**CRIMINAL LAW**

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# PURPOSES

* **Deterrence**
  + We should punish as much as will deter people from committing future crimes
    - Utilitarian calculus: People calculate pleasure vs. pain (Bentham)
  + For effect, potential criminals need **notice and credibility** (i.e. believes he could be captured and punished)
  + Problems
    - Hazy calculus involved: Is the emotional killer or the premeditated killer more deterrable? What about the drunk driver versus the premeditated killer?
    - Not much evidence that people actually consider getting caught/punished when they commit crimes. Not fully rational actors.
* **Rehabilitation**
  + We should punish as much will rehabilitate the criminal
    - Crime committed due to societal influences, not inherent evil
    - Tailor punishment to circumstances with parole boards to analyze rehabilitation
  + Problems
    - How do you rehabilitate someone? CrimJus system currently isn’t set up for rehabilitation – see, e.g. prisons are hellholes that promote criminal behavior
    - High racial, SES, and inter-judge disparities in1960s/1970s
    - High recidivism rates showed that it wasn’t working
    - Paternalism (we know what’s best for you)
  + Law: Punishment cannot be exclusively given for rehabilitation (SCOTUS)
* **Retribution** 
  + We should punish as much as people are morally culpable
    - Moral responsibility of criminal (Moore)
    - Typically focuses on DF’s ability to choose to commit the crime
  + Problems
    - How do we calculate moral culpability? Subjective, external value judgments.
    - How do we calculate appropriate (proportional) punishment? Unless literally eye-for-an-eye we are forced to translate (monetary theft translated into prison time)
    - Encourages moral condemnation of criminals – problems of the moral/social condemnation lead to lack of work and more likely to recidivate
  + Relatedly: **Social Cohesion**
    - Punishment as a statement of social values (Durkheim)
* **Incapacitation** (Dilulio)
  + We should punish as much as is necessary to incapacitate the person from committing further crimes
    - CBA – society spends $X to imprison person and stops him from committing criminal activity which costs society $Y. Imprison where Y>X.
    - Criminal propensity based on age (20-35 prime years, rare over 40).
    - Requires identifying those people likely to recidivate and imprisoning them more than others (or assuming that all people who commit Crime Y are equally likely to recidivate)
  + Problems
    - **Replacement effect** (especially in drug crimes)
    - **Prison conditions** (cultivate criminal behavior)
    - May struggle to take into account other costs as a result of imprisonment – e.g. costs of recidivism (see **prison conditions**), costs to social services to inmate’s dependents, costs of social services to inmate if released (because his employment options will be limited), and costs to those who will have to take care of inmate post-release, and loss of efficiency in his working/skill development.
* Relevant Policy Considerations
  + Proportionality of punishment to culpability
    - E.g. contra Lesser Crime Theory
  + Notice to individuals that their behavior is criminal
  + Placing duty on 3d parties
    - Cardwell – (AR omission) stepmother guilty of husband’s abuse of his son
  + Require action - don’t punish guilty thoughts or moral obligation

#AR

# #VOLUNTARY ACT

DF must have committed voluntary *act* to be culpable.

* **MPC 2.01 (Majority):** Only one element must be voluntary
  + Exceptions (Involuntary Act Defense):
    - Reflex
    - Unconscious or sleeping
      * Includes physical action where not conscious (Newton)
        + Newton: DF shot victim after receiving a shot to the abdomen, which DRs said was an unconscious reflex. NG.
        + Yang Hypo: What if Newton had a medical condition of uncontrollable rage whenever seeing a LEO?
    - Hypnosis
    - Otherwise not the product of effort or determination.
* **Martin Rule (Minority):** Every element of offense must be voluntary.
  + Martin: DF drunk on public highway after being carried there by LEO. NG because appearing in public place (an element) was not voluntary. *Perhaps so strict because CT concerned about Martin being dragged to highway by LEOs.*

# #OMISSION

DF did not act where he had a *duty* to act.

* What Creates The Duty?
  + **MPC Rule 2.01** – Liable where omission of action when:
    - Statute
    - CL duty to act (e.g. special relationship)
  + **Jones Rule** **(Majority)** – Liable where omission of action when:
    - Statute
    - Status (e.g. special relationship)
      * Parent to child, husband to wife, master to apprentice (Jones)
      * Non-traditional family?
        + Carroll: Yes - stepmom DF has duty to stop husband from killing his son.
        + Miranda: No – live-in bf DF doesn’t have a legal duty.
    - Contract
    - Voluntary care and seclusion from others
  + Create peril via crime (Jones - Indiana)
  + **NOT** only moral obligation
    - Jones: DF was providing for a family friend’s child, which dies due to lack of care. Disputed evidence regarding whether there was a contractual relationship. Remanded for findings.
    - Pope: DF invites mother & victim to house; witnesses and doesn’t stop a savage beating that results in victim’s death. Statute creates duty only when responsibility for supervising child (mother was still there).
    - Beardlsey – DF fails to help mistress while she’s committing suicide. No legal duty to her simply because she’s in his house.
* What Must Action Be? Steps that are **reasonably calculated to be successful**. (Cardwell)
  + Cardwell: DF took only nominal steps to stop her child’s abuse. G.
* Good Samaritan Laws
  + Only in 6 states
  + Developed to counteract the **“Bystander Effect,”** whereby no bystander acts because each thinks someone else will do something. “Deputizing” the public (but risk to autonomy). Kitty Genovese situation.
  + E.g. Vermont Good Samaritan Law
    - Know that person is exposed to great physical harm
    - No peril to self or interference with important duties
    - No assistance or care being provided by others.
  + Policy considerations
    - Selective prosecution
    - Evidentiary concerns
    - High tort liability if NPS.

#MR

You must have MR to have culpability and must have requisite MR for all elements of the crime.

# MPC STANDARDS (MAJORITY)

* If **one** culpability is stated, it applies to all material elements
* If culpability is **undefined**, purpose, knowledge, or recklessness apply
* Requirement is satisfied by those above it – e.g. purposeful conduct satisfies recklessness
* **Not adopted in the federal**, but it is considered persuasive (e.g. SCOTUS relies on knowledge standard re: willful blindness in Jewell but adds requirement that DF take steps to avoid knowledge)

|  |  |  |  |
| --- | --- | --- | --- |
| **#Culpability** | **Conduct** | **Attendant Circumstances** | **Result** |
| Purpose | DF’s conscious object is to engage in such conduct | DF is aware of, hopes, or believes that the circumstance exists | DF’s conscious object is to cause this result |
| Knowledge | DF is aware that his conduct is of this nature | DF is aware that the circumstances exist | DF is aware that the result is practically certain |
| Reckless | DF consciously disregards a substantial and unjustifiable risk that he is engaging in this proscribed conduct | DF consciously disregards a substantial and unjustifiable risk that the proscribed circumstances exist | DF consciously disregards a substantial and unjustifiable risk that the result will occur |
| Disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe, considering the DF’s purpose and circumstances known to him | | |
| Negligence | DF fails to recognize a substantial and unjustifiable risk that he is engaging in this conduct | DF fails to recognize an unjustifiable risk that the proscribed circumstances exist | DF fails to recognize a substantial and unjustifiable risk that the result will occur |
| The failure to recognize the risk, given the DF’s purpose and the circumstances known to him, involves a gross deviation from the standard of care a reasonable person would observe. | | |

# COMMON LAW #CL

* When statute is silent for a CL crime MR is **intent or recklessness** (awareness of but disregarded risk that result would occur – imputed intent of *natural and probable consequences*)
  + Faulkner: Statute w/o intent requirement defaults to **intent** or **recklessness** (imputed intent from knowledge of probable result) .
  + Cunningham: “Malicious” MR in S means **intent** or **recklessness** (via academic)
  + Morissette: presumption for MR in CL crimes, but statutory silence in public welfare and regulatory crimes may be construed for SL consistent with legislative purpose.
* When a Federal statutes is silent, MR should be read as “knowingly”
* Negligence standard
  + Civil Negligence: Deviation from the standard of care. E.g. AK (Hazelwood): Civil negligence standard because there is a reasonable expectation of **deterrence** through lower standard
  + Criminal Negligence: **Gross deviation** from standard of care. E.g. NM (Santillanes): Criminal negligence standard due to **moral condemnation** of crime

# WILLFUL #BLINDNESS

* **MPC** – Knowledge when DF is aware of a **high probability** of a fact’s existence, *unless* **actually believes** that fact doesn’t exist.
* **Federal** (Jewell and Giovanetti) – Knowledge when:
  + DF subjectively believes in a high probability that fact exists
  + DF takes deliberate actions to avoid learning the truth.
    - Giovanetti: Deliberate action requires more than failure to investigate due to lack of curiosity (leased house to gamblers and never checked it/NG).
    - Jewell: Courier knew of secret compartment and facts suggested weed, but never investigated. G.
      * D (Kennedy) wants exception for those that truly believe fact doesn’t exist

