealth, sex, age, education, intelligence, and confidence"
 - a) Structural impediments to bargaining in the shadow of the trial
 - (1) poor lawyering,
 - (2) agency costs
 - (3) lawyers' self-interest
 - (4) defendant's lack information
 - b) Assumption of rationality
 - (1) Disproven by behavioral economics

C. Cases

1. Prosecutors Can Bargain through Sentencing Reductions/ Withholding indictments
 - a) Brady v. United States (SCOTUS, 1970): Guilty plea is not compelled "whenever motivated by the defendant's desire" to shrink the range of possible punishments → survived 5th amdt. Challenge
 - b) Bordenkircher v. Hayes (SCOTUS, 1978): Prosecutors can use a potential second indictment as a bargaining chip to induce a guilty plea.
 - (1) Presenting the defendant "with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution" is no violation.
 - c)
2. Prosecutors Must Follow Through on Agreements

a) Santobello v. New York (SCOTUS, 1971): defendant can withdraw plea if the prosecution doesn't follow through on its end of the bargain

3. No Vindictiveness for Forcing a New Trial on Appeal

a) North Carolina v. Pearce (SCOTUS, ???): the due process clause "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."

IX. Jury Trial and Nullification

A. When is Jury Required?

1. Duncan v. Louisiana (SCOTUS, 1968): "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court - would come within the Sixth amendment's guarantee" of a jury trial.

B. What Must Jury Look Like?

1. Williams v. Florida (SCOTUS, 1970): Jury of 6 – not 12 – passes constitutional muster.
2. Apodaca v. Oregon (SCOTUS, 1972): Jury verdict must be substantial majority but need not be unanimous.
3. Batson v. Kentucky (SCOTUS, 1994): Attorneys can't use peremptory challenges to stack jury based on race.
4. Taylor v. Louisiana (SCOTUS, 1975): Venire must represent a "fair cross section of the community" to ensure impartiality, but this does not mean the jury must represent the crosssection.

C. Nullification

1. United States v. Dougherty (DC Circuit, 1972): No right to have jury informed of nullification powers b/c of grave dangers of formalizing an informal process.
2. Connecticut v. Johnson (SCOTUS, 1983): Judgment notwithstanding the verdict for the prosecution violates 6th amdt. right to a jury trial.
3. People v. Fernandez (CA Ct. App. 1994): Jurors could not acquit on a more serious offense and convict for an uncharged lesser one.
4. Judges may toss jurors for intent to disregard the law; in an effort to prevent jury
5. People v. Engelman (Cal. Ct. App., 2000): It is proper for a judge to insist on reporting an intent by one or more jurors to disregard the law.
6. United States v. Thomas (2nd Cir. 1997): Courts need not permit jury nullification if it's within their power to prevent it.
 - a) Only black juror on panel was tossed when others claimed he said he would not convict because black defendants committed them out of economic necessity.
 - b) United States v. Abbell (11th Cir. 2001): Thomas standard for juror-tossing is "basically" a beyond reasonable doubt standard.
7. Merced v. McGrath (9th Cir., 2005): Permissible to excuse a juror for saying s/he will exercise jury nullification "where appropriate."

X. Victim Impact Statements

A. Definition: statements from victims and family members describing the damaging consequences of the crime.

B. Booth v. Maryland (SCOTUS, 1987): since the defendant is often unaware of the victims characteristics, they are irrelevant to blameworthiness.

1. Death penalty option → blameworthiness is relevant

2. **OVERRULED by Payne**

C. Payne v. Tennessee (SCOTUS, 1991): use of impact statements didn't violate the 8th amendment on cruel and unusual punishment

XI. Sentencing

A. Presentencing Reports' Use in Passing Judgment

1. Williams v. New York (SCOTUS, 1949, Black): Courts may use pre-sentencing reports including inadmissible evidence when making sentencing determinations.

a) Overruled for death penalty cases [*Gardner v. Florida, SCOTUS*]

2. Fed. R. Crim Pro 32(d):

a) Defense gets full access to presentence report, but document must be stripped of 3 things judge sees confidentially:

(1) Diagnostic opinion

(a) Might disrupt rehabilitation program

(2) Confidential information

(3) Information that might result in harm to defendant or others

b) United States v. Watson (9th Cir., 1971): Defendant was sentenced harshly based on PSI where confidential informant called defendant a "major dealer"; there was no way to contest the charge.

3. *Fatico* Hearing

a) A hearing where hearsay is allowed, but the government must corroborate anonymous charges

b) US v. Fatico (2nd Cir., 1979): Evidence that defendant was a major organized crime figure was corroborated by 7 FBI agents alleging testimony from 17 different informants.

B. Due Process

1. Due process rights apply to sentencing hearings, including effective assistance of counsel. [*Mempa v. Rhay, SCOTUS*]

C. Discretion

1. Rehabilitation leads to harsher sentences and ignores the exercise of political power inherent in the practice of sentencing [*Francis Allen, 1964*]

2. Large ranges → individualized punishment + variations only explicable by judge-variation [*Marvin Frankel, 1973*]

D. Sentencing Reform

1. Mandatory Minimums

a) Only actually mandatory when they require:

(1) Filing of most serious charge

(2) NO bargaining

(3) Judge to base sentence on conduct using PSI and not proven crime

b) Plea bargains – was defendant sentenced below the mandatory minimum?

- (1) Whites: 50% of the time
- (2) Blacks: 30% of the time
- 2. Presumptive/Guideline Sentencing
 - a) Narrow limits for normal sentence + limited departure [California]
 - b) Create sentencing commissions
- 3. Federal Sentencing Law 28 USC §3553
 - a) Basic Rule: court shall impose sufficient sentence (not greater than necessary) to comply with purposes below
 - (1) Consider
 - (a) Nature/circumstances of offense
 - (b) History/characteristics of defendant
 - (c) Need for sentence to:
 - (i) Reflect seriousness of crime
 - (ii) Deter criminal conduct
 - (iii) Protect the public from defendant's further crimes
 - (iv) Provide defendant w/ educational/vocational training
 - b) Sentence shall be within guidelines UNLESS "aggravating or mitigating circumstance" not taken into consideration by
 - c) Operation of Guidelines
 - (1) Purposes for Sentencing commission
 - (a) Substantive federal criminal law is sprawling/unorganized
 - (b) Initial set of rules would need updating/modification
 - (c) Insulation from politics
 - (2) Components of offense
 - (a) Base offense level based on crime
 - (b) Specific characteristics related to seriousness
 - (c) Additional adjustments
 - (i) Obstructed justice?
 - (ii) Vulnerable victim?
 - (iii) Multiple counts?
 - (3) Success in fulfilling system's objectives
 - (a) Abandoned rehabilitation
 - (b) Truth in sentencing; criminals serve full terms
 - (c) Less disparity
 - (d) Brought law and due process to system
 - d) United States v. Thompson (D. Mass, 2002): Downward departure from sentencing guidelines was justified for model citizen doing everything he could to rehabilitate himself.
 - e) US v. Pereira (1st Circuit, 2001): Family history is irrelevant to person's culpability and may only be considered if criminal is "irreplaceable or otherwise extraordinary."

Actus Reus

XII. Overt and Voluntary Conduct [MPC § 2.01, p. 1081]

A. MPC § 2.01

1. Basic Policy: Liability ONLY IF based on conduct that includes a voluntary act.
2. Non-voluntary Acts:
 - a) Reflex/convulsion
 - b) Bodily movement during unconsciousness/sleep
 - (1) Commentary: “the law cannot hope to deter involuntary movement or to stimulate action that cannot physically be performed”
 - c) During hypnosis/ result from hypnotic suggestion
 - d) “otherwise not a product of the effort or determination of the actor, either conscious or habitual”
3. Possession → Act IF
 - a) Knowingly procured/received thing possessed
 - b) Aware of control long enough to terminate possession

B. Caselaw

1. Voluntariness presumed in statute: Appearing in a public place while intoxicated → assumption of voluntariness [*Martin v. State*]
 - a) Even though not in statute
 - b) How did we resolve this under MPC?
2. Broad conduct criminalization impermissible: State cannot punish a person for “who he is, independent of what he has done” [*Jones v. Los Angeles*, 9th Cir., 2006]
 - a) Case of law barring sitting, lying sleeping on street in LA where not enough beds to accommodate all of skid row’s homelessness.
3. Evidence of involuntary unconsciousness → jury instruction on subject required [*People v. Newton*, CA. Ct. App., 1970]
4. Killing while asleep → acquittal at common law AND MPC [*Cogden*]
5. Choice not to take medicine + seizure +driving → liability [*People v. Decina*, 1956]

C. Policy

1. Two kinds of “misfires” [Prof. J.G. Murphy]
 - a) Un-free choice is made: mistake, accident, compulsion duress
 - b) Non-choice: seizure, convulsions, reflexes
 - (1) No human action occurred here at all
 - (2) “talk of excuse here seems to make no more sense than excusing a rock for falling on one’s head”
2. How Far Back In Time Can We Go to Find a Voluntary Act
 - a) *Martin* cannot be squared w/ *Decina* [Mark Kelman]
 - b) Any time actus reus + mens rea are simultaneously satisfied and causation can be established from the act → prima facie liability

- (1) Proximate cause of drunken presence in public was cops, not drunkenness, so *Martin* can be distinguished from *Decina*

XIII. Omissions

A. MPC § 2.01

1. Basic Policy: Omission + physically possible for actor to perform + Element 3 → liability
 - a) Element 3: Either below
 - (1) expressly made sufficient by substantive law OR
 - (2) duty to perform imposed by law

