

CRIMINAL LAW OUTLINE

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INTRODUCTION

Criminal Justice System in the U.S.

- I. Mass Incarceration and its Causes and Consequences
 - A. Mass incarceration
 - Massive in terms of total numbers
 - Massive in terms of disproportionate impact on people of color
 - B. Causes
 1. **Tough on crime policies**
 - Examples of these policies:
 - Policing, arrest, charging, and convictions
 - Longer and mandatory sentences
 - Three-strikes laws and other recidivism laws
 - Federalizing crimes
 - What led to these policies?
 - High crime rates, especially the homicide rate
 - Actors with an interest in the system being like this
 - Private prison industries (for-profit systems) that make money by putting people in prison
 - Voters with an interest in these issues + anyone who doesn't want people in prison voting
 - Victims and victims' families
 - Death penalty abolitionists who advocate for life without parole as an alternative
 - Rural communities for whom prisons are a source of income
 - Prosecutors
 - Careerist rationales
 - Do-good rationale (acting in the good-faith public interest)
 - Limited resources
 - Not enough people with power on the other side
 - Some public interest lawyers, families, Sentencing Project, but mostly people who do not have the means to enact change or who are not politically favored
 - One group with power = fiscally concerned
 2. **War on drugs**
 - Huge part of the federal crimes (25%) and accounts for about 30% of the state increase in crimes
 - C. Consequences
 - Disproportionate impact on people of color
 - Roughly 33% of African Americans ages 20-29 are in some form of criminal supervision
 - Strained resources

The Role of the Prosecutor

- I. Prosecutorial Discretion
 - A. Types of prosecutorial discretion:
 1. Charging sentencing
 2. Selective enforcement
 3. Plea bargaining
 - B. Differing standards
 - ABA requires a prosecutor to dismiss charges when he or she “reasonably believes that proof of guilty beyond a reasonable doubt is lacking.” ABA recommends that prosecutors consider the strength of evidence, harm caused, possible disproportion between authorized punishment and gravity of particular crime, defendant's willingness to cooperate in the prosecution of others, and the likelihood of prosecution in another jurisdictions.
 - DOJ authorizes prosecutors to bring charges when they have “probable cause” that the person committed a federal offense
 - Even when there is evidence that prosecutors believe shows guilt beyond a reasonable doubt, can choose not to pursue charges (often because of limited resources/the need to individualize justice/overcriminalization)
 - C. Federal versus state prosecution

