

BUILDING BLOCKS OF CRIMINAL LAW

LEGALITY

1. No punishment without law
2. No **retroactive** lawmaking (*Keeler; Rogers*)
3. Statutes should be **understandable** to reasonable law-abiding people so people have **notice** that conduct is prohibited (*Mochan, Morales* [vagueness does not provide notice])
4. Statutes should be crafted so that they do not delegate basic policy matters to police officers, judges, and juries on an ad hoc basis.
Legislature should make these policy calls (*Mochan, Morales*)
5. **Rule of lenity**: If statutes are ambiguous, should be read in favor of the defendant. Generally invoked when there are two equally plausible interpretations (*McBoyle, Smith*)
6. Vagueness is a constitutional limit on substantive criminal law. **Test for vagueness**:
 - Failure to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits (plurality in *Morales*)
 - Authorizes or encourages arbitrary and discriminatory enforcement (majority finding in *Morales*)

CULPABILITY

1. Break the statute down into elements (conduct, attendant circumstances, result).
2. What is the conduct required (**actus reus**)?
 - a. Actus reus must be **voluntary** (*Martin v. State; MPC 2.01(1)*)
 - Under the MPC, (a) reflex/convulsion, (b) bodily movement during unconsciousness or sleep, (c) conduct during hypnosis or resulting from hypnotic suggestion, or (d) bodily movement otherwise not a product of effort/determination of the actor is not a voluntary act (*MPC 2.01(2)*).
 - **One core act** is usually enough for actus reus under the MPC, but need to look at the statute to see if the part that is voluntary is sufficient for culpability
 - Court cannot criminalize being/status (*Jones v. City of LA*)
 - b. Omissions:
 - i. Is there a duty? Must be a legal duty.
 - Sources of legal duty:
 - Imposed by **statute**
 - **Status relationships** (common-law pocket; judges create these statutes relationships and have expanded them/limited them)
 - **Contractual duty** to care for another
 - **Voluntary assumption of care** that thus **secluded** helpless person/prevented others from rendering aid
 - **Created the peril**
 - ii. If no, then no liability unless an argument can be made for **expansion** through one of the duty categories (e.g. status relationship)
 - *Carroll* case expanded liability to step-parents
 - *Beardsley* case limited liability for man-mistress (though today likely don't need formal marriage; de facto is acceptable)
 - Could potentially expand to roommates, same-sex partner situations, etc.
 - c. Possession
 - Most courts interpret possession offense to require that the accused be aware that she has the thing charged of possessing
 - *MPC 2.01(4)*: says accused has to be aware of control of the thing possessed for a sufficient period to have been able to terminate possession
 - Some courts invoke strict liability standard for possession
3. What was the defendant's state of mind (**mens rea**)?
 - a. Must establish mens rea with respect to each element
 - b. **Common law mens rea**
 - i. **Prevailing approach** at common law: Malice means foresight of prohibited consequences (**recklessness**). Defendant had to be **subjectively aware** his actions posed a substantial risk of causing the prohibited harm but proceeded anyway (*Cunningham*)
 - ii. **Minority view** at common law: Malice means "intentional and willful," though intention can be proved by knowledge that the injury was the probable result of the unlawful act (*Faulkner*)
 - iii. Knowledge: courts interpret knowledge sometimes as only requiring an awareness of the facts, not necessarily knowledge as to the meaning of the law (*International Minerals, Ansalidi, Overholt*)
 - iv. Willful blindness can satisfy knowledge if:
 1. **Majority approach**: if lack of knowledge is solely because of a conscious purpose to avoid the truth, this is sufficient for knowledge regardless of probability (*Jewell*)
 2. **Minority approach**: actual (subjective belief) is required for knowledge, regardless of probability (dissent *Jewell*)
 - c. **MPC mens rea**
 - i. Is there a mens rea term in the statute?
 1. If yes, *2.02(4)*: if culpability requirement with respect to one element, assume application to everything unless contrary purpose
 2. If no, *2.02(3)*: default standard of **recklessness**
 - ii. MPC mens rea terms