# LESSER CRIME THEORY (#LCT)

* The MR of a lesser crime is imputed to the greater realized crime
* Generally Rejected
  + Cunningham: CT overrules trial judge’s reliance on LCT (DF intended to steal gas meter; released gas kills neighbor. NG of homicide.).
  + Faulker: CT rejects GVT’s reliance on LCT (DF intended to steal rum, but started a fire that destroyed the ship. NG of destruction.
* CT accepts
  + Olsen: In a statutory rape case, because mistaken world and actual world were both crimes DF is found guilty of *more serious* crime. (MPC only makes guilty of *lesser* crime)
    - Olsen: DF thought girl was 16yo, she was 13yo. Both are crimes. Because even his mistaken world was a crime, G of more serious crime. LCT. Plus S interp:
  + Felony Murder Rule is an application of LCT.
* Policy considerations
  + Deterrence (don’t do crime at all, even minor crimes)
  + BUT disproportionate for culpability

# STRICT LIABILITY #SL

* Decision tree
  + Is S clear about culpability? (If so, follow that)
  + If no, crimes **with CL analogue** require MR (Morissette/Staples)
    - Crimes without CL analogue **MAY** be SL
      * Where Congressional purpose (Dotterweich) OR clear intent (Staples)
    - SL is **disfavored**, but *may* be allowed when DF has notice he is dealing with a dangerous thing (Staples) (e.g. Freed)
* Presumption for a MR requirement in CL crimes (Morissette)
  + Read presumption of MR to each S element (X-Citement Video)
    - X-Citement Video: DF ships child porn but doesn’t know it’s child.
* Public welfare and regulatory crimes, not existing in CL, **MAY** be read to have SL
  + If consistent with legislative purpose (Morissette)
    - Balint: SL for drug offense because of Congressional **deterrence** purposes
    - Dotterweich: SL for public health because **deterrence** (places burden on innocent party with greatest opportunity to gain knowledge) (Tort-like)
  + BUT this is **disfavored**, want clear statement from legislature (Staples)
    - Limits to when DF has notice he is dealing with dangerous character? (Staples)
      * Staples: DF unknowingly has an unlawful gun; requires MR (firearms are super common)
      * Freed: DF unknowingly has an unlawful grenade; SL (dangerous).
* **MPC:** SL only for crimes with civil penalties
* Policy considerations:
  + Higher penalties for CL crimes require more protection
  + CL gain historic presumption of MR
  + Social benefit for SL in regulatory and public welfare
    - Places burden on party with greatest opportunity to learn and manage risk (Dotterweich)
    - PW/Regulatory can have many victims, while CL more likely to have one or few
    - New crimes designed by legislatures to alter social behavior, SL better **deterrent**
  + BUT: SL doesn’t punish culpability, empowers those with discretion, and erodes presumption for innocence.
  + Canada burden shifts to DF, requiring proof of reasonable care. SL requires clear legislative intent. (City of Sault Ste Marie)

# #MISTAKE

* **MPC** **Rule:**
  + Ignorance/mistake of fact is a complete defense if it negates the required culpability
  + If still guilty of a lesser crime in ignorance/mistake, guilty only of **that lesser** crime.
* **Common Law**: Generally, a reasonable mistake of fact exonerates requirements of specific and general intent.
  + **Statutory rape**: If ignorant/mistaken would still be a lesser crime, guilty of charged crime (LCT) (Olsen)
    - Olsen: DF thought girl was 16yo, she was 13yo. Both are crimes. Because even his mistaken world was a crime, G of more serious crime. LCT. Plus S interp:
      * Textualism: S allows for reduced sentence for good faith violators, so legislature contemplated.
      * Purposivism: High penalty to crime shows purpose of **deterrence** (protecting young children)**,** and allowing mistake wouldn’t serve purpose.
        + Contra Staples, which used high penalties of CL crimes to support MR (heightened punishment = heightened need to punish *culpability*).
    - 30 jurisdictions make statutory rape SL; 3 allow reasonable mistake.
      * SL reflects legislative purpose to protect young people (Garnett/Olsen)
      * BUT racial disparities in enforcement (black male, white victim

#Homicide

* Any act (or omission, where a duty) that results in death of a human
* Do we have too many grades/degrees? Can we expect actors in crimjus to adjudicate effectively?
* Homicides peaked in 1990s.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Common Law Category | Intended Killings | | Non-Intended Killings | |
| COMMON LAW | MPC | COMMON LAW | MPC |
| First Degree Murder | Premeditation, Deliberation, & Willfulness | Purposefully or knowingly | Statutory predicates of felony murder | N/A | |
| Second Degree Murder | Intentional | Purposefully or knowingly | Depraved Heart, Felony Murder | Recklessly under circumstances manifesting extreme indifference to the value of human life (presumed for certain felonies) |
| Voluntary Manslaughter | Heat of passion | EED | HEAT OF PASSION | EED; |
| Involuntary Manslaughter |  | | Gross Negligence | Criminal Negligence |

# #MURDER

**Killing with *malice aforethought***

* Malice aforethought – **Intentional** killings with actual malice or implied malice (e.g. reckless conduct like depraved murder)
  + US legislatures divided into degrees – by 1950s majority of US jurisdictions had done so. At the time, 1D received capital punishment; so narrow the crimes that fit there.
    - 1D – Purposeful w/ premeditation
    - 2D – Intentional w/o premeditation (e.g. in the moment killings)
      * Intent to cause SBI (Serious Bodily Injury)
      * Felony Murder
    - California
      * 1D – Homicide by *certain means*, for *certain felonies*, or by deliberation/premeditation.
      * 2D – Residual
    - Pennsylvania
      * 1D – Intentional
      * 2D – Engaged in or accomplice to a felony
      * 3D – Residual
    - New York
      * 1D – 2D murder when victim is specific people or DF is serving life
      * 2D – Intent to cause death, depraved heart, or in the course of committing certain felonies

Premeditated Murder (1D)

* **Common Law**
  + *Murder (homicide with malice aforethought) that is premeditated, deliberate, and willful.* What constitutes premeditation?
  + **Carroll Rule**: **No time is too short**, no need to plan.
    - Carroll: 5ms between provocation and killing. G of 1D. After argument, DF shoots wife in back of head while she’s asleep and then takes body to the dump.
    - BUT: No functional difference between premeditated 1D and provoked 2D?
  + **Guthrie Rule**: Must have an **opportunity for reflection**; **some period** between intent to kill and actual killing. Need *evidence* of DF consideration and weighing decision.
    - Guthrie: DF with history of being teased is being teased by victim & stabs him. No premeditation; G of 2D.
  + **Anderson Categorical Test**
    - Evidence
      * Prior actions that show planning
      * Prior relationship to establish motive
      * Manner of killing (e.g. makeshift weapon)
    - 1D when very strong evidence of 1 **OR** 1+2 **OR** 2+3
* **MPC Rule**
  + 1D when **purposefully** OR **knowingly** OR **recklessly** with extreme indifference (assumed for attempted or commission of robbery, rape, arson, burglary, kidnapping, or felonious escape.).
* Policy considerations to requiring premeditation
  + **Deterrence** – Very difficult to deter an immediate, emotional killing. So punish a mercy killing (Forrest) with 1D while a horrific emotional killing (Anderson) receives 2D.
  + **Retribution** – Someone who plans to killing is more culpable than someone who merely loses his temper.
  + BUT **Incapacitation –** More necessary to incapacitate a the kind of person likely to kill emotionally than someone who kills in very particular circumstances (although he has a very depraved heart).
  + Other factors to 1D? Cruelty, youth of victim,, risk to others, prior record, etc.

Depraved Heart Murder:

* **Common Law**
  + *Involuntary* homicide with **gross recklessness** (reasonably anticipate that death to another is likely to result)
  + Malone: Russian roulette kids. G of 2D because 60% chance of death (actually 33%).
    - Consent isn’t a defense to homicide and extreme assaults.
    - No idea of contributory negligence (each wrong is independent)
  + Fleming: Drunk/speeding DF kills woman. Malice imputed from reckless, wanton, and **gross deviation** from standard of care. **Inferred awareness** of great risk.
    - Effects of intoxication under **MPC** - Intoxication cannot negate recklessness (unless actor would have been unaware of risk while sober) **(Majority**)
    - Policy Considerations to making murder vs. negligent homicide
      * Deterrence – impute higher culpability
      * Perverse result if lower punishment while driving drunk
      * Social Cohesion: Statement about norms via legal fiction
  + CTs struggle to define gross recklessness
    - Conscious of risk? (Under MPC, maybe not under CL)
    - Inference of consciousness from degree of risk (e.g. speeding while drunk in Fleming) How to calculate degree?
* **MPC Rule (210)**
  + 1D when recklessness (aware but disregard) with extreme indifference (imputed from certain felonies)

## Intent to Cause SBI

* + **Common Law:** *Involuntary* homicide treated as murder in some CL jurisdictions. Infer malice aforethought for murder.
  + **MPC:** Does not exist

**#Felony Murder** – *Involuntary* homicide during commission or attempted commission of a felony (SL, no MR – version of LCT) **#FMR**