B. Caselaw

1. Omission → breach IF [*Jones v. US*, DC Circ., 1962]
 - a) Statute imposes duty
 - b) Status relationship
 - (1) E.g. mother?
 - c) Contractual duty to care
 - d) Voluntarily assumed duty to care + prevented others from aiding
2. Agreement to feed + knowledge of no other way for 92 y/o to get food → murder [*Commonwealth v. Pestinikas*, PA, 1992]
3. Crazy mom beating child + D housing the couple + omission to prevent beating → NO liability [*Pope v. State*, MD, 1979]
 - a) Policy justification: protect parental rights
 - (1) **Use this to limit the case if need be!**

C. Policy

1. Bystander Indifference
 - a) Explanations:
 - (1) Presence of other bystanders reduces individual sense of responsibility
 - (2) Social inhibitions to intervene in other's lives arise in groups
 - b) JS Mill: non-intervention is effectively harming another
 - c) Macauley: only criminalize if conduct would be criminalizable elsewhere
 - (1) Probably b/c liberty interest at stake
2. Duty to rescue:
 - a) VT, RI, MN: duty to rescue laws
 - b) Knows another exposed to grave physical harm + to extent not place self in peril + no interference w/ duties owed others + others not helping → duty of reasonable assistance
3. Special Circumstances → Duties
 - a) De Facto Family?
 - (1) Basic rule: ONLY formal legal relationships → duty to care
 - (a) Affair + in man's house → no duty [*People v. Beardsley*, MI, 1907]

(b) Stepmom → duty to protect stepkids from husband [*People v. Carroll*, NY, 1999]

(c) Live in BF → NO duty to protect GF's kids from her [*State v. Miranda*, CT, 2005]

(i) Judge changed earlier vote, b/c:

(a) Boundaries too amorphous, fact-based, hindsight driven

(b) Too much power in hands of state

b) Failure-to-Protect Defendant was Abused by Killer?

(1) Child told mom of abuse from violent stepfather → culpable omission

4. Distinguishing Omissions and Acts

a) Removal of vegetative patient's feeding tube → omission to care, not act of killing [*Barber v. Superior Court*, CA, 1983]

(1) Policy: patient's interest and desires are key ingredients of the decision making process

(2) Cessation of heroic life support is not an affirmative act

b) No 14th amendment violation by allowing withdrawal of life-sustaining treatment but criminalizing assisted suicide [*Vacco v. Quill*, SCOTUS, 1997]

Mens Rea

XIV. Basic Mens Rea

A. MPC § 2.02

1. 4 types of *mens rea*

a) Purposely:

(1) Nature of conduct/result → "conscious object to engage in conduct of that nature or to cause such a result"

(2) Circumstance:

(a) Aware of existence

(b) Believes/hopes it exists

b) Knowingly:

(1) Nature of conduct/circumstances → "aware that conduct is of that nature"

(2) Attendant circumstances → aware that such circumstances exist

(3) Causing result → aware that it is practically certain conduct will cause the result

(a) Typically must be combined with 1 or 2

(b) **WILLFULLY = KNOWINGLY**

(c) E+E: purposeful actor desires a result, but a knowing actor does not care whether it occurs or not

- (d) Willful blindness → knowingly
- c) Recklessly: “consciously disregards” a substantial and unjustifiable risk that the element exists or will result
 - (1) Disregard must involve “gross deviation from the standard of conduct” of a law abiding person
 - (2) E+E: requires actual subjective recognition of danger and conscious disregard
 - (a) Drive 90 mph on crowded street but did not consider possibility of death → not reckless
- d) Negligently: “should be aware” of substantial and unjustifiable risk
 - (1) Failure to perceive must involve a “gross deviation” from reasonable person

2. Other Mens Rea issues

- a) Default culpability → recklessness
- b) One mention of *mens rea* → applies to all elements of an offense
- c) Hierarchy → mention of one lesser still allows for all the others to apply
- d) Purpose is element → conditional purpose will satisfy
 - (1) **WHAT THE HELL DOES THIS MEAN?**
- e) Knowledge of high probability of fact → knowledge UNLESS actual belief that fact does not exist [**willful blindness**]
 - (1) Cite: [*Jewell v. US*, 9th Cir.]
- f) Knowledge of all elements of offense → willfully
- g) Mens rea different for different elements + grading depends on mens rea → grade to lowest mens rea

B. Pre-MPC Mens Rea

1. ‘maliciously’ implies a foresight of consequence [*Regina v. Cunningham*, 1957]
 - a) Cunningham: it was a jury question of whether pulling a gas meter off the wall for money was “malicious” poisoning within statutory meaning
2. A ‘wilful’ act does not become ‘malicious’ only because it was the consequence of an act committed during a felony [*Regina v. Faulkner*, 1877]
 - a) Faulkner: Defendant lit a match in a ship while stealing some rum and the whole ship blew up.
 - (1) Concurrence: crown wants to make everything a strict liability crime if it’s the consequence of an act committed during a felony.
3. ‘Negligence’
 - a) Varies depending on the state
 - b) Ordinary civil negligence standard is sufficient to protect defendants where statutes impose punishments for negligence [*State v. Hazelwood*, AK, 1997]
 - c) Nuh-uh, says NM, b/c of social opprobrium that attaches w/ criminal conviction [*Santillanes v. NM*, 1993]
4. Tips for conducting pre-MPC mens rea analysis

- a) Tough to be 'wrong' b/c different mens rea words take on different meaning in different contexts
- b) Turn to ordinary meaning of the word
- c) 'malice' means foresight of the prohibited consequence

C. Specific vs. General Intent

1. Black's definitions

a) **specific intent.** The intent to accomplish the precise criminal act that one is later charged with.

(1) At common law, the specific-intent crimes were robbery, assault, larceny, burglary, forgery, false pretenses, embezzlement, attempt, solicitation, and conspiracy.

(2) Also termed criminal intent.

b) **general intent.** The intent to perform an act even though the actor does not desire the consequences that result.

(1) This is the state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability.

(2) General intent usu. takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).

2. Specific Intent: Actions that must be done with a specified further purpose in mind OR with subjective knowledge of another fact (attendant circumstance).

a) Ex: burglary is breaking and entering with the further objective of committing a felony

b) Ex of fact: bigamist must have knowledge of existence of his legal marriage when marrying the second wife

3. General Intent: person did an intentional action that was wrong

a) Ex: breaking and entering

D. Proving Mens Rea

1. We must infer subjective mens rea from a person's conduct

2. Basic Rule: presume a person intended the natural and probable consequences of his acts.

a) Required inferences → Often not OK

(1) Courts may NOT be required to presume the that , though b/c it's not always true. [*Francis v. Franklin*, SCOTUS, 1985]

b) Permissive inferences → acceptable

(1) Ex: presume the unexplained possession of recently stolen property establishes knowledge of possession of stolen property. [*Barnes v. US*, SCOTUS, 1973]

E. MPC Mens Rea

1. Terminology

- a) “element of an offense” includes conduct, attendant circumstances OR results
 - (1) Can be part of offense, negative an excuse/justification or negative a defense
- b) “material element” every kind of element that isn’t jurisdiction related
- 2. Purpose vs. Knowledge
 - a) Knowledge of requisite external circumstances → common to both
 - b) Purposive: conscious object to perform an action of that nature OR cause such a result.
 - c) Purpose: aware that conduct is of the required nature
 - d) Knowingly: aware that result (prohibited by the statute) is practically certain
- 3. Recklessness
 - a) Elements (so to speak)
 - (1) Conscious advertence
 - (2) Substantial risk
 - (3) Unjustifiable risk
 - b) Needed: a standard for HOW substantial and HOW unjustifiable
 - (1) MPC: the jury should set it
- 4. Negligence
 - a) Tribunal must determine whether non-awareness of severe unjustifiable conduct merits condemnation
- 5. Recklessness vs. Negligence
 - a) Key unresolved issue: who determines that the risk is “substantial” and “unjustifiable,” the person engaging in the conduct or the jury?
 - (1) Person engaging → must be aware of substantiality and unjustifiability
 - (2) Jury → sufficient that person was aware of risk EVEN IF s/he thought the risk insubstantial or justified.

XV. Strict Liability

- A. Basic Rule: Certain crimes require no mens rea; defendants can be convicted even if they don’t know they’re doing anything wrong
- B. Caselaw
 - 1. Presume mens rea requirements in new statutes unless Congress explicitly states otherwise. [*Staples v. US*, SCOTUS, 1991, Thomas]
 - 2. Overruled Cases
 - a) No mens rea read in if it would obstruct the purpose of the statute [*US v. Balint*, SCOTUS, 1922]
 - (1) Narcotics sale are *mala in se*
 - (2) Statute wanted those selling drugs to act at their own risk
 - b) No mens rea required in violations of FDCA, b/c non in statute [*US v. Dotterweich*, SCOTUS, 1943, Frankfurter]
 - (1) Rest on Balint

- (2) Policy Justifications
 - (a) SL justified when legislation is regulating things “beyond self-protection” like drug labeling
 - (b) Regulation by prosecution, which is permissible/effective
- 3. Mens rea in common law crimes is imported when they’re converted into statute [Morissette v. US, SCOTUS, 1952]
 - a) In this case: larceny

Mistake of Fact and Law

XVI. MPC §2.04

- A. Mistake of fact/law → Defense IF
 - 1. Negatives the mens rea required to establish offense OR
 - 2. Law provides it as a defense
- B. Defendant’s belief about fact/law would be a crime → act as if world was as defendant believed
 - 1. Grade punishment according to supposition
- C. Belief that conduct isn’t illegal → Defense IF
 - 1. Two ways to get Defense
 - a) Statute not known to D + not published/reasonable available OR
 - b) Reasonable reliance on official (but wrong) statement of law IN
 - (1) Statute
 - (2) Judicial decision
 - (3) Administrative order
 - (4) Official interp by public officer/body charged w/ interpreting law
 - 2. Std of proof for Defendant: preponderance of the evidence

