**RELAX!!**

Spring 2012

Stephen J. Shulhofer – Criminal Law – Attack Outline

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| --- | --- |
|  | Relevant? 🡪 Probative/Material |
|  | Prejudice > Probative? |

# EVIDENCE

* 1. **Analysis**
     1. Is the evidence *relevant*? (*FRE 401*) 🡪 Must be probative and material.
        1. Probative – Does the fact make anything more or less likely than it would be without it?
        2. Material – Is the fact of consequence to the determination of the case?
     2. Does *prejudice* outweigh *probative value*? (*US v. Queen*, *FRE 403*)
  2. Other Crimes Evidence – Not admissible to prove the character of a person or to show action in conformity. (*FRE 404(b)*)
     1. Admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. (*FRE 404(b)*)
     2. Prior sex crimes or child molestation are admissible (*FRE 413(a)/FRE 414(a)*) subject to *FRE 403* (*US v. Guardia*)
     3. If Δ testifies, prosecution can ask about other crimes on cross 🡪 credibility
     4. *People v. Zackawitz* – Evidence of a cache of weapons at home inadmissible 🡪 while *relevant* to the *material issue* of premeditation, *prejudicial* effect outweighs *probative* value
        1. Owning more guns in addition to the murder weapon doesn’t increase the probability that Δ will murder someone

# JURY

* 1. **Generally**
     1. Trial by jury is guaranteed by the 14th Amendment which, if in federal court, would come within the 6th Amendment guarantee (*Duncan*)
     2. Jury is not necessary for petty offenses (imprisonment < 6mo) (*Baldwin*)

## Composition

* + 1. *Taylor v. LA* – Venire (potential jurors) must be a cross-section of the community
       1. Peremptory challenge can’t be used to exclude a particular race/gender
       2. Number/Unanimity: 12 unanimous for federal, 6 unanimous acceptable for state (*Williams*), Unanimity not required if substantialmajority (11-1, 10-2) (*Apodaca*)

## Jury Nullification

* + 1. *US v. Dougherty* – Juries can nullify, but doesn’t need to be explained
    2. *CT v. Johnson* – JNOV in favor of prosecution violates 6th Amendment
    3. *People v. Fernandez* – Judge can instruct “no” to question about lesser crimes
    4. *People v. Englemen* – Judge can instruct jurors to rat out others intending to nullify
    5. *US v. Thomas* – Dismiss a juror only with evidence of refusal to follow instructions
  1. **Policy**
     1. Juries protect from judges or prosecutors, weigh cred of witnesses
     2. Jury adds common sense, and modern ideas – Protect against *de minimis* prosecution
     3. Against nullification – Fair warning, avoid arbitrary application of the law to provide effective deterrence

# PUNISHMENT

## Theories of Punishment

* + 1. Retribution – Just deserts/Moral culpability
       1. *Hart* – Severity in proportion to wickedness of the offense
    2. Utilitarian – Social Protection
       1. Deterrence (Individual/General)
       2. Incapacitation
       3. Rehabilitation
    3. **Mixed Theory** – Punishment serves social good but cannot exceed retributive cap
       1. *US v. Milken* – White collar offenders often have exemplary past, but are in positions of power, and use sophisticated means of avoiding detection
          1. Sentencing guidelines lead to stiff penalties/less discretion and don’t value prior moral career
       2. *US v. Jackson* – Life sentence for bank robbery (repeat offender)
          1. Sentence can’t be reviewed on appeal
          2. Repeat offender law speaks to general deterrence
          3. Dissent indicates there is no need to hold Δ longer than aging out of crime
    4. Blameworthiness (Culpability) requires (1) voluntary choice, (2) awareness of harm, (3) reasonable alternatives
    5. **Victim Impact Statements** – Usually not relevant during trial (*Booth*), but allowed at sentencing (*Payne*)

### Shaming Penalties

* + - 1. *US v. Gemerntera* – Sandwich board in front of post office
         1. Reasonably related to statutory objective of rehabilitation
         2. More desirable than incarceration

No greater deprivation of liberty than necessary

Excellent specific deterrence

* + - * 1. Re-integrative rather than stigmatizing
        2. Problems

May not deter behavior

May ostracize Δ leading to more crime

May exacerbate depression/socially aversive behavior

* + 1. Civil Commitment – Mental institution would be limiting freedom to prevent future crime. Does not serve *retributive* or *utilitarian* function.
       1. Sexual predator laws allow civil commitment of sex offenders due to “personality disorder” or “mental abnormality”

# REQUIREMENTS OF JUST PUNISHMENT

## Generally

### Legality

* + - 1. Requires fair warning
         1. *Mochan* – convict Δ of common law harassment 🡪 no longer allowed
      2. Safe Harbor – Must be clear how to not be in violation (*City of Chicago*)
         1. Void for vagueness?
    1. Proportionality – Grading
    2. Culpability – Moral Fault
       1. Voluntary Act (Actus Reus) – Reasonable choice 🡪 implies alternatives
       2. Awareness of Harm (Mens Rea)
       3. Causation

## Statutory Interpretation

* + 1. *Ex post Facto –* No criminalizing acts that were innocent when done
    2. Rule of Lenity – Construe statute as favorable to Δ as permissible
    3. Void for Vagueness – Strike down statutes when the meaning cannot be reasonably determined and application confers excessive discretion (*City of Chicago v. Morales*)
       1. Note difference between vague as applied and constitutionally vague
    4. Standard of Evidence – Preponderance < Clear and Convincing < Beyond a Reasonable Doubt
    5. Consider
       1. Text – *McBoyle* – Plane is not a motor vehicle
       2. Purpose – *Smith* – Bartering with a gun is using a gun
       3. Legislative History/Intent
       4. Void Absurdities

|  |  |
| --- | --- |
|  | Voluntary act? |
|  | Omission with duty? |

## Actus Reus

* + 1. **MPC §2.01**
       1. **Conduct must include a *voluntary act* or omission when there is a legal duty**
       2. Not voluntary: (a) reflex, (b) body movement during sleep, (c) conduct under hypnosis, (d) body movement not the product of the effort or determination of the actor (NOTE: doesn’t include irresistible impulse)
       3. No liability for omissions without (a) being expressly sufficient by law or (b) duty to perform outlined by law
       4. Possession is an act if the actor *knowingly* received the thing possessed or is aware of his control for long enough to have terminated possession
    2. **Examples**
       1. *Martin v. State* – Δ drunk brought in public by police 🡪 not voluntary
          1. NOTE: MPC only requires **a** voluntary act, not **all** voluntary acts
       2. *People v. Newton* – Jury question if is evidence of involuntary unconsciousness
       3. *Bratty v. AG* – Not involuntary acts: Doesn’t remember, irresistible impulse, unintentional or consequences unforeseen
       4. *People v. Decina* – Epileptic drives, has fit 🡪 knew he was subject to attacks and voluntarily drove 🡪 Guilty
    3. Omissions – Require a legal duty (*Jones v. US*, MPC §2.01(3))
       1. Analysis
          1. No liability for omission without a legal duty

Statutory, status relationship, K-duty, voluntary assumption of care, duty to control the acts of another, duty of land owner, creating another’s peril

* + - * 1. Good Samaritan law – Duty to act when there is no personal danger

Policy: Risk to personal liberties

* + - 1. Examples
         1. *Pope v. State* – Legal duty to child if: parent, adoptive parent, in *loco parentis*, or responsible for the supervision of a child under 18. Moral ≠ legal obligation
         2. *State v. Miranda* – No legal duty for live-in boyfriend to help child
         3. Legal duties – Statutory duty, Status relationship (parent/step parent [*Carroll*]/spouse), Assumed K-duty, Voluntarily assuming care and interfering with others rendering aid, Duty to control another’s conduct, Duty of land owner, Creating another’s peril (*Jones*)

|  |  |
| --- | --- |
|  | Determine material elements of the crime |
|  | Determine level of mens rea for each element |
|  | Knowing – Consider ostrich – ALL 3!!! |
|  | Mistake? |
|  | Statute is silent consider SL |