- Many of the important federal crimes can also be charged as state crimes. State penalties are typically much lower
 - Decision to refer a case for state rather than federal prosecution can be as significant as the decision whether to prosecute the case at all.
- D. Internal/external review
- Not much internal oversight on discretionary decisions (supervisors) generally
 - There are few additional mechanisms other than the trial process to police prosecutorial overreaching or misconduct in bringing charges
- E. *Inmates of Attica Correctional Facility v. Rockefeller (1973)*
- Facts: Inmates want to have a writ of mandamus to force prosecutors to investigate the people who beat/mistreated the inmates during this riot. The inmates want the state to charge and prosecute, and/or the federal government.
 - Background: Attica is a NY prison which was the site of a massive prison riot during which prisoners took hostage of prison guards. The prisoners wanted to negotiate prison conditions. There was also a lot of racial tension during this time period. During the riot, Governor Rockefeller didn't go into negotiate and instead authorized government officials to try to take back the prison by force. There was a gunfight and lots of teargas, during which lots of inmates and hostages died. After the prison was reclaimed, the corrections officers beat all of the inmates.
 - Issue: Can the court force state or federal prosecutors to investigate/prosecute?
 - Holding: **It is the discretion of prosecutors to decide whether to charge or not; it is not up to the court to decide when to prosecute. There is no mandatory duty the court can put upon the state/federal prosecutors to bring such prosecution.**
 - Rationale: The judiciary can't force the prosecutors to prosecute because it is hard to draw the line, resource constraint problems, the problem of confidential information prosecutors don't want to disclose, etc.
 - Significance: Establishes a general principle that the court cannot insist on prosecution. A victim or another person also cannot go to court and make a prosecutor bring charges. Private prosecution violates American separation-of-power principles and additionally, if this were allowed, it cannot be assured that the powers of the State are employed for the public interest broadly.
- F. *U.S. v. Armstrong (1996)*
- Facts: Respondents were indicted in federal court on various crack charges. Respondents filed a motion for discovery, alleging that they were selected for federal prosecution because they are black. The claim is that white defendants are prosecuted in state courts, where penalties are generally lower.
 - Background: The Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of high penalties for the possession and distribution of crack cocaine, which treat one gram of crack as the equivalent of 100 grams of powder cocaine. There is also a disparity between the severity of punishment imposed by federal law and that imposed by state law. The brunt of these elevated penalties fell most heavily on blacks, even though 65% of the persons who had used crack were white.
 - Issue: What is the appropriate standard for discovery for a selective-prosecution claim based on discrimination?
 - Holding: **The claimant for a selective-prosecution claim must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose, by showing that similarly situated individuals of a different race were not prosecuted. Respondents' evidence did not constitute this evidence.**
 - Not enough to show effect; have to show purpose as well. Statistics can show effect but this doesn't show purpose. To get intent, need other forms of evidence.
 - Rationale: Respondents failed to identify individuals who were not black and could have been prosecuted (though this information only would have been available if discovery were ordered and prosecutors released their data on charges), and their other evidence was hearsay. Sentencing data further shows that in 90% of federal crack sentences, the convicted person was black. If discovery were ordered, this would divert prosecutors' resources and disclose the Government's strategy.
 - Dissent: Defendants shouldn't have to prepare sophisticated statistical studies to receive mere discovery. This is a dangerous pattern and should be examined.
 - Significance: **Really high threshold for discovery in these cases.** We would need evidence on all the cases brought and then rejected. We would need numbers on rates of use of the drugs in both populations. We would need numbers on distribution. However, can't get this information unless given discovery. Can't get discovery until proof with this information (meaning discovery has to be done by the person seeking discovery).
 - Difficulty in balancing policy interests: don't want to make it too easy for people to bring these claims, but also don't want to make them do too much to get discovery .

- Post-Armstrong, these cases are rarely brought and when they are brought they are VERY rarely successful. The policy rationale is wanting to give government the benefit of the doubt unless the defendant can show the evidence that there is discrimination. This is the main rationale for having a high, demanding threshold.

II. Plea Bargaining

A. Plea bargaining

- Can threaten someone with just about anything as long as there is evidence for the threat
 - If there are a range of laws under which one can be charged, a prosecutor can threaten the defendant with the law that has the highest penalty to get the defendant to plead guilty and accept the lower penalty
 - Almost always a range of penalties which the prosecutor can try to bring
- Plea bargaining is called the “trial penalty”

B. Plea bargaining v. guilty plea

- Guilty plea is very prevalent; 95% of state felony convictions and 96% federal
- Accepting a guilty plea waives three principal rights:
 - Privilege against self-incrimination
 - Right to jury trial
 - Right to confront one’s accusers
- Guilty plea rate is not necessarily considered the same as the bargaining rate
 - Some defendants enter a guilty plea with no expectation of receiving more lenient treatment in return
 - Indirect inducements v. parties negotiating explicitly

C. Voluntariness and knowing and intelligent standards

- Voluntariness
 - Must not result from threats or promises *other than* those typically involved in any plea agreement
- Knowing/intelligent
 - Defendants need sufficient awareness of relevant circumstances and any direct consequences of a guilty plea for it to be knowing and intelligent
 - This does not include collateral consequences
 - *Padilla v. Kentucky 2010*: Court held that attorneys have to inform non-citizens of the risk of deportation if they plead guilty (“direct” consequence)

D. *Santobello v. NY 1971*: **If the prosecution fails to honor commitments made to defendant in exchange for her plea, then defendant must be allowed to withdraw the plea**

- However, if the agreement was just to make a “recommendation” to the judge and then the judge does not abide by the recommendation, the prosecution still honored its commitment.

E. The trial judge cannot initiate plea discussions but if the parties request her to become involved, she is free to meet and indicate the plea concessions she would consider appropriate. FRCP forbids judicial participation in plea negotiation but provides that the judge must explicitly accept/reject an agreement and must inform the parties whether she is willing to be bound by it.