XVII. Mistake of Fact

- A. MPC approach
 - 1. Basic Policy: mistake of fact → defense IF
 - a) Negates mens rea
 - b) Mistake about gravity → partial defense (go with subjective belief, objectively established)
- B. Common law approach [OFTEN STILL FOLLOWED]
 - 1. Basic Rule:
 - a) Don’t think it’s a crime: Wrong about fact where you believe you aren’t committing crime → no crime b/c negatives mens rea
 - b) Know it’s a crime: Wrong about fact when you KNOW it’s a crime → go with objective reality
 - 2. Regina v. Prince (Ct. of Crown, 1875): Court need not read mens rea into statute if it’s not there

- a) Moral Wrong principle: taking was a moral wrong in itself
- b) Abductor thought girl was 18, but in fact she was 14 when he “took” her according to statute
- c) Dissent: mens rea MUST apply if (untrue facts in D’s mind + reasonable grounds to believe + would not be crime if as supposed)
 - (1) Reading mens rea requirement in → not guilty b/c facts would negative mens rea
 - (2) Lesser crime principle: knowing commission of a lesser crime leads to risk of conviction for worse crime IF you’ve made a mistake

3. Lesser Crime vs. Moral Wrong today

- a) Lesser Crime: MN, Federal
 - (1) D must knowingly possess drugs, but mistake about attendant circumstance (thinking not near school; thinking heroin not crack) is irrelevant [*MN v. Benniefield, 2004*; *US v. Barbosa, 2001*]
 - (2) D is entitled to instructions on mistake about the seriousness of offense (e.g. pot not crack) [*US v. Cordoba-Hincapie*]
- b) Moral Wrong: CA statutory rape, MD Statutory Rape
 - (1) There is no mistake of fact defense for lewd conduct w/ child under 14 [*People v. Olsen, CA, 1984*]
 - (a) Partly a statutory interpretation case: defense given in similar statute but not here + *expressio unius*
 - (i) USE TO LIMIT
 - (2) Judges won’t read mens rea in to statutory rape unless legislature puts it there specifically [*Garnett v. State, MD*]
 - (a) Based on reading of legislative history
 - (b) Other jurisdictions → strict liability crime
- c) Honest Belief vs. Reasonable Belief
 - (1) For UK, honest belief is sufficient for statutory rape charge, ignoring even reasonable belief; prosecution must prove *absence of honest belief*. [*B v. DPP*]
 - (a) Ways to limit:
 - (i) Minor
 - (ii) Specific statute

XVIII. Mistake of Law (*Ignorantia Juris/Ignorantia Legis*)

A. Basic Rule: Ignorance of the law is no excuse (*ignorantia juris non excusat*)

1. Exceptions:

- a) Unknown and unpublished
- b) Official reliance

B. Caselaw

1. Mistake of Law Granted

- a) “the voluntary, intentional violation of a known legal duty” → Defendant must subjectively know he is violating the law and belief need not be reasonable [*US v. Cheek*]
 - (1) JURIES make determinations of credibility
 - (a) Income tax case here → jury unlikely to believe D thought seminar saying taxes were unconstitutional allowed him not to pay
 - (2) Entitled to instruction to that effect, though
- b) “in any manner not authorized by this statute” → must be aware of statute to have violated it [*Liparota v. US*, SCOTUS, 1985]
- c)

2. Mistake of Law Not Granted

- a) Peace officer’s misreading of statute allowing firearms possession was not “founded upon” a statute; MPC erroneous provision brought in to NY Penal code [*People v. Marrero*]
 - (1) WME: MISREADING OF THE LAW! The NY State legislature specifically altered the provision from the MPC
- b) ICC Regulations → knowing conduct is enough (knowledge of law not needed) [*US v. International Minerals*, SCOTUS, 1971]
- c) Complex, confusing regulations → knowing conduct is enough; lawyers misreading difficult environmental law is no protection [*US v. Overhold*, 10th Cir., 2002]
- d) “willfully” deal in firearms → knowledge that actions are unlawful is sufficient to convict; no need to know code provision [*Bryan v. US*, SCOTUS, 1998]
 - (1) Filing numbers and using straw purchasers → establish knowledge of unlawfulness
- e) Drug distribution → no knowledge of code needed; Cheek distinguished on basis of crime [*US v. Ansal di*, 2nd Cir. 2004]

3. Official Reliance Caselaw

- a) Asking state’s attorney if something is illegal → no official reliance defense [*Hopkins v. State*, MD, 1950]
 - (1) **OVERRULED BY RALEY**
- b) Ask govt. officials in official capacity if unlawful → due process violation if convicted [*Raley v. Ohio*, SCOTUS, 1959]
- c) Reversal at circuit review + pending SCOTUS appeal + conduct that resulted in first charge → official reliance defense [*Albertini v. US*, 9th Cir.]
 - (1) **Rejected by SCOTUS in Rodgers**
- d) Circuit split makes review reasonably foreseeable → conviction possible even if conduct was lawful under circuit law at the time [*US v. Rodgers*; *US v. Qualls*]

C. Mistake of Law in “Failure to Register”

1. Criminalizing mere presence in LA while failing to register as a felon → violation of due process [*Lambert v. CA*]
 2. Judge giving misleading instructions to released felon on firearms possession → can't prosecute for following judge's instructions [*State v. Leavitt*]
 3. Non-informing of protection order subject about unlawful firearms possession during order of protection hearing → NO mistake of law defense [*US v. Wilson, 7th Cir., 1998*]
- a) Dissent (Posner): "this is not the kind of law that a lay person would intuit existed"

D. Policy for Mistake of Law

1. Purpose is not ensure communication to citizenry but create limited uncertainty about the law to deter potential harmful behavior. [Prof. Stevenson]
 2. Obscuring the law allows for morality to guide instead of the law b/c people will just try to act morally, and we can deny the defense to the baddies. [Prof. Kahan]
- a) *Marrero* lost on the son-of-a-bitch rule.

Rape

XIX. MPC §213.1

A. Basic Rule: sexual intercourse w/ non-wife female + element 2 → Rape

1. Element 2:

- a) Compel to submit by inflicting on anyone:
 - (1) Force
 - (2) Threat of imminent death
 - (3) Serious bodily injury
 - (4) Extreme pain
 - (5) Kidnapping
- b) Substantially impaired her power to appraise/control conduct by administering drugs w/o her knowledge "for the purpose of preventing resistance"
- c) Female is unconscious
- d) Female is less than 10 years old

B. Punishing rape:

1. 2nd degree felony
2. To bump to 1st degree:
 - a) Actor inflicts serious bodily harm on anyone "in the course thereof"
 - b) Stranger rape (not voluntary social companion + hadn't previously "permitted sexual liberties")

C. Sexual intercourse includes: some penetration of os/anum, however slight

1. No emission required

D. Sexual intercourse w/ non-wife female + element 3 → Gross Sexual Imposition

1. Element 3:

- a) Threat that would prevent resistance by a woman of ordinary resolution
- b) Knows she has mental disease rendering incapable of appraising conduct
- c) Knows she is unaware that act is being done to her
- d) Submits in mistaken belief it's her husband

XX. Actus Reus

A. Force

1. Facts → force

- a) Repeated refusals to come upstairs; took car keys; he left room for five mins; she said he wanted to go; she took off clothes after he asked her to; she was still asking to leave → force + non-consent [*State v. Rusk*, MD, 1981]
- b) Ex boyfriend; threat to "fix face"; "not playing"; they went together to a friend's apartment; she said no; he undressed her → nonconsent, BUT NOT FORCE [*State v. Alston*, NC]
- c) High school principal; threat to prevent graduation → intimidation, NOT force [*State v. Thompson*, MT, 1990]
- d) "rape, as defined by the legislature ... requires actual physical compulsion or violence or a threat of physical compulsion or violence" [*Commonwealth v. Mlinarich*, PA, 1985]
 - (1) Threat to send 14 y/o back to foster home doesn't count
- e) "to justify a conviction the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety." [*Hazel*, MD]
- f) Jury can consider whether impermissible retaliation constitutes force [*State v. Lovely*, NH, 1984]
- g) Any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely given permission to the act of sexual penetration → physical force [*In Re MTS*, NJ, 1992]
 - (1) Flawed statutory interpretation; collapses force into consent

2. Reasonableness of fear is a jury issue [*Rusk*]

B. Nonconsent

1. Facts → nonconsent

- a) Jury can consider whether repeated 'no's and pulling away was "genuine, was real, and would be known as such to a reasonable person" [*State v. Gangahar*, NE, 2000]
- b) BAC of 0.15 → victim is incapable of consent b/c can't "appreciate consequences of their actions" [*State v. Al-Hamdani*, WA, 2001]

XXI. Fraud/Deception

A. Fraud does not vitiate consent [*Boro v. Superior Ct*, CA, 1985]

1. On implied acquiescence and surplusage grounds

- B. Controlling state of mind in consideration of threat is that of the defendant, not the victim
[*People v. Evans*, NY, 1975]

XXII. Mens Rea

A. Caselaw

- 1. Good faith mistake of fact must be reasonable in rape cases [*Commonwealth v. Sherry*, MA, 1982]
- 2. Mistake of fact defense for defendants based on their subjective views is only viable in rape cases if the legislature specifically creates it [*State v. Williams*, PA, 1982]
- 3. Court declined to adopt different jury instructions on reasonable mistake of fact in date rape cases [*Commonwealth v. Fischer*]
 - a) Grounds for decision: claim of ineffective assistance of counsel