## Mens Rea

* + 1. **Common Law**
       1. *Regina v. Cunningham* – Gas meter – Malice requires either *intention* to do the harm, or *recklessness* as to whether it will occur
          1. Culpability is not portable – Guilty of stealing ≠ guilty of poisoning
       2. Intent
          1. Transferred intent holds as long as harm was of the intended type
          2. General intent – Knowing, reckless, or negligent (Assault and battery)
          3. Specific intent – Purposeful (Assault with intent to kill)
       3. Negligence
          1. Ordinary Negligence – Deviation from the standard a reasonable person would observe (*Hazelwood* – Exxon Valdes)
          2. Criminal Negligence – Gross deviation from the standard of care (*Santillanes*)

B<<<PL

### MPC §2.02

* + - 1. A person is not guilty without acting purposely, knowingly, recklessly, or negligently as law requires for *each material element* of the offence
      2. Kinds of Culpability
         1. Purposeful (Willful) – Conscious object to engage in conduct/cause result
         2. Knowing – Aware conduct is of that nature/circumstances exist
         3. Reckless (Malice) – *Conscious disregard* of a substantial and unjustifiable risk that a material element exists/will result
         4. Negligent – When Δ *should be aware* of a substantial and unjustifiable risk that a material element exists/will result. Must be a gross deviation of the standard of care a reasonable person would observe.
      3. Recklessness is the standard if not prescribed by law
      4. Culpability applies to all material elements when ambiguous
    1. Willful Blindness – Only applies when statute requires *knowingly* (Do *Giovannetti* first then throw in the other two)
       1. *Giovannetti* (Majority) – Subjective awareness of a high probability AND conscious active avoidance
       2. *Jewel Majority* – Conscious purpose to avoid learning the truth
          1. i.e. Don’t look in the trunk – Kid doesn’t look in his birthday present early
       3. *Jewel Dissent (MPC §2.02(7))* – Subjective awareness of a high probability that something is suspicious – unless believing it doesn’t exist
          1. i.e. Rent apartment to gamblers then go about normal business even though aware that it is likely they’re gambling – But what is a “high probability”
    2. Mistake of Fact – Distinguish common law vs. MPC
       1. Analysis
          1. Lesser Moral Wrong (*Regina v. Prince*)
          2. Lesser Legal Wrong (*Barbosa*)
          3. MPC – Mistake is *honest* and *reasonable*?

Defense if it *negatives* mens rea requires (§2.04(1))

Unavailable if Δ would be guilty of an offence if the situation were as he supposed it to be (§2.04(2))

* + - * 1. CONSIDER MISTAKE OF LAW
      1. Lesser Moral Wrong – When act is wrong, Δ assumes risk of illegality
         1. *Regina v. Prince* – Taking a girl over 16y from father is wrong 🡪 assume risk of her being under age
      2. Lesser Legal Wrong – Δ assumes the risk that act turns out to be a greater crime
         1. NOTE: Crime is *only* vertically portable, not horizontally portable
         2. *Benniefield* – Δ knew he had drugs, but not that he was near school – guilty
         3. *Barbosa* – Δ thought he had heroin, tuned out to be crack – guilty
      3. MPC §2.04 – Mistake – Is mistake *honest* and *reasonable*?
         1. (1) Mistake is a defense if (a) it negatives the mens rea required to establish the material element of the offense
         2. (2) Mistake is unavailable if Δ would be guilty of another offense had the situation been as he supposed. In that case, mistake reduces the grade of the offense to that offense which he would be guilty of had the situation been as he supposed
         3. (3) Belief that conduct is not an offense is a defense when (a) statute is unknown to Δ and otherwise unpublished/unavailable, or (b) Δ acts in reasonable reliance upon an official statement of the law
         4. §213.6 – Strict liability below 10y, otherwise a defense if Δ proves by preponderance that he *reasonably* believed child was of age
    1. Mistake of Law – Only valid if based on an official statement of the law 🡪 judicial decision or other official determination by the government
       1. MPC §2.04(3) – Belief that conduct is not an offense is a defense when (a) statute is unknown to Δ and otherwise unpublished/unavailable, or (b) Δ acts in reasonable reliance upon an official statement of the law
    2. Strict Liability – Distinguish common law vs. MPC
       1. Analysis
          1. Public Welfare Crime?

*Morrison* – Must be regulatory/small penalty

*Staples* – No SL if it is a non-dangerous felony 🡪 requires a conscious awareness of wrongdoing

* + - * 1. MPC §2.05 – SL only for fines/forfeiture
        2. *Malum in se*/*malum prohibitum*
        3. **NOTE**: SL offence can make evidence inadmissible as irrelevant (*Garnett*)

#### Statutory Rape

* + - * 1. *People v. Olsen* – Strict liability under lesser legal wrong (@ knife-point)

Dissent – Reserve for small crimes

* + - * 1. *B (a minor)* – English – no SL for honest mistake of fact
        2. *Garnett v. State* – SL offense, mental status of Δ is not relevant 🡪 inadmissible. Exploitation of girls, trial about girl’s maturity/appearance
        3. Trend against SL for girls > 14y because of stigma/sentencing/offender lists

#### “Old” (malum in se) vs. “New” (malum prohibitum)

* + - * 1. *US v. Balint* – SL for silent statute about selling illegal drug
        2. *Morissette v. US* – “Knowing” applied to all elements of government property conversion statute 🡪 Larceny, stealing, etc.

#### Public Welfare

* + - * 1. *US v. Dotterweich* – SL for silent drug mislabeling statute
        2. *Staples v. US* – Automatic weapon no SL for felony without *clear statement*
        3. *X-Citement* – Knowing applied to transport and depictions are of minors

Dissent – Plain text would only apply to transport 🡪 last antecedent

* + - 1. MPC §2.05 – SL only for fines/fines & forfeiture. If practical enforcement precludes litigation of Δ’s culpability, cannot rightly demand criminal sanctions
         1. *Regina v. Sault Ste Marie* (Canadia) – Categories 🡪 (1) Mens rea, (2) No mens rea but reasonable care defense (public welfare), (3) SL

Eventually SL held unconstitutional altogether

* + - 1. Policy – High deterrence/difficult to show mens rea, small penalty/lots of cases. Punishing w/out blameworthiness, caseload is always problem, subjective stigma.

|  |  |
| --- | --- |
|  | Force |
|  | Consent |
|  | Resistance/Coercion |
|  | MPC |
|  | Mens Rea/Mistake |
|  | Policy |

# RAPE

* 1. Force – Protect from false conviction, but some rape at the margin
     1. Aberrant physical force – “Additional Force” (Majority/*Rusk*)
     2. Inherent force of sex adequate – (*MTS/NJ*) 🡪 Collapses force and consent
     3. Physical, intellectual, moral, emotional, psych force – (*MPC GSI*, *PA statute*)
        1. Eliminates force – Consider rights based approach
     4. *Reasonable* threat of force is adequate (*Warren*), Δ must intend a threat (*Evans*), and must be threat of physical harm to Δ or 3rd person (*Rusk*)
     5. Force 1st degree, and lesser graded offences (Minority)