F. Policy considerations for plea bargaining

1. Necessity

- We need plea bargaining because its necessary with today’s resource constrains
 - The system would shut down if we brought every case to trial
- Why are we so okay with asking defendants to waive their constitutional rights, yet we wouldn’t ask medical patients to “waive” operations or students to “waive” education in light of resource constraints?
 - There are alternatives to plea bargaining that could help the resource problem (i.e. designing a more efficient trial process; encouraging bench trial, which only waives the 6th amendment right to jury, rather than jury trial)

2. Propriety of sentencing concessions

- The justifications for imposing a lower sentence on a defendant who pleads guilty than on a defendant whose guilt was found at trial are unclear
- ABA outlines several justifications:
 - Defendant is genuinely contrite (recognizing guilt and taking responsibility for their actions)
 - Concessions allow for alternative correction measures
 - Defendant demonstrates genuine remorse or concern for the victims
 - Defendant’s cooperation results in prosecution of others who have committed equally serious or more serious crimes
- Opponents argue that it is hard to get “genuine” mea culpa because of the inducement of a lighter sentence dangled over the defendant

3. Cooperation

- Proponents: defendant provides substantial assistance to the government, which aids the government in prosecuting more serious crime
 - Opponents: not everyone has an equal opportunity for cooperation; lower-level criminals have nothing to offer and receive a higher sentence as a result.
4. Criminal history
 - Bargaining power of prosecutors for repeat offenders increases for those with criminal histories who face long sentences if convicted at trial
 5. Freedom of choice
 - Proponents: exchange benefits both parties and harms neither, and the gains the participants realize have social value; for the innocent recidivist in a low-stakes case, this helps them
 - Opponents: is it really a meaningful choice? Additionally, just because it's benefitting a particular defendant doesn't mean it benefits defendants as a group. Bargains may also impose costs on third parties whose interests are not represented in the bargaining process
 6. Structural problems
 - Relevant parties to a plea bargain are each represented by against with their own personal interests which may go against the defendant's interests
 - Prosecutors: resource constraint problems
 - Defenders: undercompensated for taking it a step further and going to trial
 7. Penalties and coercion
 - Proponents: Sentence imposed after trial will represent a punishment appropriate to the defendant's crime, not a punishment for having contested his guilt or a weapon to coerce him to waive his rights
 - Opponents: This is not how the system works
- G. *Brady v. United States (1970)*
- Facts: Brady was charged with federal kidnapping and faced a maximum penalty of death if found guilty. Upon learning that his codefendant would plead guilty and be able to testify against him, petitioner changed his plea to guilty.
 - Issue: Was defendant's plea voluntary and knowing/intelligent, and thus a proper waiver of his constitutional rights?
 - Holding: **A guilty plea is not compelled/invalid under the Fifth Amendment whenever motivated by defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.**
 - Rationale: Brady's plea was both voluntary and intelligent because he had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty. There was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties. Under the voluntariness/intelligence standards, a plea of guilty is not invalid merely because it was entered to avoid the possibility of the death penalty.
 - Alschuler article on this case: Competent counsel is an indication of intelligence, but not necessarily voluntariness. Additional information shows that the defense attorney had to persuade the defendant to plead guilty, and the defendant's mother also tried to influence him to take the plea. The presence of the defense attorney in Brady did not dissipate the possibly coercive impact of the decision.
 - Significance: This could've been coercive if the prosecutor didn't actually want the death penalty but was just trying to use this as a tactic. Could show that through comparable cases the 30-50 years was what was generally asked for; not the death penalty.
- H. *Bordenkircher v. Hayes (1978)*
- Facts: Respondent was indicted on a charge punishable by 2-10 years (forged check). The prosecutor told Hayes that if he plead guilty he would recommend a sentence of 5 years. He also said that if he did not plead guilty he would return to the grand jury and seek an indictment under the state's Habitual Criminal Act, which would subject Hayes to a mandatory sentence of life imprisonment by reason of this two prior felony convictions. Client pled guilty, so prosecutor went to the grand jury.
 - Issue: Did the prosecutor violate due process clause that requires that vindictiveness against a defendant for having successfully attacked his first conviction play no part in the sentence he receives after a new trial?
 - Holding: **The prosecutor in this case, by openly presenting the defendant with the unpleasant alternatives of foregoing charge or facing charges on which he was subject to prosecution did not violate the Due Process clause of the 14th Amendment.**
 - There are constitutional limits to prosecutorial discretion, but this case did not present a need for limitation.