B. Mistake of Fact

- 1. Even reasonable belief of consent does not constitute a defense. [*Commonwealth v. Simcock*, MA, 1991]
- 2. Subjective culpability is inherent in the force requirement, so reasonable, mistaken belief of consent cannot provide a defense [*Commonwealth v. Lopez*, MA, 2001]
- 3. Jurisdictions ALLOWING mistake of fact if honest, reasonable
 - a) NJ [*State v. Oliver*]; CT [*State v. Smith*]; CA [*People v. Mayberry*]
- 4. No gray area between parties → one person is lying → no mistake of fact, b/c jury is making credibility determination [*Tyson v. State*, 1993]

C. Recklessness as Rape Mens Rea

- 1. Britain: Defendant must have active knowledge of non-consent OR be reckless as to non-consent [*Regina v. Morgan*, 1976]
- 2. Alaska: Legislature's removal of resistance requirement tempered by focus on Defendant's understanding of the totality of the circumstances [*Reynolds v. State*]

XXIII. Marital Exception

- A. All distinctions for rape based on marital statutes were irrational and therefore could not be applied constitutionally [*People v. Liberta*, NY, 1984]

Homicide

XXIV. Intended Homicide

A. Common Law

- 1. Basic rule: unlawful killing + malice aforethought → murder
 - a) Malice aforethought
 - (1) Killing with intent, without provocation
 - (2) Killed by an act intended to kill another
 - (3) Intended to kill generally w/o specific intent to kill one person
 - (a) E.g. bomb into a crowd
 - (4) Death results from act intended to cause bodily harm

B. Statutory Schemes

1. California Penal Code

a) Murder: Unlawful killing of human being/fetus + malice aforethought → murder

b) Malice:

(1) Expressed: “manifestation of deliberate intention” to kill

(2) Implied:

(a) No considerable provocation OR

(b) Attendant circumstances show “an abandoned and malignant heart”

c) Degrees of Murder

(1) First degree: any of the methods below

(a) Tools: using destructive device, explosive, WMD, armor-piercing ammo, poison, lying in wait, torture

(b) “Or by any other kind of willful, deliberate and premeditated killing”

(i) “Not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.”

(c) Circumstance: arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, sex crime, drive-by shooting

(2) Second degree: all else

d) Manslaughter: unlawful killing of human being + NO malice + Element 3 → manslaughter

(1) Element 3: several types

(a) Voluntary: sudden quarrel/heat of passion

(b) Involuntary:

(i) Killing during non-felonious unlawful act

(ii) Killing during lawful act which might produce death + (unlawful manner OR “without due caution and circumspection”)

(c) Vehicular

(i) Killing by driving during unlawful act + not felony + gross negligence → 1st degree vehicular manslaughter

(ii) Driving during lawful act which might produce death + unlawful manner + gross negligence → 1st degree vehicular manslaughter

(iii) Same as above + NO gross negligence → 2nd degree vehicular manslaughter

(2) Definition of Gross Negligence

- (a) Does not prohibit murder charges if facts show “wantonness and conscious disregard for life” OR malice

2. PA Penal Code

a) Basic Rule: mens rea + causes death of another human being → criminal homicide

- (1) Classification depends on mens rea
- (2) Intentionally causing suicide + force/duress/deception → criminal homicide

(a) **BUT WHAT GRADE?**

b) Murder

(1) Intentional killing → Murder in the 1st degree (death/life in prison)

(a) “intentional”:

- (i) Poison
- (ii) Lying in wait
- (iii) Willful + deliberate + premeditated

(2) Killing during felony → Murder in the 2nd (life in prison)

(3) All other murder → Murder in the 3rd (20 years max)

(a) **What’s included here?**

c) Voluntary manslaughter

(1) Sudden intense passion + serious provocation → voluntary manslaughter

(2) Purposeful/knowing killing + unreasonable belief of facts that would otherwise justify → voluntary manslaughter

d) Involuntary Manslaughter (5 yr. max)

(1) reckless/negligent manner + death “direct result” of conduct → involuntary manslaughter

3. NY Penal Law

a) Criminal negligence (MPC def.)+ causing death → negligent homicide

b) 2nd degree manslaughter (15 yr. max)

- (1) Reckless + cause death
- (2) Intentionally causes/aids suicide

c) 1st degree manslaughter (25 yr. max)

(1) Intent to cause physical injury of A + causes death of A or B

(2) Intent to kill A + kill A or B + extreme emotional disturbance

(a) “extreme emotional disturbance” requires reasonable explanation/excuse, determined from viewpoint D “as believed circumstances to be”

d) 2nd degree murder (15 yrs to life)

(1) Basic Rule: Intent to cause death + causes death

(a) Defenses

(i) Extreme emotional distress → Man-1

(ii) Causing/aiding suicide + NO duress/deception

- (2) Reckless indifference: Reckless conduct + “depraved indifference to human life” + causing death
- (3) Felony Murder: Listed felony + in furtherance/in flight + causes death of non-participant
 - (a) Defense (prove all four)
 - (i) Did not commit homicidal act or aid in any way AND
 - (ii) Not armed w/ deadly weapon AND
 - (iii) No reasonable ground to believe other was armed
 - (iv) No reasonable ground to believe other participant intended to kill

4. Model Penal Code

- a) 210.1: Criminal Homicide
 - (1) Causing the death of another human being → criminal homicide (murder, manslaughter, negligent homicide)
 - (a) Mens rea: purposely, knowingly, recklessly or negligently
- b) 210.2: Murder
 - (1) Criminal homicide → murder IF
 - (a) Purposely/knowingly OR
 - (b) Recklessly + extreme indifference to the value of human life
 - (i) Element 2 is presumed if committed during the course of a series of crimes
- c) 210.3: Manslaughter
 - (1) Criminal homicide → manslaughter IF
 - (a) Recklessly OR
 - (b) Murder + influence of extreme mental/emotional disturbance + reasonable explanation/excuse
 - (i) Viewpoint: person in actor’s situation under the circumstances as he believes them to be
 - (a) QUESTION: why not “circumstances as he reasonably believes them to be”
- d) 210.4: Negligent Homicide
 - (1) Criminal Homicide → negligent homicide IF committed negligently

C. Premeditation

- 1. Basic Rule: No time is too short for necessary premeditation.
 - a) AZ definition: intention/knowledge that s/he will kill another human being + preceded by any length of time to permit reflection → premeditation
 - (1) No evidence of actual reflection is needed
 - (a) Interpreted by AZ S. Ct. to require proof of actual reflection to save from constitutional challenge [*State v. Thompson, AZ, 2003*]

2. Pennsylvania

- a) Picking up gun on mantle for other reasons, shooting sleeping spouse after an argument → premeditation [*Commonwealth v. Carroll*, PA, 1963]
- b) Conscious intent to bring about death → no need to consider how elaborate the designs to kill for premeditation purposes [*Commonwealth v. O'Searo*, PA, 1976]
- 3. Pulling gun out at card match and blowing opponents away in heat of argument → premeditation [*Young v. State*, AL, 1982]
- 4. No specified time BUT some period btw. formation of intent and killing → premeditation [*State v. Guthrie*, WVA, 1995]
 - a) Categories of premeditation facts
 - (1) Planning activity indicating a design to take life
 - (2) Prior relationship/behavior indicating motive
 - (3) Evidence indicating: deliberate intention + preconceived design

D. Provocation

- 1. Basic Rule: Extreme mental/emotional disturbance + reasonable explanation/excuse → murder is downgraded [MPC § 210.3]
 - a) Viewpoint: reasonable person in actor's situation + circumstances as he believes them to be
 - (1) MPC commentary: "situation" is designedly ambiguous.
 - (a) Political assassin does not get reasonable extremist
 - (b) Afford flexibility to differentiate on what should be material
 - (c) Basic question: "can the actor's loss of self-control be understood in terms that arouse sympathy in the ordinary citizen?"
 - (2) MPC effort to individualize reasonable person standard has been largely unsuccessful
 - b) Examples:
 - (1) Battery
 - (2) Sudden mutual combat
 - (3) Words?
 - (a) Varies, depending on the jurisdiction
- 2. Caselaw
 - a) Verbal taunting by wife + threat to career → NOT provocation [*Girouard v. State*, MD, 1991]
 - b) "such as might naturally cause a reasonable person in the passion of the moment to lose self-control and act on impulse and without reflection" [*US v. Roston*, 9th Cir. 1993]
 - c) Adultery Discovery
 - (1) Evidence of adultery is admissible → possible provocation, if reasonable person would respond the same way [*Maher v. People*, MI, **1862**]

(2) Must be sudden discovery of adulterous intercourse; less intimacy is insufficient [*Dennis v. State*, MD, 1995]

(3) Must be legally married for provocation to apply in adultery [*State v. Turner*, AL, 1997]

d) Cooling Time?

(1) Any cooling time → no provocation [*US v. Bordeaux*, 8th Cir., 1992]

(a) Rekindling doctrine: rarely allowed [*State v. Gounagias*, WA, 1915]

(b) Long wait in apartment to kill → jury could find manslaughter [*People v Berry*, CA, 1977]

e) Victim Not Provoker

(1) Mistaken identity → defense still allowed [*State v. Mauricio*, NJ, 1990]

(a) WME: makes sense, b/c reasonable person as shooter believed things to be

(2) Kill restraining bystander → NO provocation [*Rex v. Scriva*, 1951]

(3) Enraged from killing wife, move on to sleeping son → NO provocation [*People v. Spurlin*, CA, 1984]

f) Defendant started bar-fight and other escalated → Provocation instruction allowed [*Regina v. Johnson*, 1989]

3. Policy

a) Partial excuse: concession to human nature

b) Partial justification: moral wrongs committed by both parties

(1) It's less wrong to kill those who have themselves committed wrong [Prof. Ashworth]

(2) Harm to society is as great even if the SOB deserved it [Prof. Dressler]

c) Reasonable?