1. 2.02(2)(a): **Purposely**: (i) if the element involves the nature of his **conduct** or a **result** thereof, it is his *conscious object* to engage in conduct of that nature or to cause such a result; AND (ii) if the element involves the **attendant circumstances**, he is **aware of** the existence of such circumstances or *believes/hopes that they exist*.
 - In certain circumstances, **can infer purpose from knowledge**
 2. 2.02(2)(b): **Knowingly**: (i) if the element involves the nature of the **conduct** or the **attendant circumstances**, he is **aware** that his conduct is of that nature or that such circumstances exist; AND (ii) if the element involves a **result** of his conduct, he is **aware that it is practically certain** that his conduct will cause such a result.
 - **Willful blindness**: 2.02(7): Knowledge can be established by high probability of belief in a fact as long as there is not a lack of actual belief
 - Must deliberately avoid the unpleasant knowledge for willful blindness to be sufficient for knowledge (*Giovanetti*)
 3. 2.02(2)(c): **Recklessly**: *consciously disregards* a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that... its disregard involves a **gross deviation** from the standard of conduct that a law-abiding person would observe in the actor's situation.
 - Defendant should have awareness that risk is substantial, but some courts say enough if reasonable person would have known
 - Justifiability depends on reasonable person standard
 - Difference between recklessness and knowledge is probability of result occurring (practically certain v. substantial risk)
 4. 2.02(2)(d): **Negligently**: he *should be aware of* a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that... it involves a **gross deviation** from the standard of care that a reasonable person would observe in the actor's situation.
 - Negligence is not a culpable standard unless the legislature makes it explicit.
 - Criminal negligence versus civil negligence
 - Criminal negligence is not a definitive standard, but generally a **gross deviation from reasonable standard of care, to the point of creating a substantial risk** (*Santialles*)
 - Civil negligence is used as standard when results are very harmful (*Hazelwood*)
- d. **Strict liability offenses**: liable if defendant didn't know of a risk and even a reasonable person would not have known of a risk
- MPC drafters did not like SL. Comes in only for **violations/statutory rape for very young children** (under 10); left some room for drafters to add these offenses.
 - Common law: strict liability gets at the concept of notice:
 - Generally invoked in the context of **public welfare offenses** (offenses where social utility outweighs what potentially innocent individual suffers). SL outside of context of public welfare is generally not okay.
 - Involves a utilitarian balancing test. Factors that make it **more likely that SL will be imposed**:
 - Generally carry a **low penalty** that does not have stigma attached to it
 - **Harms are greater**
 - E.g. dealing with an inherently dangerous produce (like grenades) (*Freed*)
 - **No root in common law** crime
 - Part of an **existing regulatory scheme**
 - Defendant is in a **good position to prevent the harm**/know they are dealing in a regulated field -- sophisticated actor
 - Cannot apply public welfare rationale to felony offense UNLESS clear statement from Congress

MISC. CONCEPTS

- **Reasonable person standard**
 - **Physical disabilities and other external circumstances** generally always come in
 - **Idiosyncratic moral values** never come in
 - Middle ground: cultural values, battered woman's syndrome, mental disorder, age, gender
- **Prosecutorial discretion**
 - Factors to consider:
 - Strength of evidence
 - Harm caused
 - Possible disproportion between authorized punishment and gravity of crime
 - Defendant's willingness to cooperate with prosecution of others
 - Resource constraints
 - Many federal crimes can be charged as state crimes, where penalty is usually lower
- **Purposes of punishment**
 - *Retribution*
 - Backward-looking; idea of just deserts; harm-focused + concern with moral culpability
 - *Utilitarianism*
 - If magnitude of punishment outweighs the magnitude or value of pleasure criminal expects to be the consequence of criminal act, he will be deterred from performing it
 - *Incapacitation*
 - *Rehabilitation*

SUBSTANTIVE OFFENSES

HOMICIDE

1. If killing is **intentional**:
 - a. Common law:
 - i. Murder: Malice aforethought
 - Malice: generally meant intent/knowing. Expanded to felony murder and depraved heart killings.
 - Forethought: premeditation (time to deliberate)
 - ii. Murder (see if statute specifies first v. second degree) **UNLESS** adequate provocation:
 1. **Traditional adequate provocation** (*Girouard*): provocation which would cause a reasonable man to be in a heightened state of passion and lose his self-control. Only a few circumstances can serve as legally adequate provocation:
 - Common-law categories: Sexual infidelity (today only if discovered in the act of intercourse (*Simonovich*)), Mutual combat, Assault and battery, Injury to one of defendant's relatives, Resistance to an illegal arrest
 - Majority view: Words can constitute adequate provocation only if they are accompanied by conduct indicating a present intention/ability to cause defendant bodily harm (*Girouard*).
 2. **Expanded adequate provocation** (*Maher*)
 - Minority view: Reasonable provocation is anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them.
 - Courts that take this approach may still rule some things out, and words still may not be enough
 3. If **adequate provocation**, manslaughter.
 - iii. If statute has a distinction between first and second degree:
 - Premeditation
 - *Carroll* (premeditation must be something other than intentionality. "No time is too short for a wicked man to frame in his mind the scheme of murder")
 - *Guthrie* (there must be some evidence that defendant **considered and weighed** his decision to kill in order for State to establish premeditation under first-degree murder statute).
 - Key facts to consider: **planning activity, motive, preconceived design** (*Anderson*)
 - For both tests, ask whether defendant was in a state of passion or whether reasonable person should have cooled off.
 - b. MPC:
 - Murder (210.2(a)) if **purposely** or **knowingly** or **recklessly under circumstances manifesting extreme indifference to the value of human life** (recklessness presumed under FM equivalent 210.2(b)) **UNLESS** extreme mental or emotional disturbance
 - (210.3(1)(b)): mitigated to manslaughter if under the influence of **extreme mental or emotional disturbance for which there is reasonable explanation or excuse**. Reasonableness determined from viewpoint of person in actor's situation (have to evaluate which characteristics constitute "situation") under the circumstances as he believes them to be (both a **subjective and an objective rule**) (*Cassassa*).
 - Doesn't have to be a single provocative event; MPC says second-degree murder can be reduced to manslaughter for people who had significant mental trauma over a period of time (*White, Elliot*)
2. If killing is **unintentional**:
 - a. Common law:
 - i. Murder
 1. **Felony murder**: elevates what would usually be negligent homicide or manslaughter to first-degree murder
 - Use common law cases + MPC as persuasive authority to argue that certain felonies are covered (limited to just dangerous, everything, etc.)
 - Causation:
 - *Majority rule: need but-for + proximate cause* (*King v. Commonwealth*)
 - *Minority rule (only need but-for cause)*: Felony must be **causally connected** to the killing. Felony-murder rule is not limited to deaths which are foreseeable; **felon is strictly liable for all killings committed by him and accomplices in the course of the felony**, as long as homicide is the direct causal result (**but-for cause**) of the felony (*Stamp*)
 - Types of felonies:
 - Any act known to be dangerous to life and likely in itself to cause death, done for the purpose committing a felony, should be murder (*Serne*)
 - In furtherance of the felony?
 - Applies in situations where:
 - The lethal **act occurs after commission of the felony**: if **the act is necessary to complete the crime** (*Gillis*)
 - Lethal act is **arguably unrelated to the felony**: if **the murder helps ensure the success of the ongoing felony** (*Cabaltero*) -- can include the acts of co-felons
 - The lethal act is **committed by someone resisting the felony**
 - Agency theory: Focuses on the identity of the killer; co-felons cannot be held liable for the acts committed by someone outside of the conspiracy
 - Proximate cause theory: focuses on foreseeability (was murder a foreseeable risk in committing felony)
 - 2. **Depraved heart**: Generally where someone engages in a truly pointless activity which poses a great risk to human life, and defendant is aware of the risk to human life but disregards the risk. (*Malone* [Russian Roulette case])