* **Statutory** or those that are Inherently dangerous, in furtherance, and not merged.
* Does not apply when DF has come to a **“safe haven”** or “come to rest” after felony.
* Predicate felony must have ***causal relationship*** with death (Stamp)
  + Stamp: DF enters business w/ intent to rob when victim has a heart attack.
  + Don’t need foreseeability or natural/probable (i.e. notions of proximate causation)
  + Where co-felons, both are implicated
    - **Minority:** Affirmative defense if didn’t know of co-felon’s intent
* Predicate felony must be **inherently dangerous (ID)**
  + **Majority:** If felony was dangerous in the **particular** case.
    - Stewart: Woman on crack binge neglects child. Child neglect was inherently dangerous in this particular case.
    - **Hines Rule**: If circumstances create **foreseeable** risk of death or **dangerous per se** (certain felonies).
      * Hines: DF, a convicted felon, accidentally shoots friend while hunting. Drinking, shot during dusk at unknown target = foreseeable risk of harm.
        + Dissent: Would require a **high probability** that death would result
  + **Minority**: If felony is dangerous in the **abstract** (higher bar – Judges attempting to narrow FMR because of concern with applications)
    - Phillips: Grand theft with fake medicine; dangerous in particular but not inherently dangerous in abstract.
  + What is inherently dangerous? More dangerous than reasonable?
    - Henderson: False imprisonment is not ID because the statutory elements (violence, menace, fraud, or deceit) include non-ID elements.
* Homicide must be **in furtherance** of predicate felony
  + **Agency** Theory (Majority): The shooter must be the felon, co-felon, or agent.
    - Canola: During burglary, co-felon and storeowner kill each other. FMR only for death of store owner.
      * Concurrence: Look to identity of decedent (i.e. innocent person gets FMR, co-felon doesn’t)
  + **Proximate cause** Theory (Minority): When killing is a foreseeable risk of the felony
  + Courts use agency theory to restrain FMR.
* **Merger Doctrine** (essentially removes assault and forms of homicide)
  + Felony cannot be predicate unless it has an **independent purpose** (Burton)
    - Merge where purpose is to injure (E.g. AWDW). Would include conspiracy?
    - Don’t merge where **independent purpose** from injury. (e.g. armed robbery)
      * Burton: Armed robber given FMR, but Court sees as independent purpose.
  + **Assaultive Elements** (Chun) - Merge felony where its *elements* are assaultive (threat of immediate violent injury) in nature.
    - Chun: Drive by shooting, but DF says only shooting to frighten. Despite DF’s claim, elements of offense itself are assaultive.
      * Overrules Robertson: DF claimed he was only discharging firearm to frighten; defense indicates independent purpose.
  + Old version: Felony cannot be predicate when it is an **integral part of homicide** AND is included **in fact** (Ireland)
    - Included infact: i.e. assault only when assault with a deadly weapon. Ireland: Without MR, AWDW would always be murder – no ability for mitigation to manslaughter.
    - Wilson: Burglary with intent to commit AWDW merged.
    - BUT Farley: **Felonies enumerated** in legislation don’t merge.
  + **Policy Considerations**
    - Policy of FMR is to **deter** felons from negligent or accidental killing with SL. Doesn’t apply to people with purpose to injure.
    - CTs implement MR because FMR leads to odd, unjust results. FMR eliminates opportunity for mitigating circumstances (e.g. MR defenses).
    - BUT Merger leads to perverse result: the more dangerous crimes (AWDW) merge and the less dangerous crimes (armed robbery) are left to FMR.
* **Policy Considerations**
  + FMR limits the evidentiary burden and gives power to prosecutors. Judges hate.
  + Retribution: Introduces great fortuity to culpability. Punishes the results rather than the DF’s conduct/intent. BUT victim doesn’t care about fortuity.
  + Incapacitation: No justification.
  + Deterrence
    - Heightened deterrence to felonious conduct, but why not increase the penalties for the underlying offense? Disparate punishments.
    - Deters risky behavior during felony – but it’s likely that a felon isn’t considering penal sanctions. Better to align penal code with culpability to be more “common sense” for notice purposes.
  + Evidentiary concerns: DF could eliminate evidence of intent by killing individual.
  + History - Arose in CL during 19th century, when only a few felonies. But when grading was introduced in 20th century felonies increased and Stamp rule (only a casual relationship needed) increased applicability
* **MPC Rule:** Not an independent rule, analyze through categories. However, MPC has presumption of super recklessness (gross indifference) for certain felonies: robbery, rape, arson, burglary, kidnapping, or felonious escape.

# VOLUNTARY MANSLAUGHTER (#VM)

* **Common Law:** Provocation as mitigating defense to murder
  + Adequate Provocation
    - Provocation to inflame the passion of a **reasonable man** AND causes action from that passion. (Girourd)
      * **Traditionally**: extreme assault or battery, mutual combat, illegal arrest, injury or serious abuse of a close relative, sudden discovery of adultery. (Girouard)
        + **Words**: Words are sufficient provocation only if accompanied by conduct that shows intent and ability to bodily harm DF (Girourd)

BUT: **Minority**: Informational words are sufficient

* + - * Loosely subjective – many courts consider the physical attributes and experiences but exclude psychological traits. Girouard: “Does not focus on particular frailties of the mind.”
      * Girourd: Wife taunts man; he stabs her 19 times with knife hidden under pillow. G of 2D/No provocation.
    - AND **must actually have provoked** (Subjective provocation)
    - **Evidence**: Allow jury to hear evidence of provocation unless no reasonable doubt (Maher)
      * Maher: Man shoots alleged adulterer after hearing rumors about wife.
      * Are we concerned this allows in community biases (e.g. homosexual provocation), and if so, should we ask for judge to set aspirational norms for community? If so, questions about legitimacy, capacity (can a judge actually do this?), and paternalism.
  + Without Cooling Time – after cooling time, no more provocation defense
    - Gounagias: “Victim” sodomized DF, bragged about it for weeks. 2wks later DF kills victim. Murder because cooling time killed provocation.
      * BUT shitty understanding of provocation. The offense was not just the sodomy – it was the sodomy + repeated acts of public humiliation.
    - Bordeaux: DF informed about rape of mother; kills eight hours later. Too much time.
* **MPC Jurisdictions (Minority):** Murder underExtreme Emotional Disturbance (#EED)
  + **MPC:** Manslaughter when DF under **EED** for which there was **a reasonable explanation**.
    - 5 adopted in whole, 12 use EED with variations (e.g. Casassa).
    - (1) Did DF *in fact* react with EED?
    - (2) Was the EED reasonable for *man in DF’s situation?*
      * Not wholly subjective: Casassa: Jilted lover becomes obsessed. G of 2D; situation too unique to DF (NY makes affirmative defense (BOP on DF))
  + EED eliminates cooling time and allows, potentially, for mounting stress.
* Policy Considerations
  + Provocation and EED mix objectivity and subjectivity. How much should the DF’s individual situation be allowed to seep in? E.g. cultural norms. BUT notice and standard issues.
  + Women in DV: Reasonable person, reasonable woman, or reasonable battered woman?

# INVOLUNTARY MANSLAUGHTER (#IM)

* **Common Law** 
  + Homicide when DF has been **grossly (criminal) negligence**
  + In MA: Homicide when DF conduct is wanton/reckless (**was** or **should have been** aware of **a grave danger** but acted anyway).
    - Welansky: Nightclub overcrowded, locked exits – people trampled during fire.
  + **(Rare)** Ordinary negligence sufficient for involuntary manslaughter
    - Williams: In good faith, parents fail to take child with toothache to Dr and it dies. Convicted of Involuntary Manslaughter.
* **MPC Rule:** 
  + Manslaughter when reckless(i.e. requires consciousness of risk)
    - Substantial risk can be less than 50% (Hall: substantial risk where skier was going fast and uncontrollably, even though only 2 people out of 17M visitors had died in similar incident)
  + **Negligent Homicide:** Homicide when committed negligently.

# CAPITAL PUNISHMENT

* History: Capital punishment was originally mandated for murder. Gradings were introduced to avoid. Now, juries have discretion in whether to impose, but used to have complete discretion.
* Constitutional DPC challenges failed
* 8A challenges
  + Furman: Strikes down death penalty as unconstitutional
    - **Per se** violation (accepted by 2 justices in Furman)
      * Must confront original meaning (capital crimes existed in 1789)
    - **As administered** violation (accepted by 3 justices in Furman)
      * Furman: Strikes down death penalty because it was so rare, juries received no direction, so that receiving it was freakish, arbitrary, and discriminatory.
  + Massive political support post-Furman. States introduce reforms to get it back.
    - Mandatory capital punishment (e.g. in NC): **No;** must be individualized
    - Guided discretion (Majority): reaction to Furman saying that death penalty was inconsistent
    - Bifurcated Trial: Separate guilt and sentencing phases with (typically) same jury. Sentencing receives detailed consideration, including evidence otherwise not admissible.
    - Narrowed murder categories through aggravating (gov’t must find one) or mitigating factors (finding reduces)
    - Appellate review of death penalty
  + Gregg: reintroduces death penalty
    - Contemporary Standards
      * **Retribution**: Expression of moral outrage at murder (eliminates self-help). Court sees retribution as strongest argument. Dissent thinks WTF bro.
      * **Deterrence**: Defer to legislature in making decision. Studies are mixed, not likely that murderers weigh costs of getting caught.
    - Not Excessive
      * Not unnecessarily painful
      * Not disproportionate to offense
  + Lockett: Sentencer must be allowed to consider mitigating factors (character, etc)
* Limits
  + Offenses
    - No rape (history of racial disparities)
    - FMR only if DF did killing and intended to kill
  + Offenders
    - No mentally regarded (Atkins) – Less culpable, less deterrable.
    - No persons under 18 (Roper)
      * Court looks at
        + National consensus: 30 states prohibited; trending downward.
        + Distinguished from adults

Juveniles are immature

More susceptible to peer pressure

Ill-informed personality traits

* + - * + Less culpable, less deterrable, more rehabilitatable
* Death Penalty and Race (McCleskey)
  + Prior cases argued that racial bias violated EPC 14A and 8A, but Court argued that murder rates or types of murders were the difference. DF brings Baldus study.
  + Rejects EPC 14A claim – No evidence of discrimination in this particular case
  + Rejects 8A claim – Not as systemic as Furman defects. Concerned about slippery slope – statistical discrimination can be everywhere, for many crimes and factors.