(1) Reasonable people don't kill under any circumstances [Stephen Morse]

(2)

XXV. Unintended Homicide

A. Distinguishing Civil and Criminal Negligence

1. Grave danger apparent + defendant chose to run risk → wanton and reckless (more than negligence/gross negligence) → criminal liability [*Commonwealth v. Welansky*, MA, 1944]

2. Contributory negligence → NO criminal defense [*Dickerson v. State*, MS, 1983]

a) Facts: drunk had turned off car, including lights, and gone to sleep in middle of highway where he was killed by another driver

B. Distinguishing Murder/Manslaughter

1. Defendant need not intend to kill for the conduct to amount to 2nd degree murder [*Commonwealth v. Malone*, PA, 1946]

2. "Malice": the condition needed to bump manslaughter to murder
 - a) Formulations
 - (1) Implied malice
 - (2) Wicked depraved and malignant heart
 - (3) Abandoned, malignant heart
 - (4) "manifesting extreme indifference to the value of human life"
 - (a) MPC
 - (b) Std: does the conscious disregard constitute a gross deviation from what a reasonable person would do?
 - b) Examples where met
 - (1) Malone
 - (2) Throwing a heavy object on a down on a busy street
 - (3) Shooting into an occupied building
 - (4) Beating a person to death
 - (5) Intent to do great bodily harm to victim short of death

XXVI. Felony Murder Rule

A. Basic Doctrine

1. Basic Rule: Any death resulting from a felony → murder.
 - a) Serne Formulation: likely in itself to cause death
 - (1) "any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which causes death" → murder [*Regina v. Serne*, 1887]
 - b) Stamp Formulation: Death need not be foreseeable [*People v. Stamp*, CA, 1969]
 - (1) Facts: death by heart attack during robbery
 - c) MPC approach: killing during felony creates rebuttable presumption of extreme indifference murder
2. Limitations:
 - a) Merger Rule
 - b) Inherently Dangerous Felony Rule
 - c) Not In Furtherance Rule
3. Foreseeability
 - a) Felony but-for cause but not proximate cause → no felony murder [*King v. Commonwealth*, VA, 1988]
 - (1) Facts: airplane crash while smuggling drugs kills smuggling copilot
4. Policy
 - a) Creating a risk of death in the context of a criminal act is more culpable than doing so otherwise [Prof. Kenneth Simons]
 - b) Strict liability for felons [*People v. Washington*, CA, 1965]
 - c) Critique: does nothing to add to the security of human life and arbitrarily punishes those who have misfortune befall them while committing crimes [Macauley]

d) Wrongdoer must run risk things will turn out worse than expected [Prof. Fletcher]

B. Misdemeanor-Manslaughter Rule (Unlawful Act doctrine)

1. Basic Rule: killing during non-feloneous unlawful act → involuntary manslaughter

2. Two Ways to Establish Involuntary Manslaughter

a) Conduct amounted to criminal negligence under the circumstances

(1) Standard way

b) 'Unlawful Act' doctrine → ONLY show that unlawful act caused the death.

3. Caselaw

a) Unlawful act must be proximate cause of death [*Commonwealth v. Williams*, PA, 1932]

(1) Failure to renew drivers license not sufficient to apply the doctrine to vehicular homicide

4. Ways It's Typically Limited

a) No regulatory offenses: Sometimes restricted to malum prohibitum, exempting regulatory (malum in se) offenses [*Mills v. State*, MD, 1971]

b) Only apply if misdemeanors rise to the level of criminal negligence [*State v. Stanislaw*, VT, 1990]

c) Limit to dangerous under circumstances of commission [*People v. Cox*, CA, 2000]

C. Inherently Dangerous Felony

1. Basic Rule: Felony must be inherently dangerous to apply the felony murder rule

a) Two ways to judge this

(1) Felony is dangerous as defined in the statute [*Phillips*]

(2) Felony was dangerous as perpetrated [*Stewart*]

2. Caselaw

a) Crime can be committed in non-dangerous ways → no felony murder rule [*People v. Phillips*, CA, 1966]

b) felony was committed in an "inherently dangerous" way → appropriate for felony murder rule [*People v. Stewart*, RI, 1995]

(1) trier of fact must consider "facts and circumstances"

c) Possession of gun → always inherently dangerous felony BUT, must be used in inherently dangerous way [*Hines v. State*, GA, 2003]

(1) Facts: ex-felon, possessing firearm for purposes of hunting, took ill advised shot on a turkey-shoot

D. Merger Doctrine

1. Basic Rule: predicate felony involves bodily injury → don't apply the felony murder rule

a) Why? Otherwise manslaughter would automatically become murder b/c manslaughter + death would become murder through the felony murder rule even though the death was already part of the predicate offense

2. Caselaw

- a) Independent Purpose Test: independent felonious purpose from the homicide → felony murder rule still holds [*People v. Burton*, CA, 1971]
 - (1) Example here: armed robbery
 - (2) Example: die from methyl alcohol supplied by fellow inmate → independent purpose → felony murder applies [*People v. Mattison*, CA, 1971]
 - (a) Policy rationale: deterrence
- b) Elevate to Murder Test: Only impermissible predicate offenses are those that would have the effect of elevating all felonious assaults to murder. [*People v. Hansen*, CA, 1995]

E. Not in Furtherance of Felony

- 1. Basic Rule: Killing must be in furtherance of felony for the felony murder rule to apply.
 - a) Three situations where problematic to apply the rule
 - (1) After felony terminated
 - (2) Cofelon on a frolic
 - (3) Death caused by person opposing felony
- 2. After the Ending
 - a) Drove away from burglary + cops try to stop 15 mins later + speeds away and kills in car crash → still in progress [*People v. Gillis*, MI, 2006]
 - b) Defendant arrested + officer shot while co-felon tried to flee → still in progress [*State v. Amaro*, FL, 1983]
 - (1) Grounds: foreseeable, in furtherance of common design
- 3. Cofelon on a Frolic
 - a) Three rapists, woman slaps one and he kills her → others not guilty of felony murder [*US v. Heinlein*, DC Cir, 1973]
 - b) Robbery leader kills robber for being an idiot → others guilty [*People v. Cabaltero*, CA, 1939]
 - (1) Grounds: connected to the ongoing felony
- 4. Killings Opposing Felony
 - a) Stick with common law limitation to actions of felons/accomplices in furtherance of felony [*State v. Canola*, NJ, 1977]
 - (1) Facts: storeowner being robbed shot cofelon and all the robbers were charged with felony murder
 - (2) Rationale: progressive thought favors restrictions on felony murder rule
 - b) Agency Theory: Guilty ONLY IF act is felon's (by his hand or someone in concert) + in furtherance of common purpose [*Commonwealth v. Campbell*, MA, 1863]
 - (1) still good law
 - c) Proximate Cause Theory: felony is proximate cause of deaths [*People v. Dekens*, Ill. 1998]

(1) Cop1 shoots Cop2 → felony murder for crooks under proximate cause theory [*People v. Hernandez*, NY, 1993]

Causation

XXVII. Causation Generally

- A. Trigger: element of the crime is causing some outcome
- B. Factual cause (but-for cause) + proximate cause → CAUSATION.
- C. MPC § 2.03

1. Basic Rule: but-for cause + element 2 → causation

a) Element 2

(1) Purpose/knowing → must be within purpose/contemplation of actor

(a) EXCEPTIONS

- (i) Only difference btw. purpose and result is different person/property injured
- (ii) Injury desired would have been worse than it was
- (iii) Actual result is same harm as designed + not too remote in occurrence to make a difference for gravity

(2) Reckless/Negligent → must be within risk of which actor is/should be aware

(a) EXCEPTIONS

- (i) Only difference btw. purpose and result is different person/property injured
- (ii) Injury desired would have been worse than it was
- (iii) Actual result is same harm as designed + not too remote in occurrence to make a difference for gravity

(3) Strict liability → probable consequence of the conduct = causation

XXVIII. Factual Cause

- A. Shooter's associate drives victim to desert to die, but victim might not have been saved by prompt medical attention → but for causation found [*State v. Montoya*, NM, 2002]
- B. Beaten child w/ fractured skull + wait to call doctors → waiting NOT but-for causation [*State v. Muro*, NE, 2005]

1. Grounds: state had shown only the *possibility* of survival, which is insufficient to prove but-for causation beyond a reasonable doubt

XXIX. Foreseeability

- A. "possible consequence which reasonably might have been contemplated" → foreseeability [*People v. Acosta*, CA, 1991]

1. Facts: two helicopters crashed when monitoring a chase

- 2. Similar ruling in midair firefighting collision between planes [*People v. Brady*, CA, 2005]
- B. Two independently set fires → each is proximate cause of firefighter's death [*People v. Arzon*, NY, 1978]
- C. Warning of explosion hazard in factory not sufficient to establish foreseeability of triggering cause of explosion [*People v. Warner-Lambert*, NY, 1980]
- D. Creating deadly hazard → foreseeability [*People v. Deitsch*, NY, 1983]
- E. Hospital's negligence in treating crime victim who would've died w/o assistance → inadmissible [*State v. Shabazz*, CT, 1998]
- F. Defendant crashes car while fleeing cops + cop doesn't grant prompt medical attention → admissible, b/c might be unforeseeable cause of death for felony murder purposes [*State v. Shabazz*,