- ii. Manslaughter
 - 1. Involuntary manslaughter: Grave danger to others must have been apparent and defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm. Depends on if **ordinary man under the same circumstances would have realized the gravity of the danger** (*Welansky*)
 - If negligence is sufficient, must be more than mere ordinary or simple negligence
- b. MPC:
- i. Murder
 - 1. Felony murder equivalent 210.2(b): Joins depraved heart with felony murder. **Recklessness** (extreme indifference to human life) **presumed** if actor is engaged/is an accomplice in the commission of/attempt to commit **robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, felonious escape**
 - 2. Depraved heart 210.2(b): Unintended killing is murder when it is committed **recklessly and under circumstances manifesting an extreme indifference to the value of human life** (*Malone, Fleming* -- drunk driving case)
 - ii. Manslaughter/Negligent homicide
 - 1. Manslaughter (requires recklessness) 210.3(1)(a): Criminal homicide constitutes manslaughter when it is committed recklessly.
 - 2. Negligent homicide (negligence is okay) 210.4(1): Depends on whether defendant was aware of the unwarranted risk he was creating. Manslaughter if actor was “reckless.” (*Hall*: consciously disregarded substantial and unjustifiable risk) Negligent homicide if actor should have been aware of such a risk, but was not (*Hall; Williams* -- omission amounted to gross negligence).

3. Causation

- Causation comes in for **any crime that has a result element**. Each element must be proven beyond a reasonable doubt.
 - **Mere possibility of survival is not proof beyond a reasonable doubt in many jurisdictions** (*Murrow*)
- But-for cause: but for actor’s conduct no harm would have occurred.
- Proximate cause (categorical question): Conduct must be a sufficiently direct cause of death, and ultimate harm is something which should have been foreseen as being reasonably related to his actions (*Kibbe, Stewart*)
- Does an intervening actor break the chain of causation?
 - Medical malpractice
 - Generally death results from the injury inflicted by defendant. Unless it can be said that original wound is merely a setting in which other cause operations can it be said that the death does not result from this wound.
 - Even if medical malpractice contributed to the death, defendant will not escape liability unless the malpractice was the sole cause of the death (*Shabazz*)
 - Subsequent **intentional** human actions:
 - Intended to produce the result:
 - Law does not treat human action that follows from defendant’s initial conduct as caused by that actor, even when subsequent human action is entirely foreseeable.
 - Even if result is exactly what the defendant wanted to happen, defendant did not cause the death if victim was intervening actor who chose to kill himself (*Campbell*)
 - Involvement in events leading up to the commission of the final overt act do not negate the intervening human actor committing suicide (*Kervorkian*) UNLESS actor could not have committed suicide but for defendant’s help (*Roberts*)
 - Subsequent acts constrained by duty, duress, exigency, etc can break the causal chain (*Stephenson*)
 - **Intervening actor must make a knowing, intelligent, intentional, voluntary decision to break causation chain.**
 - Length of time is really relevant here
 - Subsequent victim behavior: defendant takes the victim as found
 - Subsequent **actions that recklessly risk** the result:
 - Subsequent actor’s risky choices do not negate the liability of the first actor, when those choices are the result of a predicament created by the first actors (*Kern*)
 - Jurisdictions differ when subsequent actor’s behavior was merely reckless or negligent (*Root, McFadden, Atencio*)
 - *Root*: Drag racing case; defendant’s reckless conduct was not a sufficiently direct cause to competing driver’s death
 - *McFadden*: Drag racing case; foreseeably is enough to determine proximate cause
 - *Atencio*: Russian Roulette; participation in the game (active engagement) was enough to satisfy causal link

RAPE

- 1. Actus reus
 - Majority of states require physical force. Varying requirements of resistance (see statute).
 - Psychological force does not substitute for physical force (*DiPetrillo, Thompson, Mlinarich*)
 - Consent must be freely given (must be voluntary)
 - Some states draw a bright line specific age of consent
 - Lack of consent is often established through proof of resistance/failure to resist because of fear (*Rusk*)
 - All states impose liability for rape when defendant has intercourse with person who was completely unconscious; nearly all impose liability when defendant has intercourse with a person who was incapacitation by drugs he gave her without her knowledge.
 - Many states do not impose liability if someone other than the defendant drugged the victim.
 - Fraud