## Consent

* + 1. **Continuum**
       1. Verbal resistance + other behavior making unwillingness clear (totality, NY)
       2. Verbal resistance (no means no)
       3. Passivity, silence or ambivalence (permission by words/conduct, PA)
       4. All words and actions other than express verbal consent (nothing but yes, NJ)
    2. Coercion – Mental force – Are Δ’s rights being trampled or just a shitty choice?
       1. Rights based approach – Must be the result of coercion, not a bargain. Are we interfering with a right of V or simply giving her a shitty choice?
       2. Generally not accepted (*Thompson*/*Mlinarich*)
    3. Resistance – Roughly 50% of states require resistance
       1. Undercuts mistake defense, corroborates non-consent
    4. Defective Consent – *MPC §2.11(3)*
       1. Age – Statutory rape 🡪 STRICT LIABILITY
       2. Mental incapacity – Rendering V incapable of appraising her conduct
       3. Incapacity – Drugs/alcohol
          1. All states – Rape if V is unconscious, most if nearly
          2. Many states – not if V is not unconscious or Δ didn’t administer
          3. *Giardino* – Rape if V would not have engaged in sex without being drunk
          4. *Al-Hamdani* – BAL of 0.15 = no meaningful consent
       4. Psychiatrist/patient – always rape
       5. Deception
          1. *Boro* – Fraud in factum vs. Fraud in inducement

Factum – V does not believe it is actually sex (Gyno using the wrong tool)

Inducement – V is hoodwinked/seduced

* + - * 1. *Evans* – No rape provided there is actual sex and V knows it is sex

## MPC

* + 1. *MPC §213.1(1)* – Rape if (a) compelled by force, threat of death, serious injury/pain, kidnapping or (b) Δ impairs V with drugs/alcohol, or (c) V is unconscious or (d) < 10
       1. 1st degree if bodily harm inflicted or they are strangers, else 2nd degree
    2. *MPC §213(2)* – Gross sexual imposition (3rd degree) if (a) Δ’s threat would prevent resistance by a woman of ordinary resolution, (b) Δ knows V is incapable of consent, or (c) V is unaware they are having sex
  1. Mens Rea – Is mistake allowed? If yes, is there a mistake here?
     1. **Strict Liability** – (Mass/PA)
        1. *Sherry* (Mass) – Sex in the face of non-consent is assumption of risk
        2. *Fischer* (PA) – Consensual sex earlier 🡪 no mistake defense for later sex
        3. *Simcock* (Mass) – Reasonable belief V consented is inadequate
     2. **Negligence** – Majority
     3. **Recklessness** – *Reynolds* (Alaska)
        1. Europe – *MC v. Bulgaria*/*Regina v. Morgan* – subjective awareness of non-consent
  2. **Examples - Consent**
     1. *Warren* – Bike path 🡪 No rape without V communicating non-consent
        1. Counter: Frozen fright – note difference in size between Δ and V
     2. *Gangahar* – Jury instruction about whether V’s non-consent would be known to a reasonable person
  3. **Examples – Force**
     1. *State v. Rusk* – Force: Took keys, V asks to be let go/don’t kill me, light choking
     2. *Berkowitz* – V says “no” throughout, pushes on bed 🡪 overturned
     3. *DePatrillo* – Pushed onto chair 🡪 not adequate force
     4. *Alston* – Verbal threat to “fix her face” 🡪 not adequate force
  4. **Examples – Coercion**
     1. *State v. Thompson* – No rape for threat of expulsion from high school
     2. *Mlinarich* (PA) – 14y, submits to sex after threat to send to juvy 🡪 no rape
     3. Retaliation – *Lovely* (PA) – Threat to kick V out/get fired 🡪 rape
  5. **Force/Consent Reform**
     1. *MTS* (NJ) – Force inherent in sex is adequate without affirmative consent
        1. 14 states use this for felony, 8 use this for misdemeanor, others nothing
        2. NOTE: This does not catch coercive behavior
     2. *PA* *statute* – Physical, intellectual, moral, emotional, or psychological force
        1. *Meadows* – Taking advantage of adolescent crush 🡪 Rape (Shulhofer = ☹)
     3. *NY statute* – Totality of circumstances. Lack of consent – Force, incapacity, reasonable person in Δ’s position would know V didn’t consent. Force – Physical force or threat of death, injury or kidnapping. Uses degrees
     4. *MC v. Bulgaria* – Actus – Penetration w/out freely given consent, Mens rea – intention to sex without consent, Force – force, threat, or coercive circumstance
     5. Shulhofer – §201 (physical force), §202 (consent=words), §203 (reckless/gross neg.)
  6. **Policy**
     1. As force goes down, mens rea should go up 🡪 Consider error costs

|  |  |
| --- | --- |
|  | 1st Degree – Define, premeditation standard? |
|  | 2nd Degree – Malice w/out premeditation |
|  | VM – Consider 3 standards |
|  | IVM – B<<<PL |
|  | Felony Murder – Put small Policy |
|  | Defense/excuse/justification? |

# HOMICIDE

* 1. **Analysis**

|  |  |  |
| --- | --- | --- |
|  | Common Law | MPC |
| 1st Degree Murder | Malice & premeditated  Enumerated Felony Murder | §210.02  Intentional/Extreme Recklessness  Felony Murder – Rebuttable presumption |
| 2nd Degree Murder | Malice/Reckless  Felony Murder |
| Voluntary Manslaughter | Heat of Passion | §210.03  Recklessness  Heat of Passion |
| Involuntary Manslaughter | Gross Negligence  Misdemeanor Manslaughter |
| Negligent Homicide | XXXXXXXXXXXXXXXXX | §210.04 – Gross Negligence |

## Intentional Killing

* + 1. 1st Degree Murder – Malice + Willful, Deliberate, Premeditated (20-life)

#### Premeditation

* + - * 1. *Commonwealth v. Carrol* (PA) – Schrader – Momentary premeditation
        2. *State v. Gutherie* (VA) – Must be some period of time between formation of the intent to kill and actual killing 🡪 otherwise 2nd degree
    1. 2nd Degree Murder – Malice (15-20y) (Common law – Reckless, MPC – Extreme R)
       1. *Anderson* – Man living w/ family, stabs daughter 20+ times while family is out
          1. NOTE: Highlights problem with premeditation rule
       2. *Commonwealth v. Malone* – Kid fires gun into friend’s side and accidentally kills
          1. 2nd Degree Murder for extreme recklessness
    2. Voluntary Manslaughter – Heat of Passion (0-10y) (Both common law/MPC)
       1. Analysis
          1. Is evidence admissible? Do you get manslaughter instruction?

Categorical (*Girouard*) – Must be: extreme battery, mutual combat, illegal arrest, serious abuse of close relative, or discovery of adultery (not all J)

Words alone insufficient (*Girouard*)

Flexible (*Maher*) – Judge determines whether extreme emotional disturbance w/ an external trigger

MPC §210.3(b) (*Casassa*) – Was Δ emotionally disturbed? *Then* was such extreme disturbance reasonable?

Doesn’t actually have to occur during “hot blood” stage (*Elliot*)

* + - * 1. Was the disturbance reasonable from the perspective of a person in Δ’s situation under the circumstances as Δ believes them to be?