#Rape

* Sexual penetration without consent
* Historically promoted female chastity, no rape within marriage. Mistrust of victims is inherent in rape law (hard to prove at trial, especially with different evidentiary rules). Out of **100** rapes: **32** reported, **7** arrests, **3** prosecutions, and **2** convictions.

# CONSENT STANDARDS

* **Non-Consent**
  + **Majority**: Rape requires **force** AND **non-consent** (w/ resistance) (Rusk)
    - **Force –** Either actual physical force (aberrational to sex) or constructive force (threats of SBI). (Alston)
      * Alston: DF pushes girls legs apart. Not force.
    - **Resistance Requirement** for non-consent – presumes consent (Rusk)
      * **Resistance** – for notice to DF of lack of consent; OR
      * Failure to resist due to **reasonably grounded, genuine fear** of death, SBI, or overwhelming fear.
    - Rusk: DF takes victims car keys in unfamiliar neighborhood, applies light choking to neck. Jury could reasonably see as force and fear of death.
      * Dissent wants active resistance – honorable women resist
* **Affirmative Consent (Minority):** Rape unless DF could **reasonably believe** victim had given **affirmative consent** (MTS)
  + Consent = words or actions that a reasonable person would see as consent
    - BUT what if words and acts are contradictory?
  + Eliminate force requirement
  + MTS: Victim doesn’t consent – no evidence of force or threats and only verbally non-consented after act, at which point he complied. No evidence of consent.
  + Most feminists oppose because it exaggerates female powerlessness
* The more ill-defined we leave consent, the more we allow in non-consent, the more honest mistakes will result. Culpability won’t align with punishment.

# MISTAKES OF FACT

* **Majority:** Honesty and **reasonableness** in mistake as an affirmative defense. Honest but *unreasonable* mistake is treated as intent (other than in AK). However, Courts seem to find that you can’t be reasonable if receive verbal negative (Sherry) or if force is used (Fischer)
  + Sherry**:** DF contends for consent despite victim’s verbal protests. Mistake of fact a defense only with reasonableness, but unreasonable to believe in consent after ***verbal negative*** consent. (later overruled – SL in MA)
  + Fisher: In PA, mistake of fact allowed in date rape (contra stranger rape). No mistake of fact ***if force*** was used.
  + What kind of reasonable person? Reasonable man? Reasonable woman?
* **Minority**: Strict liability (e.g. MA)
* No mistake of fact defense in statutory rape (Olsen)

# PROCEDURES

* Much of rape law is shaped by procedure, not substantive law.
* **Corroboration requirement**: Victim’s testimony must be corroborated. Used to be majority, now 13 states in inherently unreliable situations.
* **Prompt Complaint** 
  + **MPC:** Requires complaint within 3mo of rape
  + Most states have moved away from requirement, but still very common in practice. Prosecutors less likely to bring claims that aren’t promptly reported.
  + Date rapes often go unreported, while stranger rapes are more likely to be prompt.
* **Cautionary instruction**: DF instructs jury to exercise caution (atypical today)
* **Rape Shield Laws:** Limiting use of victim’s sexual history
  + Historically, a victim could be asked anything. Juries more likely to indict when a victim was a virgin than when she had a sexual history.
  + Today, no general admissibility of evidence.
    - Sexual history cannot be used to establish credibility
    - No general reputational evidence (like promiscuity)
    - Limits admissibility of specific instances of prior sexual conduct. Allowed:
      * Sexual history with DF
      * Explanatory evidence against government introduced evidence (e.g. alternative source of semen)
      * Evidence to impeach witness or show bias (DeLawder)
        + DeLawder: Can introduce evidence that shows victim was pregnant (and wanting to blame DF), to discredit victim’s testimony.
    - Pre-Trial hearing with judge about what evidence is admissable

# 

#Defense

# SELF-DEFENSE #SD

Common Law (Majority) (Peterson)

* **Imminent** **deadly** (or SBI) force from threat against DF
  + SBI: Could include breaking a finger.
  + Inevitable death is not imminent death (BWS)
    - Norman: DF with long history of abuse, and failure of options to allow her to escape, kills husband while sleeping. VM; not given perfect or imperfect SD instruction because no imminence.
* **Necessity** – DF honestly and *reasonably* believes force is necessary; DF must take alternative if available (Peterson)
  + Goetz: Reasonable man in DF’s *situation*. Will consider:
    - Circumstances facing DF
    - Relevant knowledge he had about other party
    - Physical attributes of parties
    - Prior experiences of DF that would form reasonable basis for belief about victim’s intentions
    - Goetz: DF, who had been mugged before, approached by youths in subway. He believes they will rob him and shoots them dead. Wanted to kill them. Later acquitted.
* **Proportionality** – DF’s response must be proportionate to threat (Deadly force only where death/SBI)
* Duty To Retreat
  + **Castle Doctrine:** No duty to retreat if inside dwelling or home. No duty to retreat from co-occupant in most states. Lessens BW ability to act in SD.
    - Some courts expand to places like workplace
  + **Initial Aggressor:** No SD claim for initial aggressor. Must communicate intent to withdraw and attempt to go so in good faith..
    - Peterson: Victim begins verbal altercation, prepares to leave. DF gets pistol; brandishes. Court considers brandishing a new altercation (lapse in time)
    - Allen: DF pursues partner to her car, where she stabs him with a rake. She follows, she brandishes rake; she shoots. DF was initial aggressor in following.
  + **Stand Your Ground Laws:** No DTR when attacked at a place where *you have a right* to be, so long as DF believes it is *reasonably necessary* to prevent death/SBI or prevent commission of a forcible felony.
* **Imperfect SD**: When SD fails, DF gets manslaughter (voluntary or involuntary). Other states give murder or attempted murder.

MPC Rule 3.04 (Minority):

* When DF believes (subjective, in-fact) that force is **immediately necessary** to protect against unlawful force
  + **Imperfect SD**: When **mistaken** AND belief was **recklessly** or **negligently** formed: can only be charged with those types of homicide (IM or NH).
* **Deadly force** only when DF ***reasonably believes*** threat of death, SBI, rape or kidnapping.
* Duty To Retreat
  + DF uses **deadly force** (death or SBI); AND
  + DF knows (subjective, in-fact test) he can avoid necessity of using force **with complete safety**
    - Abbott: Scuffle occurs as a result of DF, victim brings hatchet. Victim so excited, he didn’t retreat (although he probably would have been safe).
  + Exceptions for **Castle**, **workplace**.

## Related Doctrines

* Statutory broadening of SD
  + **MPC:** SD when DF *reasonably believes* death, SBI, rape or kidnapping.
  + Goetz: NY allows SD when DF *reasonably believes* certain felonies (including robbery).
  + **Castle Doctrine:** Can use deadly force if any threat to property or personal safety.
  + **Policy Considerations**: Violations of proportionality because legislature places a higher value on personal autonomy/property or stress deterrence.
* **Battered Women**
  + Background: 20% of women will be abused in their lifetime. Some jurisdictions have mandatory prosecution or mandatory arrest where reported, but takes away victim’s agency and decreases reporting.
    - BW SD: 80% of cases are direct confrontation. But 8% sleeping husband, 8% unaware husband, and 4% contractual killings.
    - **BWS:** Cycles of tension, battering, and contrition plus social pressures lead women to remain. **BW go through cycle twice.**
      * Critiques: Not peer reviewed, doesn’t fit most cases neatly, no explanation why some BW kill and why most don’t.
  + **Reasonableness:** Every court allows evidence of BWS to establish reasonableness (i.e. reasonable person)
    - Relevant to the **honesty** and **reasonableness** of belief in threat (Kelly)
    - Kelly: What kind of expert testimony is allowed:
      * Testimony to explain reasons for DF’s failure to leave husband
      * Testimony that DF had BWS and what that meant.
      * BUT Expert cannot comment on **reasonableness** of that belief or what, in fact, the DF **believed**.
  + **Imminence:** Inevitable death is not imminent death.
    - Norman: DF with long history of abuse, and failure of options to allow her to escape, kills husband while sleeping. VM; not given perfect or imperfect SD instruction because no imminence.
    - Sands: DF beat for 15 year (the morning before he pushed her down the stairs and fired two shots at her head). Kills with five shots. No SD where no imminence.
* **Protection of Property**
  + Common Law
    - Deadly force can be used to stop any felony against real property.
    - Non-deadly force can be used to stop imminent taking of property
  + **MPC 3.06**
  + Ceballos: DF may use deadly force against **atrocious or forcible felonies** that create a **fear** (in particular case) of great bodily harm
    - So no trap guns (no opportunity for discretion in use)
    - Ceballos: After many thefts of DF’s home, he set up a trap gun. Two unarmed boys open door and are shot. No defense – nobody home to be fearful.
    - BUT: CA later creates **presumption of satisfactory fear** when someone unlawfully enters and DF knew or had reason to know that it was unlawful
  + Colorado “Make My Day” Law – no requirement for fear when someone enters home or car
* **LEO Deadly Force**
  + CL allows LEOs to shoot fleeing felons
    - BUT felonies have dramatically changed (used to be capital)
  + Garner: LEO may use deadly force when:
    - **Necessary** to prevent escape of unarmed suspected felon
    - Probable cause that suspected felon poses **significant threat** of death or SBI
    - Garner: LEO tells victim to stop as he is escaping; shoots when climbing over fence. TN S allows LEO to use force so long as he announces force beforehand.
    - What is deadly force? 9th Cir – police dog is not deadly force