- Fraud in the factum (lying about the very nature of the act, impersonating someone's husband): considered rape
 - Fraud in the inducement: generally not rape (*Boro*)
2. Mens rea
- Resistance can come in to show defendant's mens rea, but is not required in many states
 - Most jurisdictions are at a **negligence standard for consent**, but most jurisdictions also have a force requirement
 - Some jurisdictions have **knowledge standard** (where actual knowledge of non-consent is unnecessary; if evidence points to actual knowledge, this is enough to satisfy mens rea (*Sherry*)) and some have **reckless standard** (where defendant recklessly disregards victim's lack of consent)

BLACKMAIL

1. Common law: Look at blackmail statute.
- a. What does the threat have to be? Threat must be sufficiently specific
 - Threats of personal and property injury or threats to accuse crime are always enough.
 - Threats to make disclosure that would defame the victim are often included.
 - Threats to expose matters that are not defamatory depends on the statute.
 - b. What does the state say the person has to get in return for the threat?
2. MPC 223.4: Theft by extortion
- a. A person is guilty of theft **if he obtains property of another by threatening to:**
 1. **Inflict bodily injury on anyone or commit any other criminal offense**; or
 2. **Accuse anyone of a criminal offense**; or
 3. **Expose any secret** tending to subject any person to **hatred, contempt, or ridicule or impair his credit/business repute**; or
 4. **Take or withhold action as an official**, or cause an official to take or withhold action; or
 5. Bring about or continue a **strike, boycott, or other collective unofficial action** if property is not demanded/received for the benefit of the group in whose interest the actor purports to act; or
 6. **Testify or provide information or withhold testimony or information** with respect to another's legal claim or defense; or
 7. **Inflict any other harm which would not benefit the actor**
 - Note: own property doesn't come under this because one always benefits from controlling own property (Tobi the bunny)
 - b. It is an **affirmative defense** to prosecution that the property obtained by threat of accusation, exposure, lawsuit, or other invocation of official action was **honestly claimed as restitution or indemnification for harm done** in the circumstances to which such accusation, exposure, lawsuit, or other official action regulates, or as a compensation for property and lawful services.

ATTEMPTS

1. Mens rea:
- Attempt is a **special intent crime**: actor must have the specific intent to produce the proscribed result
 - For attempted murder:
 - Sufficient that actor knew conduct had a high probability of leading to the result (*Raines*)
 - Intent to kill can be inferred by using deadly weapon directed at vital part of human body (*Raines*)
 - Common law is pretty much the same as MPC for attempt
 - MPC 5.01: Criminal attempt:
 - Result element: **Purpose/belief**
 - Conduct element: **Purpose**
 - Attendant circumstance: **Same as underlying offense**
 - Exception:
 - MPC 5.05(2): If the particular conduct charged to constitute an attempt is so inherently unlikely to result or culminate in a commission of a crime... court should impose a sentence for a crime of lower degree
 - Can you attempt an unintentional act?
2. Actus reus:
- Distinction between preparation and intent
 - 4 tests:
 - i. **Last step test**: have to wait until last possible act before commission of the crime (*Eagleton*)
 - ii. **Dangerous proximity test**: must be so near accomplishment that the crime would be committed if not for interference (*Rizzo*)
 - iii. **Res ipsa test (unquivocal)**: generally at last step or right before; must be no alternate explanation for the act so act speaks for itself (*McQuarter*)
 - iv. **Substantial step test (MPC 5.01(c)(3))**: must be **strongly corroborative** of actor's purpose (*Jackson*); Ex. (MPC 5.01(2)):
 - a. Lying in wait, searching for, or following the contemplated victim of the crime;
 - b. Enticing/seeking to entice the victim to the place contemplated for the crime's commission;
 - c. Reconnoitering the place contemplated for the commission of the crime;
 - d. Unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the crime will be committed;
 - e. Possession of materials to be employed in commission of the crime which are specifically designed for such use or which can serve no lawful purpose of the actor under the circumstances
 - f. Possession, collection, or fabrication of materials to be employed in the commission of crime, at or near the place contemplated for its commission, where such possession serves no lawful purpose of the actor under the circumstances

- g. Soliciting an innocent agent to engage in conduct constituting an element of the crime
- Abandonment
 - Court traditionally denied any defense of abandonment, and many adhere to this view
 - Some states recognize renunciation as a complete defense