XXX. Intervening/Superseding Acts

A. Assisted Suicide

- 1. Pulling trigger for suicide is an intervening act; gun provision + incitement → NOT causation [*People v. Campbell*, MI, 1983]
- 2. Final Overt Act Test: defendant must participate in final overt act for there to be murder [*People v. Kevorkian*, MI, 1994]
- 3. Basic law: no murder for assisting suicide if no coercion

B. Subsequent Actions Recklessly Risking Result

- 1. Drag racer not liable for death of friend who swerved around him and was killed by onrushing truck [*Commonwealth v. Root*, PA, 1961]
- 2. Chasing man, threatening to kill + hit by car trying to escape → sufficiently direct cause [*People v. Kern*, NY, 1989]
- 3. Drag racer liable where bystander is killed by accomplice. [*State v. McFadden*, IA, 1982]
 - a) tort liability standards sufficient for criminal causation
- 4. Players in Russian roulette game → proximately caused death coplayer [*Commonwealth v. Attencio*, MA, 1963]

Attempt and Solicitation

XXXI. Basic Attempt

A. MPC § 5.01

- 1. Basic Rule: Mens Rea for crime + Element 2 → Attempt
 - a) Element 2
 - (1) Conduct = crime IF circumstances are as he thinks
 - (2) Causing result is element + takes act/omission with purpose/knowledge of causing result w/o further conduct
 - (3) Substantial step in conduct planned to culminate in crime

(a) MUST be strongly corroborative of actor's criminal purpose

(b) Sufficient actions

(i) Lying in wait

(ii) Enticing victim to place for commission

(iii) Reconnoitering place for crime

(iv) Unlawful entry where crime to be committed

(v) Possession of materials + specifically designed for unlawful use/ serve no lawful purpose under circumstances

(vi) Possession of materials + proximity to place + serves no lawful purpose under circumstances

(vii) Soliciting innocent agent

2. Combined w/ Accomplice Liability

a) Conduct designed to aid another + sufficient for accomplice liability → attempt

3. Renunciation Defense

a) Abandon effort/prevent commission "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose" → complete affirmative defense

(1) Motivated by fear of increased probability of detection or apprehension → NOT voluntary → NOT renunciation

(2) Motivated by decision to postpone criminal conduct or find better victim → NOT complete → NOT renunciation

XXXII. Mens Rea

A. Basic Rule: Mens rea for actual crime must be presence + specific intent to commit the target crime

1. even if that crime does not require specific intent

B. Caselaw

1. No intent to kill for HIV positive rapist → not sufficient for mens rea for attempted murder b/c not enough evidence that he thought there would be infections or that there could be infections. [*Smallwood v. State*, MD, 1996]

2. "Every attempt requires specific intent to commit the target crime even if the completed crime does not require specific intent" [*People v. Beck*, CA, 2005]

3. Man shot and missed at tent intending to scare, not kill → NO attempted murder [*Thakcer v. Commonwealth*, VA, 1922]

a) If he'd hit, it would've been murder

C. Attempt combined with other inchoate crimes

1. No attempted felony-murder [*State v. Gray*]

XXXIII. Actus Reus

A. Basic Rule

1. Dangerous Proximity Test: Several factors to be considered

a) Seriousness of offense

b) Community resentment

c) Closeness in space/time

2. Equivocality Test: How clearly do the acts bespeak intent?

a) Ex: blowing out match near haystack b/c observed → attempt [*King v. Barker*]

b) Walking to field w/ enemy + loading rifle + never aiming → NOT attempt

[*People v. Miller, CA, 1935*]

(1) “that quality of being equivocal must be lacking before the act becomes one which may be said to be a commencement of the commission of the crime or an overt act...”

B. Preparation vs. Attempt

1. Basic Rule: The first step is not necessarily sufficient and the final step is not necessarily required. [*King v. Barker, NZ, 1924*]

2. Not found person trying to rob before stopped by a cop → NOT guilty of attempted robbery [*People v. Rizzo, NY, 1927*]

a) Still good law [*People v. Acosta, NY, 1993*]

3. Arrange to meet cop posing as minor + prearranged signal → NOT sufficient for attempted sexual assault [*State v. Duke, FL, 1998*]

C. Crimes of Preparation

1. Burglary: breaking and entering with intent to commit felony inside

2. Assault: attempt to commit a battery

D. Substantial Step

1. Assembling weapons + cruising a bank → substantial step [*US v. Jackson, 2nd Cir., 1977*]

2. Setting ‘bill trap’ to rob ATM repairmen w/in 90 minutes → NOT substantial step [*US v. Harper, 9th Cir., 1994*]

3. Bringing money from out of town + looking at drugs + no offer → NOT substantial step [*US v. Joyce, 8th Cir., 1982*]

E. Renunciation

1. Trying to say it was all a joke after grocery clerk only had \$50 → NO renunciation for attempted armed robbery [*People v. Johnson, NY, 1982*]

2. Girl convinces rapist to let her go → NO renunciation [*People v. McNeal, MI, 1986*]

a) Unexpected resistance means that the renunciation wasn’t voluntary

3.

XXXIV. Solicitation

A. Solicitation MPC § 5.02

1. Definition: (purpose of promoting/facilitating crime) + encourage other to engage in conduct which would constitute crime/attempt/establish accomplice liability → solicitation

a) Uncommunicated is OK IF “designed to effect” communication

b) Renunciation defense: persuade person not to do “under circumstances manifesting a complete and voluntary renunciation of criminal purpose”

B. Caselaw

1. Mere solicitation is insufficient to constitute attempt [*State v. Davis*, MO, 1928]
2. Detailed planning for husband-assassination → substantial step [*US v. Church*, Military, 1989]

XXXV. Impossibility

A. Basic Rule: Legal impossibility precludes attempt conviction, but factual impossibility does not.

1. Legal impossibility: Belief that conduct is criminal does not make it so.
 - a) What defendant wanted to do isn't illegal even though defendant thinks it is
 - (1) E.g thinks it's not hunting season even though it is, but goes hunting anyway
 - b) Element required for an attempt not satisfied
 - (1) Firing an unloaded gun at someone where crime requires gun be loaded
2. Factual Impossibility: B/c of non-legal facts beyond D's knowledge something isn't a crime → convictable for attempt
 - a) Trying to pick an empty pocket

B. Caselaw

1. Buying goods believed to be stolen, but not actually stolen → no attempt liability [*People v. Jaffe*, NY, 1906]
 - a) Grounds: legal impossibility
 - b) WME: This GETS THE LAW WRONG; actually factual impossibility
2. Believing someone to be alive + person is dead + shooting them → factual impossibility → attempted murder [*People v. Dlugash*, NY, 1977]
3. HIV-positive defendant bit cop believing it would kill him → factual impossibility → attempted murder [*State v. Smith*, NJ, 1993]
4. Crime to send letter from prison w/o warden knowledge + unbeknownst to defendant warden knew → legal impossibility → no liability [*US v. Berrigan*, 3rd Cir. 1973]
5. Defendant claiming selling heroin + turns out to be baking powder → no liability [*US v. Oviedo*, 5th Cir. 1976]
 - a) Rejected legal/factual impossibility distinction

Accomplice Liability/Conspiracy

XXXVI. Accomplice Liability Generally

A. MPC § 2.06

1. Legally accountable for other's conduct IF
 - a) Mens rea for crime + causes innocent to engage in conduct
 - b) Made accountable by code
 - c) "Accomplice": purpose of promoting + Element 2
 - (1) Element 2

- (a) Solicits other to commit it
 - (b) Aids/agrees/attempts to aid other person in planning/committing
 - (c) Legal duty to prevent + failure to make proper effort to prevent
- 2. Causing result is element + act w/ culpability w/ respect to result → accomplice liability
 - a) Basically, mens rea for result causing is the same
- 3. NOT accomplice IF
 - a) Victim
 - b) Conduct is inevitably incident to commission
 - c) Terminates complicity + Element 2
 - (1) Element 2
 - (a) Wholly deprives complicity of effectiveness
 - (b) Gives timely warning to law enforcement
 - (c) Makes proper effort to prevent
- 4. May still be convicted as accomplice even if person on whose conduct liability is based is not convicted for whatever reason

B. Common Law

- 1. Several categories
 - a) Principal: does the crime
 - b) Principal in the second degree: physically present aiding and abetting
 - c) Constructive presence: present nearby, but not at specific scene
 - (1) E.g. keeping lookout
 - d) Accessory before the fact: some way concerned with act before the fact but not present
 - e) Accessory after the fact: same as above, but after commission
- 2. Modern statutes: wipe out distinctions for all except accessory after the fact.