# #NECESSITY

* Not recognize everywhere (50% if juris); most by S and some by CL (e.g. federal)
* **MPC** **Rule (3.02) -** Defense when**:** 
  + Threat of harm to self or another
  + DF believes is necessary
  + Choose lesser harm over greater harm
  + S is silent on the specific situation
  + No legislative purpose would militate against
  + BUT cannot have recklessly or negligently created situation requiring choice
* **Federal** via CL (Schoon)
  + Choose **lesser** evil between choice of evils
  + Act to prevent **imminent** harm
  + **Reasonably anticipated** direct casual relationship between act and harm’s end
  + No legal alternatives
* New York Law
  + Harm to be avoided is grave
  + No prior fault of DF (may included negligence)
  + Emergency/imminent harm
  + Benefits clearly outweigh the harm
  + DFs belief is reasonable (at the moment) and right (ex post)
* Prison escape
  + Lovercamp factors for prisoners (Unger: **Relevant**; Need not all need be met]
    - Specific and immediate threat of death, sexual assault, SBI
    - No time for complaint (or history of futility)
    - No time or opportunity to resort to justice system
    - No force or violence used on innocent
    - Immediate report to authority when at place of relative safety [SCOTUS – must make good faith effort to report].
  + Unger: DF threatened before transfer and did not report (fears reprisal). Assaulted and molested. Received call threatening death, and he escapes.
  + Sanction behavior when gov’t has failed in its responsibility, but tension with desire to limit justifications (and worries about encourages escapes based on personal beliefs). Dissent in Unger: Sanction reform as means to hasten prison reform.
* Civil Disobedience: No federal necessity for indirect civil disobedience (i.e. breaking a law that is not the object of the protest). (Schoon)
  + Schoon: DFs break into IRS office to protest some foreign intervention. No necessity.
  + Policy: Necessity is a utilitarian analysis; allowing impunity to break law solely for protest is too high a cost and indirect protests are less likely to change the law.
* Economic necessity: Not a thing, you Bernie Bros.
  + Southwark: Homeless DFs squat in empty houses; no great or imminent danger.
* Necessity is typically not a defense for homicide (Dudley), although Dudley was based on the selection of the youngest/weakest and the selection by lots may have allowed?
* **Torture** 
  + Public Committee Against Torture (Israel case): Necessity could be used to torture (e.g. ticking time bomb). Ex post authorization!
  + Torture Memos: Torture based on likelihood of person having information; likelihood of attack x the anticipated harm

# #DURESS

* **MPC Rule** (2.09): Defense when coerced to commit crime by:
  + Use, or threat of use, of unlawful force
  + Against person or person of another
  + That person of **reasonable firmness** *in his situation* would not resist
  + BUT Not if DF **recklessly** placed himself in situation where probable duress would occur (or negligently if negligence is sufficient culpability).
* **Common Law:** Threat or use of harm that is present, imminent, and pending and of such nature to induce a **well-grounded** apprehension of **death/SBI** (in self – maybe close relative)(Toscano)
  + Threats must be inescapable (or must make **good faith efforts to inform the police**)
    - Toscano: DF conspires to obtain money, thought he would be in harm if he didn’t participate (no direct threat). Harm not imminent enough.
    - Must have **reasonable** opportunity to escape. Contento-Pasham: DF swallows cocaine balloons, but doesn’t go to LEOs because he thinks they are corrupt.
  + Some jurisdictions emphasize **strict temporal immediacy**: E.g. Fleming**:** DF is POW in Korea: cooperates in propaganda upon threats of forced marches and imprisonment. Must have come to the “last ditch.”
  + **Contributory fault:** Duress is unavailable when DF voluntarily joined a criminal organization that he knew would bring him under pressure to commit an offense.
* Many jurisdictions prohibit use of duress when it leads to homicide.
  + E.g. Erdemovic – low ranking soldier in Serbian Army during Srebrenica, told to kill civilians or he would be killed. Given only 5 years, but cannot use duress.
* No defense based on positive inducements (worried that this will open the floodgates).
* Innocent Pawn Doctrine – Duressor is guilty of crimes that duresee commits.
* Duress versus necessity – some jurisdictions treat as mutually exclusive, MPC doesn’t (allows when lesser evil). Duress can only be established through a “do it or else” command.

# #INSANITY

* Practically less than a complete defense: Acquittal by reason of insanity often means mandatory civil commitment (often for quite some time). Sometimes guilt is better option.
* Separate from **competence to stand trial.** Competence is determined at the time of trial as a procedural right, while insanity looks to commission of act as a substantive protection.
  + Competence hearing: Can DF understand nature of criminal proceedings? I.e. what is the role of the judge, jury. If not competent, must release or civil commitment.
* **Civil commitment**: for *mentally ill and presently dangerous*. Committed person must establish sanity by clear and convincing evidence (Historically was indefinite with BOP)
* What about a “Guilty but insane” plea? Punishment wouldn’t be that different, and allows for social cohesion of conviction and reduces jury anti-nullification.

M’Naghten Rule (Majority)

* Presumption for sanity; To rebut, DF must prove (at time of crime):
  + No **knowledge of wrongfulness**; OR
    - E.g. “Killed victim because God told me”
  + No knowledge of **nature or quality** of act
    - E.g. “Thought squeezing lemons but choking a person
  + M’Naghten: DF went to shoot the PM because he had delusions of persecution. Found NG and outcry leads Lords to decide this as an advisory case.
* **Federal Insanity Defense** (Post-Hinckley)
  + Standard
    - As a result of **severe** mental disease or defect
    - At time of offense
    - **Unable** to appreciate nature and quality of wrongfulness
    - Analysis: Raises bar on mental disease, eliminates “substantial” requirement, and makes binary (able or unable). No volitional prong.
  + **Presumed sanity** (like M’Naghten) DF must prove insanity by clear and convincing evidence.
    - Pro: Brings in line with other affirmative defenses, DF most likely to have evidence of insanity, and allows DF control over medical reports
* **Irresistible Impulse**: Insanity defense where DF has mental disorder and criminal conduct is a consequence of an irresistible impulse of that disorder (*sometimes added to M’Naghten*)
* Factors often overlap – attempting to discern moral culpability of conduct. Shift to scientific analysis – e.g. McNaughton used experts to testify. Dominant test until 1940s and later resurrected.

MPC Rule(15 states today):

* As a result of mental defect or disease
* At time conduct occurred
* Lack **substantial capacity** to
  + Appreciate wrongfulness of conduct; or
  + Conform conduct to law (*volitional* – similar to irresistible impulse but focus on long-term ability over short-term impulse)
* Excludes mental disease abnormally expressed in criminal or anti-social conduct (e.g. sociopaths)
* Blake: DF has long-term psychiatric problems. Robs bank then goes to court. Adopts MPC “substantial” because it better reflects current mental illness medical ideas.
* Lyons: DF had mental defect from drug use. **5th Cir drops volitional prong**. Psychiatrists can’t discern those who can’t conform from those who do not conform.

#Liability

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  |  | **ATTEMPT** | | **ACCOMPLICE** | | **CONSPIRACY** | |
|  |  | MR | AR | MR | AR | MR | AR |
| CL | **Conduct** | Specific intent to commit crime | >Substantial step  >Dangerous Proximity | Intend to aid/abet | Aid/Abet (deprive of one chance of life) | Purpose of agreeing to crime | Agreement AND overt act |
| **Result** | Same as for offense |
| **Circumstance** | Same as for offense |
| Notes |  |  | >Luparello: expanded liability for foreseeable  > Sliding Scale (Fountain) |  | >Lauria rule for knowledge when stake in venture (felonies) | >Pinkerton: expended liability for furtherance and reasonably foreseeable  >Alvarez: expanded Pinkerton |
| Scope – Wheel or chain | |
| MPC | **Conduct** | Purpose to commit | Substantial step in commissionf | Purpose of facilitating P1 in crime | Aid/abet offense | Purpose of agree to the crime | Agreement to commit AND overt act (except for 1D or 2D felonies) |
| **Result** | Purpose, Knowledge | Same as for offense |
| **Circumstance** | Same as the crime | Blank (purpose or same as crime) |
| Notes |  |  |  |  | Scope – individualized inquiry | |

# #ATTEMPT

* Salient in crimes with a result element – e.g. element of homicide is that death results; element of robbery is that property is taken. Practically: Often a misdemeanor. Often given lower (50% or below) punishment than full crime. **MPC** requires same punishment for 2D and below, but even then, attempted cases are more rarely brought or given lesser sentences. Charged attempts are almost completed.
* Spanning the Gap with substantive crimes of preparation.
  + Burglary: Breaking in to commit a felony
  + Anti-stalking statutes
  + Loitering or vagrancy statutes
* Policy Considerations
  + Deterrence – Why punish the same conduct/MR with a lesser charge?
  + Incapacitation – Maybe failures are less dangerous because they are worse criminals or less likely to actually crimes. Maybe more dangerous because failed and will try again.
  + Concerns about fortuity introduced into punishment (e.g. FMR)
    - BUT Law emphasizes consequence: In an attempt, less harm has – in fact – occurred.