GROUP CRIMINALITY

ACCOMPLICE LIABILITY

1. Mens rea
 - a. Specific intent is generally required to hold a person liable as an accomplice; **must actually intend his action to further criminal action of the principal**
 - b. MPC/majority view in common law:
 - **Conduct: Purpose** to facilitate “commission of the offense” (2.06(3), *Hicks*) -- not enough to know/expect it will happen
 - **Result:** Same mens rea as underlying offense; CAN be an accomplice to an unintentional crime (*McVay, Roebuck, MPC 2.06(4)*).
 - Intentionally facilitating **conduct** that is inherently dangerous creates a “**community**” of purpose, and it doesn’t matter whether the defendants were at odds with each other
 - **Attendant Circumstances:** Ambiguous; depends on the facts
 - c. Common law minority view:
 - **Conduct: Knowledge is sufficient**, particularly when the crime is serious (*Fountain*)
 - **Result:** Same mens rea as underlying offense; minority view; can NEVER aid an intentional crime
 - **Attendant Circumstances:** Ambiguous; depends on the facts
 - Look at statute to decide about mens rea in the first instance.
 - Then:
 - Could treat accomplice exactly the same as principal in relation to that attendant circumstance (emphasize utilitarian arguments)
 - Could treat accomplice with different standard: point out the facts that make the accomplice different from the principal (emphasize retributive justice arguments); accomplice may need more for culpability
2. Actus reus
 - a. MPC 5.01(c)(3): Attempt to aid is enough to establish intent to facilitate the offense
 - Even if the encouragement never reached the principal
 - **Omission:** Person can be an accomplice if he has a legal duty to prevent the offense and fails to do so with the purpose of promoting/facilitating the crime (even in the absence of preconcert (*Staniel*))
 - 5.01(c)(3): If principal is acquitted can still charge accomplice
 - b. Common law: Defendant **must actually aid**. Otherwise, no crime was committed.
 - Must be more than mere presence (*Wilcox*)
 - All of the elements of the act must exist and be imputable to the defendant (*Hayes*)
 - If principal is acquitted, whether accomplice can be charged depends on the jurisdiction:
 - If principal was acquitted for justification defense, no crime was committed in eyes of common law -- no accomplice liability
 - If principal was acquitted for excuse, crime is still committed -- accomplice can be held liable (*Vaden*)
 - **Accomplice by omission?**
3. Is defendant on the hook for other crimes committed by accomplice, other than one facilitated?
 - *Luperello:* defendant is on the hook for offense he intended to facilitate/encourage, but also of **any reasonably foreseeable offense** committed **by the person he aids and abets (?)**
 - Jurisdictions that have this: limited to “natural and probable” foreseeable offenses (*Roy*)
 - Majority of jurisdictions refuse to use this test.
 - MPC rejects the natural and probable consequences doctrine.
4. Can technically have someone who is an accomplice to a conspiracy

CONSPIRACY

1. Separately punishable offense and a way to be guilty of other crimes
2. Actus reus
 - The **agreement itself** usually satisfies actus reus
 - Agreement can be inferred from circumstantial evidence (*Interstate Circuit*)
 - Can have an impulsive agreement; prior consideration is not required (*Urban Riot case*)
 - Some jurisdictions require an **overt act** in addition to agreement to conspire
 - MPC 5.03(5): for more serious crimes, just need agreement itself. For other crimes, need overt act
 - Common law: differs by jurisdiction
 - Federal system usually requires an overt act
3. Mens rea
 - Common law: **Specific intent: intent to agree; most states require purpose**, even when object crime is a serious felony
 - **Okay to infer from knowledge** under certain circumstances (*Lauria*)
 - Knows of the crime **and**
 - Either:

- Intends to participate (i.e., has the purpose that the crime occur) **or**
 - The crime is very serious **or**
 - He has a stake in the venture
 - Charges criminals above market price
 - Derives the bulk of his profits from supplying criminals
 - No legitimate use for the volume of goods supplied
 - No legitimate purpose for the volume of goods supplied
 - Cannot conspire to commit an unintentional crime
 - MPC 5.03(1): Purpose: must have the purpose of promoting or facilitating its commission (either through agreement that one or more of them will engage in criminal conduct which constitutes such crime or attempt/solicitation of the crime OR through agreement to aid persons in planning/commission of crime or attempt/solicitation)
 - Ambiguous as to attendant circumstances mens rea
4. Can defendant be held liable for additional offense other than the offense they intended to facilitate?
- MPC: no
 - Common law: Yes, for *Pinkerton* jurisdictions (on the hook for anything in furtherance of the conspiracy/reasonably foreseeable as the necessary or natural consequences of the conspiracy)
 - In some jurisdictions, can be **negated by defendant's minor role** in a conspiracy/lack of knowledge about the unintended substantive offense.
5. Scope of conspiracy
- **Abandonment**
 - When conspiracy ends (either when crime intended to achieve is achieved, or if it's ongoing but none of the conspirators are engaging in any action to further the conspiratorial objectives)
 - To **withdraw**, defendant needs to communicate intent to withdraw with other members of the conspiracy (this the point at which *Pinkerton* liability stops)
 - Some jurisdictions require defendant to tell the authorities as well
 - **At common law, no renunciation. Some jurisdictions have softened this if the actor thwarts the conspiracy's success.**
 - **MPC: will allow defendant's renunciation to serve as affirmative defense**

CORPORATE CRIME

1. Holding corporation liable:
- a. Common law: **Federal government** holds corporation liable when:
 - Agent commits a crime (individual has mens rea + actus reus)
 - The crime is considered a crime of the company when:
 - Agent acted within the scope of his or her employment (even if contrary to "authorized" scope of employment; employee just has to be on the clock (*Hilton Hotels*))
 - With the intent to benefit the company
 - This can be satisfied by acts which, in fact, do not benefit the company (*Sun Diamond*)
 - No established non-federal common law jurisdictional rule: use different standards (federal, MPC, something else)
 - b. MPC 2.07: A corporation can be committed of the commission of an offense if;
 - a. Offense is a violation or offense is defined by a statute in which legislative purpose plainly appears and **conduct is performed by agent of corporation acting in behalf of the corporation within the scope of his employment** except if the law designates agents for whose conduct corporation is accountable, or the circumstances under which it is accountable; **or**
 - b. Offense consists of an **omission to discharge a specific duty of affirmative performance** imposed on the corporations by law; **or**
 - c. The commission of the offense was **authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial agent**
 - MPC commentary says mere title is not enough to make corporation liable; must be placed in a position where he had enough power, duty, responsibility, and authority to in behalf of the corporation to handle business engaged in at the time of act
2. Ways to punish a corporation:
- Probation (*Guidant*)
 - Fines: problem with spillover effects/not sufficient deterrence
 - Compliance programs
 - DPAs and NPAs: preferred course for federal prosecutors
3. Holding officers liable
- Prevailing/MPC view: 2.07(6): (a) legally accountable for **conduct he performs/causes to be performed in the name of the corporation or on its behalf** to the same extent as if it were performed in his own name; (b) when **duty to act is imposed by corporation, agent having primary responsibility for the discharge of the duty is legally responsible for reckless omission** to perform the required act as to the same extent as if the duty were imposed by law directly upon himself
 - **Knowledge** of defendant's employees can be chargeable to employer in determining defendant's willfulness (*Gordon*)
 - Corporate officer must have **responsible relation to the situation** (*Dotterweich, Park*)