- Rationale: The accused was free to accept or reject the prosecutor's offer. The Court has generally accepted the reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. The decision of what charge to prosecute and whether or not to bring a charge before the grand jury generally rests entirely in the prosecutor's discretion. Prosecutor's desire to induce a guilty plea is fine as long as the selection was not deliberately based upon an unjustifiable standard like race, religion, etc.
 - Dissent (Blackmun): The court's decision gives plea bargaining full sway despite vindictiveness. Solution would be to hold *Bordenkircher* to the original charge.
 - However, this doesn't really get past the issue because a prosecutor can just go for the harshest sentence in the first place each time.
 - Dissent (Powell): The real issue here is that the prosecutor did not initially go for the life sentence, recognizing its disproportionality. To go for this after the defendant entered a guilty plea was implementing a strategy calculated solely to deter the exercise of constitutional rights. This is not a constitutionally permissible exercise of discretion.
 - Significance: If it's an acceptable law, the prosecutor can charge you with it. However, prosecutor cannot say "if you plead guilty I'm going to throw the book at your co-defendants, including your brother." This threat is different because a defendant can't weigh this threat because it implicates another person. **The prosecution can threaten anything they want about the defendant as long as the evidence supports the charges.** However, using a third party to threaten a defendant is not allowed because this falls outside of the contracting/bargaining idea of weighing costs and benefits of taking a plea or not.
- I. David Lynch 1994 (former public defender, then ADA)
- Observed that prosecutors were making the sentencing decisions, not judges
 - No official rules that bound prosecutors in the making of plea-bargaining offers
 - U.S. Attorneys offices are slightly different -- have some review procedures, though this is often cursory
 - Snap judgments: few minutes per case
- J. Gerard Lynch 1998
- Prosecutors have disproportionate power in the bargaining process
 - Law enforcement and prosecutors are on the same team, and work towards the same goals
 - It's not really a "bargain"; the prosecutor is more of a judge
 - Ways to make the system fairer:
 - Recognize the true role of the jury in our system (safeguard against prosecutorial determinations)
 - Greater formality of procedure, and greater attention to the selection of prosecutors
 - Making rules that those who investigate a case should be barred from adjudicating (including deciding what to charge or what plea to accept)

The Role of the Jury

I. Advantages and disadvantages to the jury

Advantages	Disadvantages
Jury is selected from cross-section of community; judicial selection can take any number of forms	Some people try to get jury duty
6-12 brings up discussion; you get the advantages of a collaborative decision-making process; only 1 decider in judge system	Disproportionate attention to certain parts of the trial process; opening/closing statements versus evidence
Fresh faces for every new trial; always bringing the "big deal" perspective to this	Jury is not intelligent about the law (could be a negative)

Advantages	Disadvantages
Juries are last resort for the defendant (mercy); can be a check on the law itself	1 juror takes other factors into consideration; creating a hung jury
Helps bring the trial down to the level of laypeople/not educated about the law (could be a positive)	Expensive: social cost on those who are serving, time cost on selecting juries, etc.
Not subject to political influences like elected judges	Groupthink (though this is really rare that a 12 Angry Men situation would occur)
Provides wiggle room for harsh application of the law	Juries not facing public backlash; anonymous unless they choose to go on a morning talk show (pos or neg)

- Though juries don't have depth or breath of experience, they tend to agree most of the time with judges (about 75% of the time). Usually when they disagree, they are more lenient than the judge (tend to acquit).