## Mens Rea

* **Common Law** 
  + DF has **specific intent** (natural/probable consequences) to commit the crime (in conduct, result, and circumstances)
  + Smallwood**:** HIV positive man rapes women without condoms. Not attempted murder – death is not natural and probable consequence of rape.
  + Thacker: DF shoots at light in tent, but no specific intent to kill her.
  + **Minority (2 states)**: Attempt if DF takes a **substantial step** towards commission.
  + Culpability Gap – specific intent is required for attempted murder charge, but isn’t required for actual murder charge. Why? Results actually matter. Concerns Yang.
    - E.g. Hypo: DF puts a bomb on a plane but has no wish to injure the passengers. Knows the passengers will die if it went off mid-air. If bomb goes off – murder. If no death – No attempted murder under specific intent rule. Gap!
* **MPC 5.01** 
  + **Conduct**: Purpose
  + **Result**: Purpose/Knowledge
  + **Circumstance**: Same as crime

## Actus Reas

* **Common Law**
  + **MPC Rule** (majority)
  + **Dangerous Proximity Rule (Minority):** Any act that has a reasonable proximity to commission of offense but for timely interference
    - Rizzo: DFs looking for victim when they are stopped by LEOs. Not enough for attempt – hadn’t located victim and had opportunity to commit crime.
    - Bell: DF agrees to pay for sex with 4yo. Never paid or saw child; not enough.
  + ***Vast* Minority:** Must take **final step** (preserve opportunity to repent)
    - BUT Barker: Rejects final step, but vague “between first and final step” rule.
* **MPC 5.01** (Preparation versus attempt) **(Majority)**
  + ***Substantial step*** (strongly corroborative of purpose) in commission
  + About distance from intent, rather than distance from completion (as Rizzo), and what actor has already done rather than what actor will do.
    - Jackson: Reconnaissance of bank and purchasing/possessing robbery paraphernalia are each substantial steps. DFs would have assaulted but for LEOs.
  + **Abandonment (Minority) –** Affirmative defense when circumstances manifest **voluntary** and **complete** renunciation of criminal purpose. Cannot be because of heightened chance of detection.

# #ACCOMPLICE

* Theory of liability, not a separate substantive offense. Cannot be punished as a principal and accomplice. Versions: Accessory before the fact, principal in the 2d degree, accessory after the fact (usually treated as obstruction of justice).

## Mens Rea

* **Common Law** 
  + **Conduct** must **intend to have encouraged or aided** the offense (Hicks) – not just incidental encouragement.
    - **Result** and **Circumstance** are same as for object offense (McVay)
    - Hicks: DF riding with murderer, laughs during it. No evidence of intent.
    - **Nexus Rule**: DF must **associate** himself with venture (purpose insufficient)
      * Gladstone: DF tells criminal informant where he can buy marijuana, draws map to house. Insufficient because no evidence of nexus. Court views nexus as evidence of purpose; but is nexus a higher bar (i.e. purpose alone is insufficient?)
  + **Luparello Rule (Minority):** Purpose to aid/abet a crime entails liability for all **natural/probable consequences** and **foreseeable** crimes that actually result
    - Luparello: DF sends friend to find info “at any cost” and friend kills guy. G of 1D – sending a crazy friend reasonably results in death.
    - Roy: DF recommends informant purchase gun from person, who robs the informant. NG of robbery – sale of handgun qualitatively different from robbery.
      * Raises Luparello standard – not liable for any conceivable event.
  + **Sliding Scale** (Posner): Lesser crime requires purpose; a more serious crime may require only knowledge of
    - Fountain: DF helps principal get shiv; guilty of murdering guard.
  + Statutes may reduce MR to knowledge by adding facilitation offenses. I.e. Know that terrorist + send material = offense. Gap filling.
* **MPC (2.06)** 
  + **Conduct:** Purpose of promoting/facilitating principal in object crime
  + **Result:** Same as object crime (Roebuck)
    - Roebuck: DF participants in ambush but doesn’t shoot the victim. Has requisite MR to involuntary killing with malice.
  + **Circumstance:** MPC leaves intentionally blank. Left it up to the courts; purpose OR same as object crime.

## Actus Reas

* **Common Law**
  + **Aid and/or encourage** principal’s offense
  + Must have at least one *hypothetical* effect (deprive of one chance of life) (low bar)
    - **Presence** is sufficient. Wilcox: DF attended unlawful performance; presence and payment are sufficient for accomplice encouragement. Presence for protesting would be different.
    - Act **without principal’s knowledge** and didn’t **actually** make crime easier. Sufficient because deprived victim of one chance at life. (Tally)
      * Tally: Prevention of warning telegram, but principals didn’t know DF would help and it probably didn’t make a difference. G.
    - Failed aid? No liability under CL, because no deprivation of a chance of life**.**
* **MPC:** Aid/abet principal’s offense (doesn’t care about effect).

Derivative Liability:If principal is innocent, accomplice liability cannot attach. (Hayes)

* Hayes: P is working for victims to set up DF, so despite requisite MR and AR DF isn’t an A.
  + Yang: DF should have been charged with attempt
* Greater or lesser culpability of P? - What is the rule here?
  + Richards: Wife orders SBI on husband, but principals do less. Wife cannot be found guilty of a greater offense than the Ps.
  + McCoy**:** Principal claims imperfect SD and receives manslaughter, while accomplice is convicted of murder.
* Innocent agent (e.g. duress): Liable when causes an innocent person to engage in conduct.
* LEO-exclusive justifications don’t impute to DF. E.g. Vaden: DF flew LEO around, who illegally shot foxes. LEO uses law enforcement justification, but DF is still G. Court deferring to law enforcement.
* **Victim liability** (e.g. statutory rape): No - MPC: If crime requires 2 parties but S only criminalizes one behavior, no accomplice liability.

# #CONSPIRACY

* Substantive offense (and a theory of liability)
  + Statutory: Most statutes have a conspiracy offense with a certain punishment for all crimes, although some statutes vary.
  + Fills the culpability gap of attempt, which makes it hard to charge before the actual harm occurs. Results matter!
  + Under **MPC**, you cannot be convicted of both conspiracy to Crime X and Crime X. In **CL**, you can be convicted of both.

## Mens Rea

* **Common Law:** DF must have the **purpose of agreeing** to a crime
  + **Lauria Rule (Minority):** Knowledge can suffice for intent when:
    - Inference of intent by:
      * Special interest in activity
        + State in venture (Falcone)
        + No legitimate use for goods or services
        + Volume grossly disproportionate to legitimate demand (Direct Sales)
      * Aggravated nature of the crime itself (i.e. **just for felonies**)
    - Lauria: DF operates a callboard that prostitutes use. No evidence intent.
  + Want to impose duty to investigate only for more serious crimes (personal autonomy)
* **MPC 5.03 (Majority):** DF must have the **purpose of agreeing** to a crime

## Actus Reas

* **Common Law: Agreement** and an **overt act**
  + Agreement: **Tacit agreement** can suffice (Interstate Circuit) Difference between parallel action and conspiracy?
  + Interstate Circuit: Letter sent to different businesses about anti-trust scheme. Only evidence of agreement is a letter addressed to all DFs and parallel action.
  + BUT Garcia: Shooting at a gang party; evidence DF shot but no evidence of murder. Mere gang membership or supporting gang members in fight insufficient for conspiracy, must show plans for fight. Mere parallel action.
  + **Withdrawal –** requires DF to directly tell co-conspirators of withdrawal and MAY require reporting to LEOs
* **MPC 5.03:**  **Agreement** AND **overt act** (except for serious crimes, 1D and 2D felonies)
  + **Withdrawal**  - requires DF to manifest renunciation of criminal purposes AND prevent commission of criminal objectives.