- However, in some jurisdictions employer must have **actual knowledge** of the criminal activity to be held responsible (*MacDonald*)

DEFENSES

1. **Mistake of fact**
 - a. Ignorance/mistake is a defense when it **negates the existence of the state of mind required** by the offense
 - b. **Common law:**
 - i. **Moral wrong theory:** No defense for mistakes where, if the facts had been as defendant believed them to be, **conduct would still be immoral**
 - Generally only used for sex crimes (e.g. **Mistake, even when reasonable, should not be a defense when the offense is a moral wrong** (dominant view in US today w/ statutory rape) (*Prince*))
 - ii. **Legal wrong theory:** A mistake of facts on reasonable grounds to the extent that if the facts were as believed defendant would have committed no offense is an excuse.
 - However, if under the facts as defendant believed them to be, he would be committing a lesser crime, this does not mean one should receive a lesser sentence. (*Prince* dissent, *Lopez* selling drugs to a minor)
 - c. **MPC approach:**
 - Claims about mistakes must be resolved by determining whether mistake negates mens rea required for statute in question
 - Under MPC, defense is allowed for honest mistakes (for statutory rape, unless child is under 10 -- then SL imposed)
 - If defendant's act would have made him guilty of an offense even if the situation is as he was supposed to be, still liable, but grade of liability will be mitigated (2.04(2))
2. **Mistake of law**
 - a. General rule: mistake of law is no defense (*Marrero*)
 - i. Exceptions:
 1. **Material element** (statutory language): if defendant doesn't meet mens rea with respect to material elements because of mistake, they are not guilty (*Weiss*)
 - a. **Crime requires awareness defendant is breaking the law** (if statute has requirement of **knowingly/willfully**, and the court says this requires knowledge of the meaning of the regulation and not just knowledge of the conduct allegedly violating that regulation (*Liparato*))
 2. **Official source interpretations**
 - MPC 2.04: limited defense in situations where conduct believes that his conduct does not constitute an offense. In regulatory offenses:
 1. Criminal sanctions available only for deliberate evasions or defiance
 2. Defense is only available when defendant acts in reasonable reliance on official statement, afterward determined to be invalid/erroneous
 - Advice of counsel, even though followed in good faith, is no excuse to violation of the law (*Hopkins*)
 3. **Lambert category**
 - Actual knowledge of law (here, duty to register) or proof of probability of such knowledge and subsequent failure to comply are necessary.
 - Very small category of cases (in *Bryant*, did not apply to sex offenders and in *Wilson* did not apply to DV and possession of firearm)
 - When the harm is greater, more likely to convict despite mistake of law (*Wilson*)
 - b. **Cultural defense:**
 - i. Could be invoked through judicial/prosecutorial discretion
 - ii. Can be used to rebut the existence of mens rea
3. **Justifications:** criminal action was good/sensible in the circumstances
 - a. **Self-defense**
 - i. **Common-law approach:**
 1. Non-deadly force: someone is justified in using non-deadly force upon another if he/she reasonably believes such force is necessary to protect him/herself from imminent use of unlawful force by another person
 2. Deadly force
 - a. Deadly force must be **necessary**
 - If defendant could respond with non-deadly force, defendant must do so
 - **Retreat** (only comes in with deadly force)
 - **Majority rule:** no duty to retreat if defendant has right to be somewhere
 - **Minority rule:** duty to retreat
 - For jurisdictions that require retreat, **castle exception** + only have to retreat if possible with complete safety
 - **Initial aggressor**
 - **Common law: initial aggressor gets no defense** (*Allen, Peterson*)
 - **MPC:** if one is an initial aggressor, they are responsible for **whatever they do as to initial aggression**. If it escalates, defendant can still use deadly force (MPC 3.04(2)(b)(i) -- force is not justifiable if the actor with the purpose of causing death or serious bodily injury provoked the use of force against him in the same encounter)
 - One is not an initial aggressor forever