C. Mens Rea

- 1. Conduct: same as needed to effectuate the crime
 - a) Words that have effect of encouraging crime, but not intent to do so are not sufficient mens rea for conspiracy [*Hicks v. US*, SCOTUS, 1893]
 - (1) Defendant, scared that shooter would kill him, told victim to die like a man
 - b) convincing other to commit burglary + telephoning cops while assisting w/ actus reus → NO accomplice liability b/c NO mens rea [*Wilson v. People*, CO, 1939]
 - (1) MPC would say: no purpose of promoting
 - c) Telling someone where to go to buy pot from a dealer he had no relationship with does not establish nexus for accomplice liability [*State v. Gladstone*, WA, 1970]

(1) Note: had crime been purchasing pot instead of selling it, nexus might have been there

2. Results: Same as crime

- a) Possible to be an accessory before the fact to a criminally negligent act of not replacing a boiler that blew up and sunk a steamship [*State v. McVay*, RI, 1926]
- b) Three man gun battle where it was unclear who fired fatal shot, but ALL THREE were liable b/c actual killer was intentional to inflicting death and others were intentional to aiding by participating in the battle [*People v. Russell*, NY, 1998]
- c) Furtherance of a common design MUST APPEAR for accomplice liability [*State v. Ayers*, IA, 1991]

3. Attendant Circumstances

- a) Silence → ambiguity

4. Conspiracy

- a) People v. Lauria (CA, 1967): Accomplice liability for provider of supplies IF
 - (1) Direct evidence of intention to participate
 - (2) Inference of intention to participate based on
 - (a) Special interest
 - (b) Aggravated nature of crime
- b) Facts
 - (1) Telephone service used by prostitution ring, but no special treatment given

D. Actus Reus

1. Basic Rule: Two ways to render assistance

- a) Helping in physical sense
 - (1) Any aid is sufficient
 - (2) MPC: “aid or attempt to aid”
 - (3) Omission is ACT if legal duty to prevent
 - (a) Typical MPC formulation
- b) Helping in psychological sense by reinforcing will of wrongdoer

2. **NOT** necessary to establish but-for causation for accomplice liability

3. At Common Law

- a) Jazz concert in violation of labor law + cheering + taking advantage for copy → aiding and abetting illegal act [*Wilcox v. Jeffery*, England, 1951]
- b) Preventing warning to victim of murderous posse → aiding and abetting murderous posse [*State v. Tally*, AL, 1894]

4. Presence as Facilitation

- a) Son forcibly rapes family friend in father’s presence → Dad’s silence “facilitated and encouraged” [*State v. Davis*, WVA, 1982]

b) Mother allowed boyfriend to beat her three year old daughter to death, violating a court order to keep BF away from child → accomplice liability [People v. Stanciel, Ill., 1992]

(1) Note: mother was under legal duty to protect child

c) Mother tried to convince daughter that father's sexual abuse was OK → accomplice liability [CG v. State, AL, 2002]

5. Relationship Between the Parties

a) Attempting to rob store w/ police informant + NOT entering store + receiving property handed out the window by informant → NOT accomplice liability [State v. Hayes, MO, 1891]

(1) Rationale:

(a) not complete actus reus of crime himself → no primary liability

(b) didn't share common motive/design w/ entrapping coconspirator → NO accomplice liability

b) public authority justification defense – cops can break the law to enforce it – did NOT prevent accomplice liability → YES accomplice liability [Vaden v. State, AK, 1989]

(1) piloting plane for illegal hunting + actual unlawful shooting done by undercover cop

c) convincing other to commit burglary + telephoning cops while assisting w/ actus reus → NO accomplice liability b/c NO mens rea [Wilson v. People, CO, 1939]

6. Culpable, Unconvictable Principal → still convict accomplice

a) Defendant aided diplomat (who has immunity) w/ espionage → still convict on accomplice liability [Farnsworth v. Zerbst, 5th Cir., 1938]

b) Jury can acquit principal but different jury can convict accomplice [US v. Standefer, SCOTUS, 1980]

7. Defenses Available Only to Accomplice

a) Cannot aid commission of statutory rape upon yourself [Queen v. Tyrell, QB, 1894]

(1) Policy: act creating it was intended to protect young girls, not prosecute them

8. Mens Rea of Principal vs. Accomplice

a) Mental state for aider/abettor + help to kill + principal DOES NOT have mens rea sufficient for conviction → Guilty EVEN IF principal is acquitted [People v. McCoy, CA, 2001]

(1) Principal was shot at earlier; aider convinced him to go back and drove the car; others shot first and principal fired back, killing

XXXVII. Conspiracy

A. Conspiracy Generally

1. MPC § 5.03

a) Establishing a Conspiracy

- (1) Basic Rule: Purpose of facilitating + agrees to participate/agrees to aid + conduct equaling crime/attempt/solicitation
- (2) Scope of conspiracy: extends to parties conspirator has himself conspired with, even if you don't know them
- (3) Multiple objectives → ONE conspiracy IF
 - (a) object of the same agreement OR
 - (b) continuous conspiratorial relationship
- (4) Overt act requirement: Conviction ONLY IF one member has done an overt act in pursuance of the conspiracy
 - (a) Exception: 1st/2nd degree felony

b) Length of Conspiracy

- (1) Ends When:
 - (a) Crime/crimes that are its object are committed OR
 - (b) Agreement is abandoned by defendant + those with whom he conspired
 - (i) No overt act during period of limitation → presume abandonment
 - (ii) Ways for individual to abandon
 - (a) Advises conspirators of abandonment
 - (b) Informs law enforcement authorities

c) Consequences of Conspiracy

- (1) Joint prosecution IF
 - (a) Conspiring w/ e/o OR
 - (b) Conspiracies are so related that they are different parts of a "scheme of organized conduct"
- (2) Joint Prosecution limitations
 - (a) Must be charged in county where he entered/did overt act
 - (b) No liability expanded by joinder
 - (c) No evidence admissibility expanded by joinder
 - (d) Severance IF request + needed for fair determination of guilt or innocence
 - (e) Court shall take "other proper measures" to protect fairness

2. Consequences of conspiracy

a) Jackson in *Krulewich v. US*

- (1) No need to try where the crime was committed
- (2) Can instead charge where any one of the conspirators did any one of the acts
- (3) Charged with hodgepodge of acts
- (4) Statutes cover most evil-doing without needing conspiracy

3. Length of conspiracy

a) Basic Rule: Once formed, a conspiracy remains in effect until its objectives have either been achieved or abandoned. [*US v. Kissel*, SCOTUS, 1910]

b) Caselaw

- (1) NO implicit crime of cover up in every conspiracy [*State v. Rivenbark*, MD, 1987]
- (2) To prove subsidiary conspiracy to conceal: “direct evidence of an express original agreement” [*Grunewald v. US*, SCOTUS, 1957]
- (3) Statements hours after a robbery detailing crime and cautioning against capture were “during the course and in furtherance” of the conspiracy. [*US v. Franklin*, 6th Cir., 2005]
- (4) If cops have frustrated specific objective but unaware criminals have neither abandoned nor withdrawn, the dangers of conspiracy remain as does the agreement to commit the crime. [*US v. Jimenez Recio*, SCOTUS, 2003]

4. Punishment

a) Feds: 5 years regardless of severity of underlying crime

- (1) Exception: limited to substantive crime’s level of punishment IF less than five years

5. Pinkerton Liability: Acts Attributable to All

a) Pinkerton Rule: as long as a conspiracy exists, acts by one member are attributable to all, UNLESS

- (1) Not in furtherance of the conspiracy
- (2) Not within the scope of the unlawful project
- (3) Could not be reasonably foreseen as a necessary and natural coinsequence of the unlawful agreement

b) Pinkerton Extensions

- (1) Reasonably foreseeable actions not within the scope of the conspiracy → liability [*State v. Bridges*, NJ, 1993]
- (2) Hardheaded erratic nature of cofelon made it foreseeable that he might kill someone other than the assigned target [*People v. Brigham*, CA, 1989]
- (3) Lookouts for high level drug deal that ended in shootout → Pinkerton liability for death of DEA agents. [*US v. Alvarez*, 11th Cir., 1985]

c) MPC: rejects Pinkerton by setting out strict conditions for liability

B. Actus Reus

1. Basic rule: Actus reus is conspiratorial agreement

a) Defendant must know essential nature of conspiracy and that its success requires organization wider than personal participation [*US v. James*, 5th Cir., 1976]

- (1) Standard formulation

2. Applications

- a) Unlawful restriction of competition can be drawn from a distributor's open carbon copy to eight competing movie chains + uniformity of action [Interstate Circuit v. US, SCOTUS, 1939]
- b) Mere gang membership during a shootout w/ rival gang is not enough to attribute deaths of victims to any individual shooter in absence of causal evidence for that death. [US v. Garcia, 9th Cir., 1998]

3. Overt Act Requirement

- a) In federal law, no specific mention of overt act requirement for conspiracy → no requirement read in [Whitfield v. US, SCOTUS, 2005]

C. Mens Rea

1. Basic Rule: Purposeful towards facilitation.
2. People v. Lauria (CA, 1967): Accomplice liability for provider of supplies IF
 - a) Direct evidence of intention to participate
 - b) Inference of intention to participate based on
 - (1) Special interest
 - (2) Aggravated nature of crime

3. Facts

- a) Telephone service used by prostitution ring, but no special treatment given

D. Scope

1. Key Issue: Single Conspiracy or Multiple Conspiracies?
 - a) Multiple schemes with one person in common + no proof of single common plan, design, scheme → NO accomplice liability [Kotteakos v. US, SCOTUS, 1946]
 - b) Knowledge that illegal abortionist committed other abortions + conspiracy to send women to him → liability for others who did the same [Anderson v. Superior Court, CA, 1947]
 - c) Drug smugglers + middlemen + two distribution teams in different areas → One conspiracy [US v. Bruno, 2nd Circ., 1939]
2. Level of Knowledge Needed
 - a) Trader A gives stock tips to hooker B who tells trader C, where if A told C it would be insider trading. A is NOT part of the conspiracy. [US v. McDermott, 2nd Circ., 2001]
 - b) Conspirator A passes information to person who was not inside the agreement, but who benefits anyway → NO liability for other conspirators b/c of that passing [US v. Carpenter, 2nd Circ., 1986]
 - (1) 3 possible exceptions
 - (a) Broad scope of the insider trading agreement
 - (i) Ex: specifically say 'we can tell other ppl.'
 - (b) Part of the ramifications of the plan
 - (c) At least known about A's relationship with his friend