Age, gender, physical statute, physical disabilities, lack of sleep are part of the reasonable person

* + - 1. Marital Infidelity
         1. *Dennis v. State* – seeing wife in a sexually suggestive embrace is insufficient
         2. *State v. Turner* – Must actually be married
      2. Homosexual Advances – MPC/Flexible would allow this, categorical no

#### Cooling Time

* + - * 1. *US v. Bordeaus* – Prior argument is insufficient – must be instantaneous
        2. *Commonwealth v. LeClair* – Suspect infidelity for wks then kill on confirmation 🡪 no manslaughter
        3. *State v. Gounagias* – 2wks after sodomy rape/bragging 🡪 Nope

#### Non-provoking Victim

* + - * 1. *State v. Mauricio* – VMS instruction for Δ who killed guy he thought was the bouncer that kicked his ass

TX requires person killed be the person that excites

* + - * 1. *People v. Spurlin* – No VMS when Δ kills daughter after VMS wife
        2. *Rex v. Scriva* – VMS for Δ who kills V that got in the way when someone killed his daughter with a car
      1. Examples
         1. Mercy killing of father – *Carrol/Gutherie* – 1st Degree murder; Categorical/Flexible 🡪 nope; MPC 🡪 VMS
         2. Bullying – Categorical 🡪 nope; Flexible/MPC 🡪 VMS
         3. Gay Panic – Limitation of MPC 🡪 would allow prejudicial defense
         4. Cultural – Categorical 🡪 nope; Flexible/MPC 🡪 VMS
      2. Policy
         1. Excuse – People do crazy shit when inflamed
         2. Justification – V had it coming 🡪 negates manslaughter of innocent 3rd party
  1. Involuntary Manslaughter – Common law – Gross Negligence, MPC – Reckless
     1. ALWAYS REMEMBER – B<<<PL
        1. Remember to consider affirmative acts as well as omission when there is a duty
     2. *Commonwealth v. Welansky* – Club owner fire w/ locked exits
        1. Recklessness, but suggests extreme negligence can be deemed reckless
     3. *People v. Hall* – Out of control snow skier
        1. Reckless – Actor must have conscious disregard of substantial/unjustifiable risk
     4. V’s Misconduct – Not a defense, but may affect proximate cause
        1. *Dickerson v. State* – Δ drove into car killing drunk driver that had stopped w/ no lights in the middle of the road
     5. Misdemeanor Manslaughter
        1. Similar to Felony Murder 🡪 Must be dangerous to human life as committed (*People v. Cox*), and there must be proximate cause.

|  |  |
| --- | --- |
|  | Determine possible felony/misdemeanors |
|  | Inherently dangerous – Abstract |
|  | Inherently dangerous – As Committed 1/2 |
|  | Merger – Independent felonious? |
|  | Merger – Assaultive? |

## Felony Murder

* + 1. **Generally**
       1. *Regina v. Serne* – Insurance fire kills two of Δ’s kids
          1. Any act known to be dangerous to life and likely to cause death, done for the purpose of committing a felony, which causes death should be murder
       2. *People v. Stamp* – Heart attack after armed robbery
          1. Felony Murder is strict liability subject to proximate cause
       3. **Burglary** – Compare *Matchet* (not IDF) with *Jenkins* (IDF)
          1. *Wagner v. State* – Entry w/out permission with intent to commit a felony
          2. *People v. Salemme* – Entry with intent to perpetrate fraudulent securities sale
    2. **Grading**
       1. Felony
          1. 1st Degree – Arson, Rape, Burglary, Kidnapping, Robbery 🡪 see statute

No Merger, Subject to Inherently Dangerous limitation

* + - * 1. 2nd Degree – Death while committing felony

Subject to Merger AND Inherently Dangerous limitations

* + - 1. Manslaughter – Death while committing misdemeanor – same as 2nd degree

### Limitations

* + - 1. Proximate Cause
         1. *Commonwealth v. Williams* – Expired license 🡪 no causation to accident caused by another driver
      2. **Inherently Dangerous Felony**
         1. Abstract Approach – Considers only the statute

*People v. Phillips* – Chiropractor kills kid with eye cancer

Can the statute be violated in a non-dangerous manner? 🡪 Not inherently dangerous to human life

NOTE: Consider whether the statute is divisible

* + - * 1. As Committed

*Hines v. State* – Guy mistakes buddy for turkey – felony gun possession

Majority – Behavior creates a *foreseeable* risk

Dissent – Behavior creates a *high probability* that someone is killed

* + - 1. **Merger** – IFP or Assaultive test
         1. There must be an *independent felonious purpose* otherwise crime merges (*Burton* – CA), but enumerated felonies *never merge* (*Farley* – SC-USA)
         2. Assaultive felony – If underlying felony statute has an assaultive aspect 🡪 merges (*Chun*)
         3. NOTE: Burglary to steal TV, V dies🡪FM; Burglary to kill V🡪Possibly VMS
    1. **Policy**
       1. This is horizontal portability of mens rea
       2. NOTE: Eng, Canadia, Mich🡪abolished; NM, Mass🡪Need reckless WRT death
  1. **MPC**
     1. **§210.02 – Murder**
        1. Murder when committed *purposely/knowingly* or *super reckless*
        2. Felony Murder – Rebuttable presumption of extreme recklessness if engaged in robbery, rape, deviate sex by force, arson, burglary, kidnapping or escape
     2. **§210.03 – Manslaughter**
        1. Manslaughter when committed *recklessly*
        2. Heat of Passion – Would be murder but committed under extreme mental/emotional disturbance for which there is a reasonable explanation from the viewpoint of Δ under the circumstances as he believed them to be
     3. **§210.04 Negligent Homicide** – Committed with criminal negligence

# DEATH PENALTY

* 1. **Generally**
     1. *Gregg v. Georgia* – Determination of guilt must precede determination of sentence
        1. Arbitrary and Capricious – No unnecessary/wanton infliction of pain; statute must provide guidance (aggravating/mitigating factors)
        2. Proportionality – Punishment must be proportional to crime
     2. Stats – 43% white, 42% black, 11% Hispanic – 3400 total (2006), ~$1.6bil
        1. KS – 3x investigation, 16x trial, 21x appeals costs
        2. NC – Trial cost is greater than cost of life in prison
        3. 80% Public support, not allowed in 12 states
  2. **Due Process – Constitutional Concerns**
     1. *Furman v. Georgia* – Need guidance/predictability
        1. Establish mandatory DP situations
        2. Establish guidelines to determine who is subject to DP
        3. No DP consideration til after trial 🡪 Bifurcated trial
     2. **Guided Discretion** – Aggravating/mitigating factors
        1. *Proffitt v. Florida* – Valid statute weighing aggravating/mitigating factors
        2. *Woodson v. North Carolina* – Invalid statute mandating auto-DP in certain situations 🡪 *requires* individualization 🡪 GD tension
     3. **Individualization** – Factors must be particular to Δ 🡪 tension w/ GD
        1. *Lockett v. Ohio* – All possible mitigating factors must be considered
        2. *Skipper v. South Carolina* – Can’t exclude evidence of good behavior in jail
  3. **Discrimination**
     1. *McClesky v. Kemp*
        1. Baldus Study – Court presumes valid to close the door on future studies
        2. **Burden of Proof**
           1. Δ must prove *purposeful* discrimination *in his case*

Δ would have to prove statute was enacted in anticipation of discriminatory effect

* + - 1. Dissent – Limit DP to those cases in study where there is clearly no discrimination
  1. **Recent Cases**
     1. *Atkins* – no mentally ill; *Roper* – no under 18y, *Kennedy* – No DP for rape
     2. *Gideon* – SC willing to overturn sentences w/out lawyer
     3. NOTE: Scalia refuses to reconcile GD/Individualization tension because not required by 8th Amend. Blackmun says no DP for same reason.
  2. **Policy**
     1. Statistical evidence appears to not be allowed for DP
     2. 8th Amendment – prohibits arbitrary punishment
     3. 14th Amendment – Equal protection
        1. Disparate impact alone is insufficient – there is no burden shifting paradigm
        2. Burden on Δ by preponderance to show discrimination *in this case*
     4. **Deterrence**
        1. If it deters, then it saves lives, if not is it wrong?
        2. Empirical studies are equivocal about deterrent effect
        3. Retribution consideration would call for DP
        4. ERROR CONCERNS - >120 inmates have been released for DNA evidence