- b. Defendant must **reasonably believe** that deadly force is required
 - Must be **honest belief** AND
 - **Reasonable person in defendant's situation** would also think that (objective reasonableness)
 - Make arguments for which features of offender's situation should come in for objective reasonableness
 - Some jurisdictions recognize **imperfect self-defense** if defendant honestly believed deadly force was required by a reasonable person would not, reduction from murder to manslaughter
- c. Force must be **deadly** (likely or reasonably expected to cause death or serious bodily injury)
- d. Must be **imminent** (inevitability is not imminence)
 - Two components: necessity + kind of force aggressor is exercising
 - Battered Woman's Syndrome: generally courts say that imminence is required and inevitability does not satisfy imminence (*Norman*).
- ii. MPC: 3.04(2)(b): Use of deadly force is not justifiable under this section unless one is arresting someone, the actor believes **such force is imminently necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse by compulsion**, or if: (i) Actor provided the use of force against him in same encounter or (ii) the actor knows he can avoid the necessity of using such force **with complete safety** by retreating/surrendering possession of property except that (1) not required to retreat from home/place of work unless initial aggression, (2) not required to retreat if a police officer
 1. Can use deadly force for the protection of other persons when (1)(a) actor would be justified under 3.04 in using such force to protect himself, (2) the person he is trying to protect would be justified in using such force, (3) actor believes intervention is necessary (MPC 3.05)
 2. MPC 3.09(2): When the actor believes that the use of force toward another is necessary and the actor is **reckless or negligence** having such belief... **justification is unavailable in a prosecution for an offense for which recklessness/negligence suffices**
- b. **Defense of property** with deadly force
 - i. Common law: **Majority view: cannot use deadly force to protect property** (can use non-deadly force)
 1. **Exception for home**: okay to use deadly force if one reasonably believes this is necessary to prevent imminent/unlawful entry of the home
 - a. Most states allow deadly force when defendant couldn't tell if force was against person or property
 2. Some jurisdictions differ
 - ii. MPC:
 1. MPC 3.06(3)(d): The use of deadly force is not justifiable to protect property UNLESS the actor believes that:
 - i. The person against whom the force is used is attempting to dispossess him of his dwelling
 - ii. The person against whom the force is used is attempting to consummate **arson, burglary, robbery, or other felonious theft or property destruction AND** either:
 - (1) Has **employed or threatened deadly force** against or in the presence of the actor; or
 - (2) The **use of force other than deadly force... would expose the actor to substantial danger of serious bodily harm**
- c. **Necessity**
 - i. Common law:
 1. Choice of evils defense; defense of the last resort. In states without a statute, common factors to consider:
 - a. Choice of evils; must pick lesser (must look at facts as they **reasonably appear** to the defendant [objective inquiry])
 - i. **Do the two evils have to both be unlawful acts?**
 - b. Has to be preventing an **imminent harm**
 - c. Defendant must **anticipate a reasonable causal relationship**
 - d. Whether defendant had **legal alternatives**
 - e. Legislature could not have anticipated the **exact scenario** at issue
 - f. Defendant could not have **set up the emergency in the first place** (clean hands)
 - g. Defendant **cannot use this defense for homicide** (sometimes exception for felony murder)
 - h. Defendant cannot use the defense to cover **economic necessity**
 - i. Whatever the emergency defendant is facing must be created by **natural forces and not human forces**
 - ii. MPC: 3.02:
 1. Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - a. **The harm or evil sought to be avoided by such conduct is greater than sought to be prevented** by the law defining the offense charged; and
 - b. **Neither the Code nor other law defining the offense provides exceptions or defense dealing with the specific situation involved**; and
 - c. **A legislative purpose to exclude the justification claimed does not otherwise plainly appear**
 2. When the actor was **reckless or negligent** in bringing about the situation requiring a choice of evils, **justification is unavailable** for any offense for which reckless or negligence suffices to establish culpability
 - Notes on the MPC:
 - **Doesn't have to be preventing an imminent harm**
 - **MPC allows this defense for homicide**
 - iii. Civil disobedience

1. **Necessity can never be proved in a case of indirect civil disobedience.**
2. *Schoon* factors for **direct civil disobedience** (potentially permissible):
 - a. Must have been faced with choice of evils and choose lesser evil
 - b. Must have acted to prevent imminent harm
 - c. Must have reasonably anticipated a direct causal relationship between their conduct and harm to be averted
 - d. Must have had no legal alternatives to violating the laws
- iv. Escape scenarios
 1. *Lovercamp* conditions significant, but absence of one of these preconditions does not disprove claim of necessity (*Unger*)
 - a. Prisoner is faced with specific threat of death, forcible sexual assault, or substantial bodily injury in the immediate future
 - b. There is no time to complain to the authorities or there exists a history of futile complaints
 - c. There is no time or opportunity to resort to the courts
 - d. There is no evidence of force or violence used toward prison personnel or other innocent persons in the escape
 - e. The prisoner immediately reports to the proper authorities when he has attained a position of safety from immediate threat
4. **Excuses:** criminal act was wrong, but something about the defendant negates culpability for the individual
 - a. **Insanity**
 - i. Insanity tests:
 1. *M'Naughten* test (**dominant formulation in the US today**; cognitive test)
 - At the time of the act
 - Disease of the mind
 - Did not know the nature and quality of the act OR if he did know it, did not know that it was wrong
 2. MPC 4.01 (cognitive + volitional test)
 - At the time of the act
 - As a result of mental disease or defect
 - Defendant lacked substantial capacity to appreciate the criminality of his conduct (*cognitive component*) OR lacked substantial capacity to conform his conduct to the requirements of the law (*volitional component*)
 - Limits to volitional prong: narcotic addiction (*Lyons*)
 3. Post-*Hinckley* federal test (cognitive test; *M'Naughten*)
 - At the time of the act
 - As a result of severe mental disease or defect
 - Defendant was unable to appreciate the nature and quality of the wrongfulness of his act
 - ii. Incompetence: MPC 4.04: "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as incapacity endures."
 - b. **Expansion of excuses** (Constitutional cases)
 - i. Illegal to punish someone for a status, not conduct (*Robinson, Jones*)
 - ii. Limits on *Robison*:
 1. Chronic alcoholism is not an excuse; do not suffer from irresistible compulsion to drink/get drunk in public (*Powell*)
 2. Drug addiction is not an excuse for possession (*Moore*)
 - c. **Duress**
 - i. **Common law:**
 1. Requires **imminent threat**
 2. Requires **threat of serious bodily harm or death to self or family member**
 3. Source must be **from a person**
 4. Person of **ordinary fortitude** might justly yield
 - Reasonable person standard today (objective) + honest belief that threat was real
 - Must have been no reasonable escape
 5. **Cannot excuse killing of an innocent person**
 6. Defendant cannot be at fault in creating the situation (**clean hands doctrine**)
 - ii. **MPC:**
 1. MPC 2.09: Duress
 1. It is an **affirmative defense** that the actor engaged in the conduct charged to constitute an offense because he was **coerced to do so by the use of, or a threat to use, unlawful force against the person or person of another, which a person of reasonable firmness in the situation would have been unable to resist**
 2. The defense provided by this section is unavailable if the actor **recklessly placed himself in a situation in which it was probable that he would be subjected to duress**. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence applies to establish culpability for the offense charged.
 3. It is **not a defense that a woman acted on the command of her husband**, unless she acted under such coercion as would establish a defense under this section.
 4. When the conduct of the actor would otherwise be justified under 3.02 (necessity), this section does not provide such defense.