II. The Right to a Jury Trial

A. *Duncan v. Louisiana (1968)*

- Facts: Duncan was convicted of battery (misdemeanor, punishable by two years' imprisonment) and sought trial by jury. He was denied right to jury trial because LA grants jury trials only in cases in which capital punishment/imprisonment at hard labor may be imposed.
 - Background: This case was brought in the midst of a school desegregation battle. In this type of environment, it was very likely that judges would be biased and treat a defendant unfairly.
- Issue: Did the denial of trial by jury constitute fundamental unfairness, thus violating the due process guarantee of the 14th Amendment?
- Holding (majority): Trial by jury in criminal cases is fundamental to the American scheme of justice. **The 14th Amendment guarantees a right of jury trial in all criminal cases which (if tried under a federal court) would come within the 6th Amendment guarantee to a jury trial in criminal cases.** This case comes under that category.
 - Adopts a 6-month line; if a defendant faces more than six months in jail, they have the right to a jury
- Rationale: America has a long commitment to the right of jury trial in serious criminal cases. Juries come to sound conclusions in most of the cases presented to them, and when juries differ in their result (compared with what a judge would've come to) it's usually because they are serving some of the very purposes for which juries were created (safeguard against corrupt/overzealous prosecutor and against the biased or eccentric judge).
 - Additionally, though this case does not draw the line between petty (for which 6th Amendment guarantee does not apply) and serious crimes, the court says that this crime is clearly serious because it is punishable by two years in prison.
- Dissent: The law should account for variations State to State in local conditions. Sometimes trial by jury may not be practical/desirable given these local conditions.
- Significance: Court established a general principle that the jury is an important safeguard against abuse even in a well-functioning democracy.

B. The Scope of the right to Jury Trial

- Juries decide on questions of fact. The judge is the judge of the law.
- Juries need not be groups of 12 in all jurisdictions.
- Unanimity is not required in all jurisdictions -- substantial majority may be enough.
- **There is no requirement that a jury must reflect the demographic character of the locality. However, under the 6th Amendment, the venire (panel of jurors from which the trial jury is drawn) must reflect a fair cross section of the community (*Taylor v. LA 1975*)**
- Challenges:
 - Juries from the venire can be struck "for cause" -- they know the defendant, the victim, or a witness
 - Juries can be struck by "preemptory challenge" -- without reason

- However, **cannot deliberately exclude jurors on grounds of race or gender** (*Batson v. Kentucky*)

C. Jury Instructions

- The jury is not made aware of sentencing laws. Judges are not allowed to tell juries sentences because it is unclear what the sentence will be.
- Theoretically, telling juries about sentencing invites jury nullification.

D. Policy

- Minority groups have often suffered at the hands of jurymen (Dale Broeder)
- No guarantee that jury people are not unusually ignorant or narrow-minded (Glanville Williams)
- Three large issues with juries (Kalven and Zeisel)
 - Series of collateral advantages and disadvantages -- important civic experience v. expenses/losing confidence in the system of justice
 - Competence of the jury -- judge has superior training and experience, and intelligence v. jury rationale of twelve heads are better than one
 - Jury may not follow the law because of a lack of understanding or support v. a device for insuring that we are governed by the spirit of the law and not the letter
- Defendant's interests v. public interest
 - The 6th Amendment grants the defendant a right to trial by jury but does not give the defendant the right to waive jury trial and insist upon bench trial instead
 - Public has an interest in jury trials ("communitarian function")
 - Democratic vehicle for community participation in government in general
 - Means by which community is educated regarding our system of justice
 - Ritual by which faith in system of justice is maintained
- In other countries, most nations (including many with strong democratic traditions) do not use jury trials in criminal cases
- In the U.S., judges and juries disagree in roughly 25 percent of cases
 - Half of the cases on which they disagree, jury sentiment about the law was what resulted in difference in decision

III. Jury Nullification

A. **Jury nullification:** Jurors' right to acquit defendants without regard to the law and evidence. Jurors may abide by their own individual conscience in coming to a decision.

B. The Role of Juries

1. Separation of powers

a) Legislative

(1) Criminal law

b) Executive

(1) Police

(2) Prosecutors

c) Judicial

(1) Judge

(2) Jury

(a) What are they a check on?

i) On the executive: Problems with enforcement of the law

- Where the race question comes in; this is where the Butler debate falls

ii) On the legislature: Problems with the law itself

- Some of law reforms have come from juries not convicting and then legislature responding to community sentiment

C. *U.S. v. Dougherty (1972)*

- Facts: Defendants wanted to publicize their opposition to the Vietnam war. They sought to use their criminal trial as a platform to further their views. Judge did not instruct the jury of its right to acquit appellants without regard to the law and evidence.
- Issue: Should judges have to instruct juries on their power of jury nullification?
- Holding (majority): **Judges do not have to inform jurors of their right to jury nullification, and defendants cannot bring this up in trial.**
- Rationale: If the court explicitly acknowledges the right to jury nullification, this encourages nullification and opens the door to chaos and anarchy. The jury should be informed of this right through informal input to protect against excess use of the power and to protect against "overburdening" the jury with responsibility.
 - Jury nullification is thus desirable; just not in excess.