# DISCRETION

* 1. **Generally**
     1. Institutions are charged with implementing criminal law & have legit authority to ignore established rules and decide questions of liability on different/no grounds
        1. Power to be lenient = Power to discriminate
        2. Discretion is necessary due to draconian punishments that can’t be enforced
        3. Easy to pass insane laws, impossible to repeal
  2. Prosecutorial Discretion – Can’t force prosecutor to file charges
     1. Threats are A-O-K
     2. *Bordenkircher v. Hayes* – Acceptable threat/follow through on Habitual Crimes offense 🡪 Life sentence
        1. Dissent – This is vindictiveness, sole purpose was to discourage right of trial
     3. *US v. Rodriguez* – 3 plead out for time served, 2 fought it 🡪 years even though they had the same criminal conduct

## Plea Bargaining

* + 1. *Brady v. US* – Waiver of constitutional rights must be voluntary, knowing, intelligent acts done with sufficient awareness of circumstances/consequences
       1. Guilty plea isn’t invalid under 5th if done to avoid harsh punishment
       2. NOTE: Unrepresented Δ confession brought by promise of leniency cause not represented by counsel
    2. *Santobello v. NY* – Δ can withdraw plea if Π fails to honor commitments
  1. **Policy**
     1. Alschuler – Guilty plea at gunpoint isn’t is no less involuntary because an attorney is present to explain how the gun works
     2. Efficiency – 10% reduction 🡪 double judicial resources
        1. BUT – If this were med/education we wouldn’t blink
     3. Sheisty incentives – Conviction count, flat payment for defense, limited resources/maxed out caseloads
  2. **Solutions**
     1. PA – Sentencing concessions for waiving jury trial
        1. Retain procedural rights, lose probability of acquittal on reasonable doubt
     2. Lynch – Formalize plea bargaining to quasi-judicial decision-making
     3. Stuntz – Require Π to show sentence from other Δ in same circumstances

|  |  |
| --- | --- |
|  | Mens Rea – Purposeful |
|  | Actus Reus – Try each test! |

# ATTEMPTS

* 1. Mens Rea – Δ must *purposefully* attempt to commit the crime
     1. *Smallwood v. State* – No attempted murder for sex w/ HIV. Need to show death was desired result
     2. *Jones v. State* – Recklessly firing gun into house 🡪 Murder for killed, no attempt for wounded

## Actus Reus

* + 1. Last Act (*Eagleton*) – Last act necessary to cause harm (Policy 1-3)
    2. Dangerous Proximity – Advance near accomplishment (Policy 1-3)
       1. Spatial proximity – How close?
          1. *Rizzo* – No attempt til Δ’s found the guy they were trying to rob
          2. *Duke* – Child molester flashes headlights – no attempted sexual assault
          3. *Shoof* – 100mi w/out abandonment 🡪 not close enough
          4. *Peasley* – 0.25mi abandoned 🡪 close enough
    3. Substantial Step – Casts widest net (Would catch *Duke*)(Policy 4)
    4. Substantial Step + Voluntary Abandonment – Substantial step must corroborate criminal act. VA is affirmative defense. Postpone ≠ VA
       1. *Johnston* – No renunciation when robbing gas station that has no $
       2. *McNeal* – No renunciation when V convinced Δ not to rape her
          1. BUT *Ross* – Reversed 🡪 Δ abandoned of his own free will (same facts)
    5. Equivocality – Behavior shows Δ is definitively trying to commit a crime
       1. Focus on objectively observable behavior
       2. *Miller* – Δ enters field w/ rifle, stops to load but never aims 🡪 no attempt
    6. MPC (§5.01(1/2), *Jackson*) – Act must be substantial step, strongly corroborative of criminal purpose. §5.01(4) – Affirmative defense of voluntary abandonment
       1. §5.01(3) – Attempted aid is a crime even if substantive crime is never committed
  1. **Substantive Crimes of Preparation**
     1. **Stalking**
        1. CA – Willfully/maliciously/repeatedly follow/harass another and make credible threat with intent to place person in fear for safety. FL – No threat.
           1. NY (*Stewart*) – arrest after being clearly told to stop 🡪 Problem of creating confrontation
     2. **Burglary** – B&E w/ intent to commit felony
        1. *Wagner* – Entry w/out permission; *Salemme* – Enter to sell fraudulent securities
     3. **Assault** – Unlawful attempted battery coupled with present ability to batter
     4. **Policing Measures** – Loitering (*Morales*)
  2. **Grading**
     1. Majority – Punishment reduced from completed crime
     2. MPC – Punishment the same as completed except for DP or life
        1. NOTE: See purposes of punishment 🡪 technically sufficient culpability
  3. **Policy**

|  |  |
| --- | --- |
|  | Purpose + Aid |
|  | Knowledge + Aid |
|  | *McVay* liability? |
|  | Was a felony murder in furtherance of the main crime?? |

* + 1. Corroboration of intent
    2. Chance to repent (*locus penitentiae*)
    3. Corroboration of firmness of intent
    4. Police opportunity to intervene

1. COMPLICITY – Aiding and abetting
   1. **Grading** – A may be convicted of lesser crime than P, or sentence may be proportional to culpability if convicted for same crime. P doesn’t need to be convicted 1st (§2.06(7))

## Mens Rea

* + 1. Aid/Encouragement/Attempt + Purpose (MPC/Majority) – Stake in result?
       1. *Gladstone* – Directions to dealer – Δ must want the result to succeed🡪no liability
       2. *Hicks* – “Take off your hat & die like a man” 🡪 no liability
       3. §2.06(3) – Accomplice if (a) with *purpose* of promoting offense, (i) solicit a person, (ii) aids *or attempts to aid* with planning/committing, (iii) doesn’t prevent when there is a duty to prevent
       4. §2.06(4) – When result is an element, accomplice if acting w/ culpability sufficient for the offense (Still *purposeful* for aiding) (*McVay* – Boiler)

### Knowledge

* + - 1. *Fountain* – Liability if Δ knew P would commit crime, and crime is serious
      2. MPC Draft – Substantial Assistance + Knowledge
    1. **Split** – *Lauria* – Purpose for lesser offenses, Knowledge for serious crimes

## Actus Reus

* + 1. *Tally* – Judge send telegram – Guilty even if telegram wouldn’t change result
    2. *Wilcox* – Presence @ concert is sufficient if not accidental
    3. NOTE
       1. **Must successfully give aid but it does not have to effect the outcome**
       2. MPC – No liability if P doesn’t commit offense (§2.06(3)), but could be attempted aid (§5.01(3)) or conspiracy (§5.03(1)(b))
  1. **Causation** – NOT required 🡪 successfully render aid 🡪 guilty even if doesn’t Δ result
  2. **Alternatives**
     1. **Facilitation** – Successful aid w/out purpose = lesser crime than aided crime (NY)
     2. **Money Laundering** – Prove Δ *knew* $ from illegal act + if < $10k, act designed to conceal/disguise tainted $
        1. *Campbel* – Real estate agent convicted when facilitating purchase of home in cash
  3. **Policy**
     1. Concerns about chilling protected speech
     2. Concerns about imposing punishment disproportionate to wrong
     3. Purposeful culpability requirement – Don’t want merchants to concern affairs of customers, but allows guilty to slip through sometimes (Private AG phenomenon)

|  |  |
| --- | --- |
|  | Agreement? Purpose to commit crimes? |
|  | Overt act? |
|  | Renunciation/withdrawal? |
|  | Pinkerton – Foreseeable? |
|  | Pinkerton – In furtherance? Bridges? |
|  | Merger |