## Scope of the Conspiracy

* **Common Law**
  + **Pinkerton Rule**: Conspiracy exists until it is revoked. Conspirators are liable for the crimes *of co-conspirators* when:
    - Crimes were in the **furtherance of conspiracy**
      * Bridges eliminates this requirement in NJ. DF and acquaintances get guns to intimidate, but they fire into crowd; conspiracy.
    - Crimes were **reasonably foreseeable**
      * Pinkerton: DF imprisoned after forming conspiracy. Co-conspirator continued committing crimes. Never knew of plans, but still guilty.
      * Alvarez: Drug buy leads to shootout. Murder against conspiracy (even lookouts and people not there) because a shootout is *reasonably foreseeable* for large drug buy when knowledge of 1) guns and 2) force would be used to protect interests.
      * Brigham: DF agrees to kill a man, accidentally identifies a kid as the man, 2d party kills him. Reasonably foreseeable that erratic man would kill someone other than target.
    - **Withdrawal:** Must take affirmative steps to disavow or defeat purpose of conspiracy to be released from expanded liability.
  + **Expanded Pinkerton –** Conspirators liable for all **reasonably foreseeable** crime of co-conspirators. Some jurisdictions follow Alvarez limitation: Does not apply to **minor players** or people with **no actual knowledge** of the circumstances.
    - Alvarez: Drug buy leads to shootout. Murder against conspiracy (even lookouts and people not there) because a shootout is *reasonably foreseeable* for large drug buy when knowledge of 1) guns and 2) force would be used to protect interests.
    - Brigham: DF agrees to kill a man, accidentally identifies a kid as the man, 2d party kills him. Reasonably foreseeable that erratic man would kill someone other than target.
  + How to conceive of conspiracy?
    - DFs want to have many conspiracies so they have as few connections to crimes.
    - **Wheel Analogy**: Many people coordinating with one person (spokes of a wheel – all different conspiracies), but no contact with each other (rim – would unify)
      * Kotteakos: Many people place fraud order with one person, no contacts with other people. Like selling to a fence.
    - **Chain Analogy**: When DF participates in one part of conspiracy, but form a link of broader chain. E.g. manufacturers, distributors, and sellers.
      * Bruno: Drug conspiracy involving smugglers, middlemen, and retailers – only links had contact with each other. Infer agreement because each knew and were dependent upon success of chain. Two groups of retailers assumed to be in cooperation.
      * BUT Borelli: Purchase is insufficient to establish a conspiracy without other evidence of an understanding. Argues that analogues are confusing and meaningless – e.g. often spokes at the end of chains (manuf or sellers)
    - Knowledge of broader scheme imputes agreement with it (and conspiracy)
      * Anderson: DF one of many people referring women to abortion doctor. Agreement/conspiracy inferred because she *must* know other women were doing the same thing.
* **MPC 5.03 (Minority)**
  + **Individualized**; who did DF agree to commit a common criminal objective (and *if know* of additional conspiracies with co-conspirator for crime)
    - McDermott: DF commits insider trading with lover, who gives it to *her* lover. Conspiracy only with lover because specific agreement, no knowledge that 3d party existed.

# #WHITE COLLAR CRIME

* Characteristics of white collar versus street:
  + Non-violent
  + Deception/deceit involved
  + Often for monetary gain
  + Planning and deliberation
  + Usually not professional criminals
  + Abuse of power or trust
* Challenge: Know what happened and who did it (which is the challenge of street crime); must prove intent and whether it was a crime.
* Offenses are defined by broad statutes, which give the prosecutor a lot of discretion.
  + Extensive use of grand jury, so defense attorney is involved in stopping the indictment.
* Operations are often large, complex.

#Discretion

# #POLICE DISCRETION

* A criminal statute will be **unconstitutional for vagueness** when:
  + Fails to provide kind of notice that will enable someone of ordinary intelligence to understand the conduct it prohibits
  + Authorize or encourage discriminatory enforcement (through vast LEO discretion)
    - I.e. Statute must provide **standards to govern exercise**. (Papachristou)
* Papachristou: Municipal vagrancy ordinance prohibits a broad swath of behavior, including wandering or strolling, that implicates housewives and country club guests. Used against two interracial couples driving in Florida (concerns of racial implications). Casts an incredibly broad net and then lets LEOs choose offenders. History of vagrancy laws being used to control socially unpopular groups.
* Morales: Loitering ordinance prohibits loitering with a suspected street gang member. Loitering is defined as “remaining in one place without an apparent purpose.”
  + Arbitrary Enforcement: This is so broad, applying to innocent conduct and any person having a conversation with a suspected gang member, that it gives complete discretion to LEOs. No limits, no standards.
  + Lack of notice: History of loitering statutes being upheld only when they have an additional act – if the additional act is refusing a police order, then the loitering itself is lawful and the order is a deprivation of liberty.
  + Stuck down, but Chicago later updates loitering to mean “remaining in a place with purpose or effect of enabling gang intimidation over territory” and restricted its application to certain areas of Chicago.
* May have **facial** (it *never* provides adequate notice or standards) or **as applied** challenges.
  + Papachristou: Struck down facially
  + Morales: Struck down facially
* **Policy Considerations**
  + Without standards governing exercise, statutes become a tool for police enforcement against undesirable groups. (Papachristou)
  + Why doctrine of notice?
    - Adjudicatory – Need crime to be delineated sufficiently for a fact-finder to determine culpability of DF
    - Prosecutor – Need crime to be delineated sufficiently for prosecutor to know when DF committee crime
  + Benefits of Ordinances – street crime was at an all-time high in Chicago and communities were trying to find preventative measures. Way of reducing gatherings of gang members. Broken Windows policing “substantiates” – communities that have small chaos will soon have a broken social order as people stop caring about maintaining it and criminals become emboldened.
  + Loitering/vagrancy laws are ways to fill gap in policing before harm occurs, like burglary and conspiracy. Requires balancing of prevention and limits to person’s autonomy.
    - BUT discriminatory impacts? New York conducts “stop-and-frisks” – 2.8 million over 6 years, at least 60,000 are unconstitutional because only based on “Furtive” movements. Racially based? Disparate impact?
  + Papachristou viewed police discretion as per se bad – negative effects of racism, while Court in Morales viewed police discretion as a good thing within limits.

# #CHARGING

* Around 5% of charged cases go to trial.
* Prosecutorial discretion: prosecutors decide **what** and **how** to charge, shaping how plea bargaining progresses and constraining the courts (e.g. mandatory minimums).
  + Decisions are both factual and normative – a) did DF commit murder and b) should defendant’s conduct be considered murder?
  + Role of personal qualms? Most prosecutors won’t bring it if they have a doubt. Others may be constrained by resources and unable to bring despite belief in guilt.
* Public or third parties may not **compel prosecution** (Attica)
  + Attica: Inmates attempt to compel prosecution of state figures for use of force in prison riot.
    - Judicial review is difficult – records are secret and reviewing could release damaging information
    - Judicial legitimacy (SOP) and competence (what to look for?)
  + Alternatives
    - Mandatory prosecution for enumerated crimes
    - Charging guidelines with internal review
    - In Europe, private individuals can bring charges and prosecutors can be forced to issue opinions about why they didn’t bring charges, subject to judicial review. E.g. M.C. v. Bulgaria. Much harder here – elected prosecutors and system is adversarial.
* **Selective prosecution** claims are very difficult (Armstrong)
  + Must show discriminatory effect and discriminatory purpose
  + To get discovery, must show that similarly situated DFs of other races were not charged.
    - DF substantiated with affidavit of cases that were all black (but didn’t show non-black people not charged). Plus not all past cases were black (though all were minority). Insufficient – court is concerned about harassment of offices.
  + Only one successful selective prosecution case in history (in 1886)
* Prosecutorial Discretion
  + Prosecutors are limited or empowered by democratic system
  + Present to grand jury, which has investigative powers. Very low bar for indictment (not adversarial). DOJ has implemented rules.
    - Standard: Probable case (not likely to serve as protection)
    - Can issue subpoenas
    - Hearsay evidence is allowed
  + Effect of grand jury is to prevent the absurd cases – it requires the prosecutors to consider the case within the context of the (low) hurdle

# #PLEA BARGAINING

* Pleas
  + **Open Plea:**  Plead guilty to everything charged, can occur up to the verdict. Advantages: potential concessions from prosecutor or judge, worried about particularly bad facts before jury, rapidity in processing.
  + **Plea Bargaining:** Pleading guilty to get something in return.
    - **Charge Bargaining:** Reduce charges if plead guilty to lesser charges.
    - **Sentencing Bargaining:** Reduce sentence if plead guilty to charges.
  + **Alford Plea**: DF pleads guilty for a lower sentence but maintains his innocence. DA’s hate this and won’t offer sentencing concession.
  + **NOLO Plea:** No contest – DF accepts charges but does not accept responsibility. No need to find factual basis, so no preclusion for civil liability. No sentencing concession.
* In most jurisdictions, the bargaining is wholly in the hands of the prosecutor. Prosecutor negotiates with defense counsel. At sentencing hearing, before judge, DF pleads, questioned by judge (voluntary), and prosecutor presents facts to substantiate charge.
  + If prosecutor withdraws his promise, DF may withdraw his guilty plea.
* Prosecutorial coercion in plea-bargaining
  + Brady: What is required to waive right to jury trial:
    - Voluntary [**with counsel**], and
    - “Knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.” (Brady)
  + Role of defense counsel:
    - Inform DF of consequences (especially collateral consequences)
    - Inform DF of the validity of the charges
    - Court views counsel as key to voluntary plea-bargaining. We are concerned about the **coercive power** of the prosecutor. E.g. Brady forbids mental and physical coercion to induce a plea. But counsel only explains the coercive nature of the plea; he doesn’t eliminate it. Indeed, explaining it can often enhance the coercive nature (by showing how fucked the DF really is).
  + **Overcharging**: allowed so long as there is **probable cause** for a charge. BUT prosecutor cannot threaten to charge third persons. (Bordenkircher)
    - Bordenkircher: DF writes a small bad check, prosecutor threatens (and later brings) a charge that would mandate life-in-prison.
  + Brady/Bordenkircher leaves open challenge of **trial penalty** (i.e. receive a higher sentence for going to trial)
* Policy Considerations – Courts see a mutuality of advantage in plea-bargaining.
  + What about advantages/costs for third parties, especially the public? Costs are saved on the front end (trial costs) and back end (reduced prison costs due to lower sentences).
  + Are there perverse incentives for the repeat players involved (prosecutor and defense attorney)? Is the cost-benefit analysis being warped by other factors?
    - Both repeat players have incentives to clear their cases as quickly as possible – prosecutor because he has a heavy caseload and defense attorney because it’s cost prohibitive to go to trial.
    - RPs have and develop working relationships, meaning prosecutor can punish a defense attorney for pushing too hard with one client.
  + The myth of bargaining power: prosecutor holds information (police), power, resources, and charging imbalances over the defense. Defense has few cards it can play.
* **New Orleans system** – screening process with more investigation in DA’s office. Charge the right level and refuse to plea bargain. More trials. Politically difficult to uphold (NOLA DA is a special case – had a lot of political capital and was very effective).
* **Philadelphia system** – Waive right to a jury by going to a bench trial, but DF can still confront witnesses. Still get procedural rights while saving time and cost to DA’s office.