- Note: **Does not require imminence**; can be threat of any physical force (does not have to be serious bodily harm or death). Threat doesn't have to be to threat or relative; can be other people one cares about.
- Note: Duress/necessity distinction only matters for third-party accomplices/conspirators (if justification everyone is off. If excuse just defendant gets off)

THE IMPOSITION OF CRIMINAL PUNISHMENT

SENTENCING

1. Factors to consider at sentencing:
 - Always relevant:
 - Deterrence
 - Retributive justice
 - Sometimes relevant:
 - Victim impact (generally comes in when it's intentionally conduct)
 - Age (important when purpose punishment is **incapacitation**)
 - Letters from family and friends about defendant's character (even absence of letters can indicate inference for judge -- *Madoff*)
2. Types of punishment:
 - Sandwich boards and other creative types of punishment (*Gamentera*) -- can be acceptable depending on purpose of punishment (bare shaming/humiliation purpose unacceptable and violates cruel and unusual punishment)
 - Current alternatives to incarceration: specialized courts for certain types of offense (e.g. MHC, drug courts, DV courts, veteran courts)
3. Sentencing schemes
 - a. **Discretionary sentencing schemes**
 - Lots of states still have this model.
 - Justifications: efficiency, rehabilitation, retributive justice
 - Criticisms: preponderance of the evidence standard, exasperate judicial bias, indeterminate sentences bad for deterrence (maybe)
 - b. **Mandatory minimum regime**
 - Justifications: useful tool for law enforcement (utilitarian), limits judicial bias
 - Criticisms: can't have one-size-fits-all rules in advance, discretion transferred from judges to prosecutors, less retributive justice
 - c. **Guidelines regime**
 - Advisory guidelines are followed 75% of time in federal system
 - When there are guidelines:
 1. Step 1: What is the guideline sentence?
 2. Step 2: Reason to depart from guidelines? (fall outside heartland of typical cases)
 3. Step 3: Does the guideline serve the purposes of U.S.C. 3553?
 - a. Factors to be considered in imposing the sentence: **sufficient but not greater than necessary to comply with these purposes in (2 [ii])**. The court shall consider:
 - i. The nature and circumstances of the offense and history and characteristics of the defendant
 - ii. Need for sentences imposed --
 - a. To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (**retribution**)
 - b. To afford adequate **deterrence** to criminal conduct
 - c. To protect the public from future crimes of the defendant (**incapacitation**)
 - d. To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (**rehabilitation**)

PROPORTIONALITY

1. 8th Amendment
 - a. Term-of-years-sentence (e.g. *Ewing* three strikes laws):
 - Step 1: Threshold question: compare gravity of offense with harshness of penalty
 - Step 2: If this leads to inference of gross disproportionality, inter- and intra- jurisdictional comparison
 - Generally, sentence is okay **as long as state has reasonable basis for believing that it will serve deterrent, retributive, rehabilitative, or incapacitative goals** (usually these sentences upheld unless proportionality based on retributive justice)
2. If making a **categorical challenge**:
 - a. Step 1: Consider **objective indicia** of society's standards (intra and inter jurisdictional comparison)
 - b. Step 2: Court's **independent judgment**:
 - **Culpability of offenders** in light of crime and severity punishment
 - Juveniles are different
 - **Offense**: how does this offense stand up with other things

- Non-homicides are different (court could never have mandatory death sentence; certain crimes not subject to capital punishment)
- **Punishment** itself
 - Life without parole is different (no life without parole for non-homicide cases for juveniles -- *Graham*; no mandatory life without parole for juveniles even in homicide cases -- *Miller v. Alabama*)
- Whether sentences are going to serve **penological goals** (test from *Ewing*)
 - Penological goals:
 - Deterrence
 - Incapacitation (Court says this cannot override everything else)
 - Retribution
 - Rehabilitation
 - **Comparisons with the rest of the world**
- Reasons court has been reluctant to do more: (1) Too much potential to second-guess massive number of sentences; (2) Hard to determine what retributively just sentence is