# CONSPIRACY

* 1. **Generally** – Agreeing with another person to commit a substantive crime
     1. *Krulewich* – Conspiracy is not implied to go beyond commission of the crime without separately demonstrating conspiracy to cover up the crime
  2. **Common Law**
     1. **Grading** – Substantive offense that doesn’t merge with completed offense
     2. **Actus Reus** – Agreement + overt act (old rule = no overt act, and didn’t have to be illegal, just “wrong”)
        1. Overt Act does not have to be sufficient for attempt
        2. Renunciation – No renunciation 🡪 conspiracy is a substantive crime
        3. Withdrawal – Can withdraw from future crimes, must inform all co-conspirators
     3. **Mens Rea** – Purposeful for conspiracy
        1. *Pinkerton* – Negligence approaching strict liability 🡪 Accomplice if no *Pinkerton*
     4. **Group Criminality** – Can largely subsume accomplice liability
        1. *Pinkerton v. US*
           1. Elements

All parties agree to participate in crime

Offense was reasonably foreseeable as a necessary or natural consequence of the conspiracy

Offense committed in furtherance of conspiracy

* + - * 1. Limitation – No liability if not in furtherance of conspiracy, not within scope of conspiracy, or was unforeseeable ramification of the plan

*US v. Blackmon* – Δ can’t get hit for offenses committed prior to joining

*US v. Wall* – No cut-and-paste – No felon gun possession when in the presence of someone with a gun

* + - * 1. Expansion

*Bridges* – Δ brings friends to fight w/ guns, no intent to kill, friends kill

Holding: Co-conspirator is liable for substantive crimes *not within the scope* of the conspiracy if they are reasonably foreseeable as necessary/natural consequences of the conspiracy

*Brigham* – Δ & Bluitt went to kill dude, saw someone, Δ said not the dude – don’t kill, Bluitt killed 🡪 Guilty

Δ could reasonably foresee Bluitt was a nutjob that would kill anyone

*Alvarez* – Agents shot during drug bust

*Pinkerton* should only apply to non-minor conspirators

BUT – *Pinkerton* applies to all reasonably foreseeable but originally unintended substantive crimes

* 1. **MPC**
     1. **Generally**
        1. §5.03(1) – Conspiracy if with *purpose* of promoting/facilitating
           1. Agrees that one or more will commit a crime or an attempt to commit a crime
           2. Agrees to aid in planning/commission
        2. §5.03(2) – When Δ conspires with C1, and C1 has conspired with C2-Cn for the same crime, Δ has conspired with C2-Cn even if Δ does not know who they are
     2. **Overt Act**
        1. §5.03(5) – Prosecution must show someone in the group performed an *overt act* in pursuance of the crime
     3. **Renunciation/Withdrawal**
        1. §5.03(6) – Affirmative defense of *renunciation* if Δ thwarted the conspiracy under circumstances involving voluntary renunciation of purpose
        2. §5.03(7)(c) – Δ abandons (*withdraws*) if he notifies all co-conspirators or notifies the police of the conspiracy
     4. **Merger**
        1. §1.07(1)(b) – When *the same conduct* *of Δ* may establish more than one offense, Δ can be prosecuted for both offenses unless one offense consists only of conspiracy or preparation
           1. NOTE: This needs to be the conduct of Δ, not co-conspirators. SO, Δ could be involved in the start of a conspiracy that completes, if Δ did not have sufficient culpability for accomplice liability, Δ may be hit with conspiracy since it doesn’t merge for Δ.
  2. **Policy**
     1. Inchoate crime – Like attempt, both can be punished whether or not offense occurs
     2. Spillover – Evidence against all conspirators admitted with jury instruction left to distinguish what evidence applies to what Δ
        1. *Krulewitch* (Jackson Concurrence) – “The naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction”
     3. Hearsay – Statements of any conspirator are admissible as evidence against all
     4. Site of trial is where any conspirator commits a crime
     5. *Pinkerton* – (Federal Courts love it, MPC and several state courts have rejected)
        1. Individuals may be difficult to apprehend, this inflicts indirect costs by punishing more accessible Δ’s
        2. Information forcing tool
        3. Incentive of groups to monitor and control excessively harmful activity
        4. BUT (*McGee* – NY) – Guilt should be personal to Δ
           1. NV – Rejected for specific intent crimes, but allows for general intent
           2. WA – Rejected as inconsistent with mens rea requirement

|  |  |
| --- | --- |
|  | Elements: Actual, unlawful, imminent, reasonable belief, threat of serious harm, necessary response |
|  | Reasonable person |
|  | Evidence admissible? BWS? Insanity? |
|  | Retreat required? |
|  | Grading – Incomplete self-defense? |

# EXCULPATION

## Justification – Self Defense

* + 1. **Generally**
       1. Elements (*US v. Petersen*) – An *actual* or *apparent* *threat of force* that is *unlawful*, and *imminent* such that Δ *reasonably* believed that he was in peril of death or *serious bodily harm* and the lethal response was *necessary* to stop the attacker
       2. MPC §3.04(1) – Use of force is justifiable when *Δ believes* that such force is *immediately necessary* for purpose of protecting himself against the use of *unlawful* force by V *on the present occasion*
          1. (2)(b)(i) Note justifiable if actor provoked with purpose of causing death or serious bodily harm *in the same encounter*, or (ii) Actor can safely retreat
          2. §3.05 – Can aid someone w/ deadly force if they had the same right
    2. **Reasonable Person** (*Goetz*)
       1. All aspects of Δ’s past that gave him knowledge of material elements
          1. Relevant knowledge Δ had about V
          2. Physical attributes of Δ and V
          3. Prior experiences he had which provide a reasonable basis for a belief that V’s intentions were such that Δ could use deadly force
          4. NOTE: Cultural information is not admissible (*People v. Romero* – information about Hispanic culture in protecting little brother)
       2. BUT ask about a reasonable person in Δ’s position
    3. **Grading** – Honest but unreasonable use of self-defense
       1. Objective – No Self-Defense 🡪 Murder (*State v. Shaw* – VT)
       2. Imperfect Self-Defense 🡪 Voluntary manslaughter (*Faulkner v. State* – MD)
       3. Criminally negligent culpability 🡪 Involuntary Manslaughter (*Shannon v. Commonwealth* – KY)
       4. MPC §3.09(2) – When *Δ believes* the use of force is *necessary* but is *reckless* or *negligent* in his belief, SD is unavailable in prosecution for an offense for which *recklessness* or *negligence*, respectively, suffice for culpability
    4. **Evidence** – Only relevant evidence about V is what Δ could have known

### Duty to Retreat

* + - 1. *Erwin v. State* (OH) – “True man” doesn’t have duty to retreat
         1. Overturned in 1979 (*State v. Robbins*)
      2. BUT SEE *State v. Renner* (TN) – True man doctrine alive and well
      3. Trend to require some retreat outside home as a factor in considering necessity
         1. BUT SEE FL Stand Your Ground
      4. Castle Exception
         1. *People v. Tomkins* – No duty to retreat at home
         2. Co-Occupants – *Garland*/MPC§3.04(2)(b)(ii)(1) (no duty) *– Shaw* (duty)
    1. **Policy**
       1. Want to limit SD to proportionate force 🡪 might be better overall for society
       2. Jury – Descriptive (*Goetz* – nullify racial killing) vs. Normative (Should be)
       3. Intelligent Baysian – Racial profiling. Proxy for socioeconomic status.