# #JURY TRIAL

* **Federal and majority of states:** 12 person juries; most require unanimous decisions.
  + 12 is not Constitutionally required (6 is allowed) and, in some states, unanimity isn’t required (10-2 or 11-2 allowed).
  + Duncan: Denying a jury trial violates fundamental fairness under 14A.
  + Policy Considerations
    - Defense against arbitrariness, abuse of power.
    - Represent the community. 12 people can make better decisions.
    - Value of legitimacy and community coming together.
    - BUT Slows down the system (which be an advantage?)
* Assembling the jury:
  + For cause challenges
  + Preemptory challenges (cannot be racial or gender discriminatory)
  + For capital cases: Jury must be both death- and life-qualified.
* Jury Nullification
  + Jury nullification: finding NG despite evidence that would be sufficient to convict.
    - If a jury acquits someone, the judge may not set aside the verdict (double jeopardy).
    - Has been used positively (Fugitive Slave Law) and negatively (lynching)
  + Should juries be informed of their ability to nullify?
    - **Majority**: No – would invite chaos and anarchy (Dougherty)
      * Dougherty: Protestors wanted jury to be instructed about power to nullify.
    - DC Ethics: In representing clients, attorneys can hint at nullification (can make collateral arguments that encourage) but cannot tell about jury nullification.
  + Judges have power to take away jury nullification through **special verdicts.**

# #SENTENCING

* In most criminal cases, the DFs are guilty (or plead guilty). They go to sentencing hearing – DF can speak to judge; very symbolic moment.
* Can stack sentences as long as one element is different, dramatically increasing the length of the total sentence.
* Pre-1970s – **Indeterminate sentencing**. Statutes had statutory maximums and no minimums; judges have complete discretion under maximum. Almost unreviewable – judge doesn’t have to justify their decision. **Parole boards** have a lot of power.
  + Judges receive a pre-sentencing report (typically cursory assembled by police or probation officer). No evidentiary protections (judges could consider things that could not be properly brought at trial). Upheld in Williams, which found that this information was important for rehabilitation.
    - No longer good law for **capital cases**, which are now frequently held in bifurcated trials with same evidentiary protections.
  + BUT **Liberal critics** fear disparities between judges and between DFs because of implicit biases. Concerns about judicial review and transparency. **Conservative critics** fear skyrocketing crime rates/recidivism and are worried about lenient judges and parole boards. Rehabilitation isn’t working.
* “Reforms” in and post-1970s
  + **Mandatory minimums**
    - Vasquez: DF has very troubled history (sexual abuse, mental illness) – assists brother in heroin; mandatory minimums would give 10 years but he pleads to 5 years. Judge perceives as unjust and wants to take mitigating factors into account.
    - Policy consideration: Doesn’t result in equitable outcomes – same crime, same outcome. Doesn’t eliminate the disparities and flaws of discretion – just move to another actor (prosecutor)
      * BUT Is this bad? Prosecutor is elected, more accountable than judges.
  + **Determinant sentencing** – *mandatory guidelines regime* via independent sentencing commissions. Formulaic exercise for judges (See sentencing chart). Introduces appellate review.
    - Offense level: Severity of the offense; e.g. use of gun?
    - Criminal history
  + **Abolish Parole** – “Truth in sentencing” is the ideal, leading to formulaic parole guidelines that require DFs to serve 85% of total sentences.
  + Complaints
    - Reforms are widely opposed by federal judges (see Vasquez) because they eliminate discretion and reduce them to bureaucratic cogs.
    - Sentencing considers entirely of conduct, not just what DF has been charged with. BOP is only a preponderance of the evidence. This means that acquitted conduct can be used at sentencing, and sometimes prosecutors with withhold evidence until sentencing.
* Reforms in 2000s.
  + **Advisory Guidelines** 
    - Judge must **calculate** the guidelines
    - Judge **does not have to follow** (*although usually does*)
    - Background
      * Any fact that raises sentence **above statutory maximum** (Apprendi) requires proof by a jury or a plea bargain; i.e. judge cannot be held to mandatory sentencing regime that varies from facts found by jury or plead to (Blakeley)
        + In 2013, Court found that any facts that **raise the statutory minimum** must be found by a jury or plea (Lane?)
      * In 2005, Court ruled that mandatory sentencing guidelines were unconstitutional unless found in bifurcated trials. As a consequence, federal and state moved to advisory guidelines.
  + **Proportionality Requirements** 
    - **Test for proportionality (**Ewing)
      * Threshold: Is sentence grossly disproportionate?
        + Gravity of offense and harshness of penalty
      * If so, look at sentences to inter- and intra-jurisdictional DFs
        + Berger: DF given 200-year sentence for child pornography (stacking 10 year mins). Court finds as **disproportionate** – AZ minimums exceed maximums in 45 other states (inter-jurisdiction) and is longer than the presumptive sentence than serious crimes in AZ (intra-jurisdictional).
      * In a facial challenge, Court does not need to consider the threshold gross disproportionality question. (Graham)
    - **Three Strikes Laws** 
      * CA: After two serious felonies, a third serious felony will result in mandatory indeterminate life in prison. **Wobblers** are offenses that can be classified as a felony or a misdemeanor. Upon a presumptive “third strike,” judge can classify a wobbler as a misdemeanor or dismiss prior serious felonies.
      * Ewing: DF steals golf clubs, invoking law. SCOTUS finds proportionate, in part because based on rational policy enacted by legislature for **deterrence** and **incapacitation**. Sentence was for stealing AFTER two serious felonies. Consider Harmelin factors:
        + Primacy of legislature
        + Variety of legitimate penological schemes
        + Nature of federal system
    - Application to juvenile sentencing
      * Juveniles may not receive life without parole (Graham (non-homicide) and Miller (homicide).
      * Judges consider penological purpose
        + Retributivist: Juveniles are less culpable
        + Deterrence: Juveniles are less able to consider consequences
        + Rehabilitation: Juveniles are young and growing, so they can be rehabilitated.
* Justice in sentencing
  + Federal sentencing guidelines don’t allow life unless a statutory maximum allows it. If not, judge may stack the statutory maximums. Madoff receives 150 years for 11 counts that stack. Judge argues that it is supported by penological purposes.
    - Deterrence: Sends a message to white collar criminals that they will be caught and punished. Worried about headlines that say DF got 12 years.
    - Retributivism: Madoff committed crimes of incredible evil and injured many people – important to the victims that he receive punishment.
  + Gementera: DF found guilty of mail theft and forced to give community service that includes lectures and walking around with a sandwich board. Statute allows judge to impose things that are **reasonably related to penological purpose.**
    - **Rehabilitative:** Puts DF in “close touch” with significance of his crime and its impact on others. Humiliation is not per se wrong.

# #MASS INCARCERATION

* CrimJus perpetuates inequality
* Incarceration has increased despite crime dropping
  + 2.2m people are in prison
  + Greater incarceration rates (1 in 100) with longer sentences
    - Black men 20-34 – 1 in 9
    - Hispanic men 18-34 – 1 in 36
    - Black high school dropout has a 70% chance of imprisonment by 30
  + Harsher sentencing policies
* Drugs Overview
  + 1.5m people are arrested for drugs, fueling the expansion of criminal justice and the prison system (25% of prison population is there for drug crimes)
  + Disparities in enforcement: African-Americans are 12% of users, 30% of those arrested, and 45% of those incarcerated.
  + Drug crimes differ in many ways from the crimes we have studied – no victim to come forward and report or provide assistance in prosecution. Police use undercover cops and wiretaps to catch. Grading is based on quantity and place of occurrence, rather than on MR (like homicide)
* **Constructive possession** – sufficient, but requires more than mere spatial proximity to drugs
  + Power: Look to access to the drugs
  + Intent: Look to circumstances (attempt to flee, inconsistent explanations, lots of drugs, large amounts of cash)
  + Kier: DF in a car with drug possessors and users. Insufficient for constructive possession.
* **Drug distribution** – rarely get actual drug distribution, can convict on *intent* to distribute based on **possession** of amount that is **too much for personal use**.
  + Pigford: DF driving truck with $50k in marijuana inside, claims he didn’t know.
* **Convicting significant others** (to get them to turn) – Hunte: DF goes with boyfriend on a trip, knows of drug activity but, at most, rolls a joint and smokes some. Still convicted – had knowledge, access to drugs, and assisted in concealment and transported.
* **Drug Free Zones** – e.g. w/in X feet of X (school, etc). Enhance punishment and leads to disproportionate effect on urban areas (because such a dense population.