E. Parties

1. You cannot be a party to a conspiracy to violate a statute designed to protect you
[*Gebardi v. US*, SCOTUS, 1932]
 - a) In this case: Mann act to bring woman across state lines for immoral purpose
2. Wharton's Rule: Where it is impossible to commit the substantive offense without cooperative action, the preliminary agreement is NOT an indictable conspiracy.
 - a) essentially the merger doctrine for conspiracy
 - b) Examples of offenses
 - (1) Dueling
 - (2) Bigamy
 - (3) Adultery
 - (4) incest
 - c) MPC:
 - (1) Rejects
 - (2) Only make sense to the extent that it avoids double-punishment for a completed crime
3. Bilateral vs. Unilateral View of Agreement
 - a) Bilateral: has to be a genuine meeting of the minds for there to be a conspiracy
 - b) Unilateral: You only need to subjectively believe that you've agreed to do something; the other person can be faking
 - (1) MPC rule
 - (a) Exception: CT and IL
 - (i) Genuine intent to carry out the plan required [*People v. Foster*, IL, 1983]
4. Statute says 'Coconspirator can't be indicted for "any reason" is NO defense' → Unilateral view of Conspiracy agreements
5. Attempted Conspiracy?
 - a) Most jurisdictions: no double inchoate crimes

F. RICO

1. START UP AGAIN WITH ASST 24

Self-Defense

XXXVIII. Self Defense

A. Self-Defense Generally [MPC §3.04]

1. Basic Rule: Use of force + **immediately necessary** to protect self + against **unlawful force** + on the **present occasion** → justifiable
2. Limitations
 - a) Resisting arrest EVEN IF unlawful
 - b) Being used against you to protect property
 - (1) Exceptions to this exception → use of force OK

- (a) Public officer in performance of duties
- (b) Person assisting public officer
- (c) Person making/assisting a lawful arrest
- (d) Unlawful dispossession of property + making a reentry
- (e) Necessary to protect self against death/serious bodily harm

3. Deadly Force

a) justifiable ONLY IF protect against:

- (1) Death
- (2) Serious bodily harm
- (3) Kidnapping
- (4) Sexual intercourse compelled by force/threat

b) NOT justifiable IF

- (1) Purpose to cause death/serious bodily harm + provoked use of force against self
- (2) Can avoid with complete safety by [retreat OR surrendering possession OR complying with demand of non-action + no duty to take]

(a) Exceptions → use of force OK

(i) No obligation to retreat from place of work/dwelling
UNLESS

- (a) Initial aggressor
- (b) Attacked by another who works there

- (ii) Public officer + performance of duties
- (iii) Person using force in assistance of public officer
- (iv) Person justified in using force in making arrest/prevent escape

4. Confinement: acceptable as protective force ONLY IF terminate ASAP unless arrested

B. Use of Force For Protecting Others [MPC §3.05]

1. Justified to protect third party IF

a) 3 Items

- (1) Justified to use force if protecting self [see above]
- (2) Person would be justified in using protective force
- (3) Intervention is necessary for protection of other

b) Vantage point: circumstances as he believes them to be

- 2. No obligation to retreat/surrender possession UNLESS he knows other person's complete safety will be secured
- 3. Person obligated to retreat → force-user must try and cause person to do so before using force
- 4. No obligation to retreat in other's dwelling/place of work

C. Use of Force Protecting Property

1. Use of force justified IF immediately necessary TO
 - a) Prevent/terminate unlawful entry or carrying of possession
 - b) Effect re-entry PROVIDED
 - (1) believes unlawful dispossession
 - (2) immediately or on fresh pursuit of dispossession
 - (3) believes other has no claim + circumstances make “exceptional hardship” to postpone entry/re-entry
2. Limitations
 - a) Request to desist required
 - (1) Exceptions
 - (a) Request would be useless/dangerous/substantial harm would come to the property before request would be made
 - b) Exclusion of trespasser would cause trespasser serious harm
 - c) Believes entry re-entry is unlawful + made on behalf of person who was actually dispossessed + re-entry is compliant with provisions above
3. Deadly Force: justifiable ONLY IF
 - a) Attempting to dispossess of dwelling otherwise than claiming possession OR
 - b) Person trying to consummate arson/burglary/robbery/other felonious theft AND
 - (1) Employed/threatened deadly force in presence of actor OR
 - (2) Use of other force would expose actor to substantial danger of serious bodily harm
4. Confinement: acceptable only if terminate ASAP unless arrest
5. Use of Device to Protect
 - a) Requirements to use these justifications
 - (1) Not designed/known to create risk of death/serious bodily harm
 - (2) Reasonable under the circumstances
 - (3) Customarily used + reasonable attempt to make known to probable intruders
6. Use of force to pass wrongful obstructor
 - a) Purposeful/knowing + unjustifiable obstruction from place actor may lawfully go → use of force is justifiable PROVIDED
 - (1) Actor thinks obstructor has no claim of right to obstruct AND
 - (2) Actor thinks land isn't in possession of obstructor
 - (a) Exception :urgency that it wouldn't be reasonable to postpone entry
 - (3) Force not greater than justifiable if obstructor would justifiably use

XXXIX. Generally

A. Legislature didn't intend to let unreasonable person go free b/c use of deadly force seemed reasonable to him at the time [*People v. Goetz*, NY, 1986]

1. Kid asked for \$5 on the subway; Goetz started blasting away

XL. Battered Women's Syndrome

- A. BWS testimony is admissible if it's relevant to the claim of self defense [*State v. Kelly*, NJ, 1984]
 - 1. Relevant in this case b/c woman thought husband was about to kill her and BWS testimony would help establish that, if believed
 - 2. BUT: "we do not mean that the expert's testimony could be used to show that it was understandable that a battered woman might believe that her life was indanger when indeed it was not"
- B. BWS relevant b/c would help jury figure out whether defendant reasonably perceived that this kind of violence was different and potentially deadly [*People v. Humphrey*, CA, 1996]
- C. Inevitable death is distinguishable from imminent death for self defense purposes and BWS testimony is inadmissible to show the former proposition [*State v. Norman*, NC, 1989]
 - 1. Wife shot husband while asleep
- D. Battered child ambushed father → no self defense instruction [*Jahnke v. State*, WY, 1984]

XLII. Limitations

- A. Neither aggressor nor mutual combat → duty to retreat [*State v. Abbott*, NJ, 1961]
 - 1. Authorities were split
 - 2. Restrict to use of deadly force; normal force is acceptable
- B.

XLIII. Protection of Property

Law Enforcement

XLIII. Use of Force in Law Enforcement

- A. Basic Rule: Making/assisting arrest + believes immediately necessary to effect arrest → use of force is justifiable
 - 1. Limitations – Must be fulfilled
 - a) Actor makes known purpose of arrest OR believes it is otherwise known OR cannot reasonably make it known AND
 - b) Valid warrant/believed to be valid warrant
- B. Deadly Force → Justifiable ONLY IF
 - 1. Felony arrest AND
 - 2. Arrestor authorized to act as peace officer OR assisting person s/he believes to be a peace officer
 - 3. Believes that force creates no substantial risk to innocents
 - 4. Believes that the crime involved use/threat of deadly force OR believes there is a substantial risk person will cause death/serious bodily harm if apprehension is delayed
- C. Escape from Custody
 - 1. Justifiable when it could have been used to effect the arrest
 - a) Exception

- (1) Peace officer + immediately necessary + prevent prison escape → any force, including deadly force

D. Assisting Arrest

- 1. Person called to assist unlawful arrest → use any force necessary to effect a lawful arrest PROVIDED believes arrest to be lawful
- 2. Private person helping private person OR entering unassisted → any force necessary to effect a lawful arrest PROVIDED
 - a) Believes arrest is lawful AND
 - b) Arrest would be lawful if the facts were as intervenor believed

E. Preventing Suicide/Commission of a crime

- 1. Use of force justified IF immediately necessary to prevent suicide/commission of a crime EXCEPT
 - a) Limitations elsewhere in chapter apply AND
 - b) Deadly force never justified UNLESS
 - (1) Substantial risk to another + no risk to innocent persons OR
 - (2) Necessary to suppress riot
- 2. Extends to use of confinement as preventive force ONLY IF termination ASAP

Necessity

XLIV. Necessity Generally [MPC §3.02]

- A. Necessary to avoid harm/evil → Justifiable IF
 - 1. Avoided harm is greater than law-breaking done to avoid
 - 2. Code does not have exceptions/defenses on point
 - 3. Legislative purpose to exclude justification does not already appear
- B. Creating situation: Reckless/negligent in creating situation + recklessness/negligence sufficient for culpability in offense being defended against → No defense
- C. Appraising situation: Reckless/negligent in appraising situation + recklessness/negligence sufficient for culpability in offense being defended against → No defense

XLV. Caselaw

- A. Threat to kill inmate → necessity instruction is appropriate [*People v. Unger*, IL, 1977]
 - 1. Failure to tell cops is relevant, not dispositive
- B. Prerequisite to necessity in prison escape is trying to surrender or return as soon as the duress/necessity lost its coercive force. [*US v. Bailey*, SCOTUS, 1980]

Duress

XLVI. MPC § 2.09

- A. Coerced by use/threat of unlawful force against person or other + person of reasonable firmness couldn't resist → affirmative defense

1. Exception:

a) recklessly placed self in situation making duress probable

b) negligently placed self in situation + negligence sufficient for crime

B. No defense that woman acted at command of husband

C. No prejudice to necessity defense

Insanity

XLVII. MPC § 4.04

A. Lack capacity to understand proceedings/assist in defense → NO trial/conviction/sentencing
as long as capacity endures