## Battered Woman Syndrome

* + 1. **Admissibility** (*Kelly*) – BWS data is admissible for
       1. Showing she honestly believe she was in imminent danger of death
          1. And can predict when the next violent outburst might occur
       2. Showing reasonableness of Δ’s belief that she was in imminent danger
       3. Showing why Δ would stay with an abusive husband and not leave
          1. Learned helplessness vs. Ability to act (NOTE circularity)
    2. **Expert Testimony** (*Kelly*)
       1. Must touch a subject beyond the ken of the average juror
       2. Field must be reliable and state of the art
       3. Witness must have sufficient expertise
    3. **Reasonable Person**
       1. *People v. Humphrey* (CA) – Question is whether a *reasonable person*, NOT a reasonable *battered woman* would believe in the need to kill
       2. *State v. Edwards* (MO) – Consider a reasonable person *suffering from BWS*
       3. *State v. Leidholm* (ND) – Assume the *physical and psychological* properties peculiar to the accused
    4. **Imminence** – Moral culpability – what if Δ subjectively believed she was in danger?
       1. *State v. Norman* (NC) – kills husband in his sleep
          1. No SD so no BWS (not relevant) because Δ was not in imminent peril
       2. *Commonwealth v. Sands* (VA) – Killed V while watching TV
          1. No SD though court believed Δ thought she had reasonable belief of danger, danger was not imminent
       3. BUT SEE *Robinson v. State* (SC) – if torture appears interminable and escape impossible, may be reasonable belief of imminence even if V is absent or asleep
    5. **Other Battering Defenses**
       1. *State v. Schroeder* – No SD for prison inmate that stabbed sleeping cellmate after cellmate made credible threat to rape/attack Δ
          1. Dissent – Should Δ stay awake all night every night til SD would be justified?
       2. *Ha v. State* (Alaska) – Inevitable harm is not the same as imminent harm
       3. *Jahnke v. State* – 16y/o blows away father as he walked through front door
          1. Holding: not OK to simply kill your abuser 🡪 vigilante violence
       4. *Werner v. State* – Holocaust syndrome 🡪 no SD
          1. Dissent – if we accept this evidence for some syndrome, should accept all

## Defense of Property

* + 1. *People v. Ceballos* – Where the character and manner of the burglary don’t reasonably create fear of great bodily harm, no justification of deadly force
       1. No mechanical devices – When Δ is present, he will possibly realize that deadly force is unnecessary 🡪 police, firemen, children, etc.
    2. MPC §3.06(3)(d)(ii) – No deadly force without (1) V threatening deadly force, or (2) use of anything other than deadly force to prevent the crime would expose Δ to substantial danger of serious bodily harm
    3. BUT SEE CA/CO – “Make my day” laws 🡪 Presumption of reasonable fear of imminent peril of great bodily harm when someone unlawfully enters their home

## Excuse – Insanity

* + 1. **Sentencing**
       1. Judge may decide whether to commit Δ indefinitely to mental institution
       2. May be automatic commitment of insane acquittees (*Jones v. US*)
          1. May force guilty plea and prison time over possible lifelong civil commitment
       3. Guilty but mentally ill – Prison sentence, but served in a mental ward (Michigan)
    2. **Standards** – Threshold – **Does Δ’s abnormality rise to the level of a psychosis?**
       1. *M’Naughten* – Δ either did not know the *nature and quality* of the act, OR, that he didn’t know what he was doing was wrong (Cognitive Test)
       2. Irresistible Impulse – Δ cannot control his conduct (Volitional Test)
       3. MPC Substantial Capacity – Was Δ deprived of “substantial capacity” to appreciate the criminality of his conduct OR to conform his conduct to the requirements of law by reason of mental defect
          1. Substantial capacity means an appreciable magnitude deviating from humanity in general, as opposed to the reduction of capacity to the vagrant and trivial dimensions characteristic of the most severe afflictions of the mind.
    3. **Abolition**
       1. *Finger v. State* – NC-SC struck down statute abolishing insanity defense
          1. Holding: Well established/fundamental principle under DPC
       2. *Clark v. AZ* – Upheld DPC challenge to AZ’s statute limiting insanity defense to only “right-from-wrong” part of *M’Naughten* 🡪 9 other states use same
       3. 5 states abolished completely
       4. Some statutes allow evidence of mental disease on the issue of whether the Δ possessed the mens rea required for the crime. Others authorize it after conviction during sentencing to allow commitment to mental institution
    4. **Addiction**
       1. *US v. Lyons* – Narcotics addiction alone resulting in lack of impulse control is insufficient, however Δ is free to introduce evidence of actual physical damage to the brain resulting in mental disease or defect
       2. *US v. Moore* – Court does not buy that simply because Δ’s drug use results in a loss of self-control he should be excused 🡪 slippery slope, technically the addict that robs a bank has lost even greater self-control than the mere possessor
          1. Dissent: Goals of criminal justice system – Retribution, deterrence, isolation, and rehabilitation – are not served by punishing the addict who by reasons of his use of drugs, lacks the capacity to conform his conduct to the law 🡪 should not be responsible for possession
    5. **Rotten Social Background**
       1. Bazelon (*Alexander* Dissent) – Trial judge should let the jury hear all sources of impaired behavioral control (socioeconomics, race, etc)
       2. BUT SEE Morse – People still choose to commit crimes. Bazelon’s theory is paternalistic. When individuals freely break the law, respect for that person demands punishment. Other treatment would be demeaning, treating him as something less than an autonomous individual.
       3. Clarence Thomas – Shitty choice is still choice
       4. US Sentencing guidelines explicitly indicate social status can’t be taken into account
    6. **Policy**
       1. Convicting mentally ill undercuts social stigma of truly morally culpable
       2. Undermines moral authority of the system and is completely unfair
       3. Deterrence vs. Incapacitation
          1. Caretakers?
          2. Faking insanity?
       4. Want to give people the appropriate treatment
       5. Where do you draw the line? How insane is insane enough?
       6. How do you verify insanity

**Policy**

**Recurring issues**

* Law as descriptive force (important in role of juries) v. law as normative force (shaping behavior, norm nurturing)
  + Internalized/shared norms are most powerful determinant of conduct (Robinson and Darley)
  + If criminalization or conviction is to have an effect in norm nurturing process it will be b/c the criminal law has a reputation for criminalizing and punishing only that which deserves moral condemnation
  + Norms of *fairness* only relevant if law is conceived as a normative force
* Clear rule (under/over inclusive) vs. flexible standard problem (fact intensive, inconsistent)
* Purpose of criminal *procedure* is to control gov’t power
* Institutional competence
  + Courts v. legislature
    - Creation of criminal laws typically seen as domain of legislatures, not courts
    - But courts inevitably have to interpret laws
  + Judge v. jury
* What is the mechanism by which society controls behavior?
  + Voluntary compliance b/c the system is perceived as being legitimate
  + Rational calculus of material incentives (dominant model)
  + Internalized expectations of reciprocity and fairness (why do you leave tips on interstate?)
* Why not rotten social background?
  + **Individualism** – based on view of laissez-faire, free market economy
  + **Determinism** – today’s society is much more complex, much more interdependent, we should take more care of each other in society
    - Bystander indifference laws
    - Rotten social background defenses
* Cost-benefit society vs. community responsibility
* In making decisions in interpreting statutes, courts often rely on certain background principles of fairness
  + They give more weight to such principles than to plain meaning of statutes
* Liberty interests affect court’s determination of liability
  + Gov role is to prevent harm, not encourage altruism
* You can’t rely on ***prosecutorial discretion*** as a guarantor of fair results
  + Rolling back tough sentences would destroy the plea bargaining system (no differential between guilty plea sentence and normal sentence)
* **Public defenders:** often bad in state court

**Juries**

* Fundamental right to jury trial
  + Advantages
    - Protects against biased/eccentric judges and prosecutors
    - Protects against conviction in unfair/oppressive situations
    - Give community input, offer collective common sense
    - Civic education
    - Juries can flexibly tailor decisions; less rigid application
  + Disadvantages
    - Cost/expense
    - May enforce biases of community we want to discourage
* Jury nullification
  + Advantages
    - Avoid rigidity in criminal law; infuse community common sense
    - Law may be oppressive, bad, outdated
    - Adds flexibility
    - Checks prosecutor’s discretion
  + Disadvantages
    - Discretionary power is also discriminatory power – studies show juries told of power to nullify spent more time discussing D’s character
    - No check on power (JNOV unconstitutional)
    - Ad hoc application violates fair warning/notice
    - Burden on jurors’ psyches (knowing they have a man’s life in their hands
    - Empirical studies show when jurors told of power to nullify spend more time discussing D’s character
    - Places more explicit burden on jury’s shoulder – they have the power of a man’s life fully in their hands
    - Greater discretion would allow more inconsistency and potentially discriminatory application of law
    - Don’t want public policy debate in jury room; that is what legislature is for
* Reasonableness standards
  + Workable if social norms are stable and widely shared and basically fair
    - But there are significant worries about whether they are so in various domains
      * Homosexuality
        + Gay panic defense might play to bad social norms
      * Rape
        + Reasonable person std might over-punish (in eyes of defendant) but might also underpunish (in eyes of victim)

**Punishment**

* Possible strategies to achieve aim of preventing crime
  + Increase severity of punishment (doesn’t work if not certain; criminals not rational actors)
    - May backfire if people unlikely to turn in; juries less likely to convict if too harsh
  + Increase certainty of punishment
  + Shaming techniques
    - Permissible if achieves deterrence, protection of public, and rehab (*Gementera*)
    - May increase general deterrence, but undermine specific deterrence
    - Stigmatization
    - Delegates punishment to the crowd?
* Federal sentencing guidelines
  + Were designed to limit discretion and thus unfairness in the system, but just pushes that risk to the prosecutor
  + Sentencing discretion can’t be used very effectively to offset to guard against voracious prosecutors
    - Mandatory minimums
* Consider the case of the poor criminal
  + Is it fair for him to be punished?
  + Morris: Yes, the criminal has acquired unfair advantages
    - But what net benefit did the poor criminal get given his *overall* history
  + Murphy: Sig prison sentences are unfair
    - Socio-economic deprivation *caused* the crime
    - What does the criminal have to reciprocate for?
* Why do people obey the law in the first place?
  + Not because of a subtle cost-ben analysis
  + Because of social influence (fear of disapproval by social group) and conscience/internalized morality
  + Compliance with law proportional to perception of fairness

**Mens Rea**

* **Trend**: In both the UK (B A Minor) and the MPC, the trend is that the effective measure of the D’s liability should be his culpability, not the actual consequences of his conduct
  + Move away from strict liability and mistake of fact liability
  + We see this with changes to attempt punishment as well
  + Tug of war at common law as to whether the lesser crime rule should apply
* Strict liability
  + Encourages people to take extra duty of care if they know ignorance/mistake won’t excuse
  + Prosecutorial efficiency
  + Is it better that 10 young people tempted to be drug addicts, than 1 drug dealer convicted of possession near a school?
  + BUT – violates fundamental principles of just punishment, illogical that a higher standard of care would result (may actually discourage the most careful from taking on the risk), the argument that no stigma attaches is not convincing
  + Hard to determine why sl is allowed in some cases but not others
    - Corporate/individual line not the line
      * *Staples* is not limited to private individuals
      * *X-citement Video* is not a private individual, and there’s a mens rea presumption there as well

**Homicide**

* Felony murder rule
  + Knowingly creating risk of death in context of a felony is more culpable than doing so in context of innocent act
  + Encourages criminals to take extra duty of care in commission of crime
  + Discourages the underlying crime
  + **BUT – GROSSLY** violates LPF, stats show not actually addressing a problem, can usually convict on other theory
    - The bump from robbery (3-4/8-9 w gun) to murder (life w/o parole)
    - A jump different in scale from normal lesser wrongs cases
  + Note: without **merger**, FMR would obliterate provocation defense every single time
* **Reasonableness standards**
  + Wouldn’t the normatively reasonable man *never* kill anyone?
  + Wouldn’t they never lose self-control?
    - Descriptive vs. Prescriptive tug of war
* Eliminating the category of manslaughter simply moves tough questions downstream

**Rape**

* Traditional gender specific laws unfair to women?
  + Protects “good women” who conform to social expectations
  + Law denying women a certain kind of social/sexual independence
  + Enforced certain gender roles
    - E.g., women shouldn’t be at bars alone
  + What becomes los in the distinction between aberrant and typical male behavior is a woman’s perspective re: what is threatening
* Studies show men consistently misinterpret female non-verbal behavior
* Courts worry about making sure we know what victim really wanted balanced against making sure def knew victim didn’t want it
* Very difficult to come up with a manageable, clear understanding of when consent is freely given
  + We want default rules that minimizes decision and error costs
    - Bright line rules have high decision and low error costs
      * Raise overall cost of error (Husak and Thomas)
        + H and T are silly

There are always error costs

They don’t consider the nature of the error

Women don’t get sex who want it vs.

Women get sex who don’t want it

* MacKinnon: Rape law assumes that single, obj state of affairs existed that can be determined by evidence, but many rapes involve honest men and violated women
* If you can infer consent from conduct, this might mean that consent to petting = consent to penetration
* **Mens rea**
  + As jds relax force requirement mens rea becomes more important
  + Subjective culpability standards make effective protection of victims more difficult
  + Negligence standard for mens rea
    - People who push for it aren’t happy with dominant cultural norms
    - Again indicates that idea that this is an area where social norms are not widely shared, stable, or even fair

**Philosophy of Punishment**

**Retribution** (Kant, Moore)

* Punishment is justified because people deserve it
  + A person who violates the rules has acquired an unfair advantage; must punish such individuals to restore the equilibrium and maintain legitimacy in society’s mechanism to prevent anarchy
  + **Contra**: Marxist view – can’t punish marginalized who receive no benefit from prevailing socio-economic structure (Murphy)
* **Premise**: (1) Can only punish if voluntarily done something morally wrong; (2) punishment must match the crime; and (3) punishment in return for evil done is itself just or morally good
  + **Affirmative retribution**: Society has duty to punish
  + **Negative retribution**: Society can only punish to extent of culpability (there is an outer bound)
* Breaks down because it cannot capture the idea that cutting deals can be an ok thing to do
  + People often feel compelled to allow deal-making

**Social Protection/Utilitarian** (Bentham)

* Punishment justified b/c of useful purposes it serves
* Seems to break down because it cannot capture something like just deserts
  + They will say things like “unfairness” is a net cost in an *attempt* to capture the notion of just deserts
* Three main strategies:
  + **Deterrence** (specific and general): But do criminals calculate as rational actors? Does punishment actual reduce recidivism (specific deterrence)?
    - Increase effect by making punishment more certain and/or severe (but juries may not convict)
    - Could lower burden of proof required (but damages legitimacy as more innocents convicted)
    - Consider role in norm nurturing; perceived legitimacy of the system (adherence to just desserts encourages voluntary compliance)
  + **Rehabilitation**: Is this paternalistic? Is it fair to expend scarce resources here and not elsewhere?
  + **Incapacitation**: Most criminals do not commit offenses uniformly throughout their entire adult lifetimes (Posner’s dissent in *Jackson*)

**Mixed Theory** (HLA Hart)

* (1) Social protection is primary purpose, but (2) you can never punish more than blameworthiness/moral fault (negative view of retribution)
  + **Criticism**: Moore argues that there is still a positive element (example of rapist not punished b/c he loses desire) in that society feels duty to punish regardless of social protection goals
* Moral fault means (1) you made a choice with knowledge of harmful consequences and (2) you had reasonable alternatives
  + Can take background circumstances into account when considering mitigating factors and sentencing, but does not excuse the culpability