- Dissent: If the jury should know of its power to disregard the law, then the power should be explicitly described by instruction of the court or argument of counsel. There is no justification for making this right known “informally” (a haphazard process of communication) if we prefer awareness to ignorance.
 - Significance: Very severe limit on the use of jury nullification. The federal courts and nearly all of the states follow *Dougherty* and refuse to permit instructions informing the jury of its nullification power.
- D. Views promoting jury nullification
- Nullification is just another form of discretion. It’s just leniency granted by a citizen group on a one-time basis rather than leniency granted by politically accountable officials.
- E. Views against jury nullification
- Jury nullification is inconsistent with the value of democracy that we should live under government of laws and not of men. Jury nullification is a method by which to get arbitrary/inconsistent results -- it’s a tool promoting arbitrary decision-making. After our stringent criminal justice procedural rules (e.g. excluding evidence) it seems incomprehensible that at the end we tell the deacons-makers that they can do so without regard to anything that went on before (*State v. Ragland 1986*)
- F. Allowable attempts to constrain jury nullification
- *People v. Fernandez 1994*: **Can not disclose to the jury nullification power** (when asked whether they had the power to acquit despite the evidence supporting a conviction, the judge said “no”)
 - *People v. Engelman 2000*: **If a juror tries to disregard the law, the other jurors must tell the Court.**
 - *U.S. v. Thomas 1997*: **A court can dismiss a juror as long as there is unambiguous evidence of a juror’s refusal to follow the judge’s instructions.**
 - This gets at how jurors express their dislike of something in a case
 - *Merced v. McGrath 2005*: **A juror can be excused for cause for expressing an intention to nullify.**
 - Fully Informed Jury Association has faced charges of jury tampering, obstruction of justice, and contempt of court for attempting to educate potential jurors about their power of nullification.
 - Courthouses have enacted laws to tightly restrict contact with potential jurors in or near the courthouse.
- G. Race-based jury nullification
- Butler
 - Promotes the use of jury nullification to fix the wrongs of democracy. Butler says that nullification is “lawful civil disobedience” which black people should use to emancipate black outlaws accused of nonviolent, malum prohibitum offenses including victimless crimes. Promotes jury consideration of nullification in malum in se crimes like theft or perjury.
 - Butler’s goal is to enhance justice for blacks through nullification applied to black defendants.
 - Kennedy
 - Nullification is unlikely to work as a protest designed to bring public attention to social problems in need of reform
 - Widespread adoption of Butler's proposal would result in measures that would result in the disproportionate exclusion of blacks from juries.
 - Butler overlooks the sector of the black community that desires punishment for all types of criminals -- even nonviolent, victimless criminals.
 - Butler's thesis prompts individuals of a given race to care more about “their own” than people of another race

What to Punish?

- I. Criminal punishment may be inappropriate because:
- A. Free society should treat certain conduct as a matter of choice rather than seeking to prohibit it
- Criminal law is only sometimes used to punish conduct simply on the ground that society considers it immoral
- B. Society sometimes has a legitimate interest in discouraging the conduct, but using the tools of criminal law for that purpose produces **more harm than good**
- Utilitarian view on punishment
 - Criminal law regulates the behavior of adults who willingly participate in transactions that society wishes to discourage (“victimless” crimes)
 - Some believe that there are other modes short of criminalization which would promote deterrence more efficiently at a lesser cost (e.g. taxation to discourage alcohol/tobacco use)
- I. We can limit the laws themselves through **purposes of punishment**
- A. Could limit punishment to **direct harms** to victims/the causation of other harms

- Hypo: Columbia political science professor who had a 3-year consensual relationship with his biological daughter, who was an adult at the time. The victim didn't want any charges to be brought because she did not feel that she experienced harm.
 - Violates community norms -- possibility of a larger societal harm (children of incestual relationships)
 - Risk of future harm
 - This is an example of a law based solely on morality
- Hypo: Bullying. Criminal penalties for bullying?
 - Massachusetts enacted a statute which made harassment punishable by imprisonment for up to two and a half years, whenever someone "willfully and maliciously engages in a knowing pattern of conduct... which seriously alarms [a specific] person and would cause a reasonable person to suffer substantial emotional distress."
 - Arguments for criminalization:
 - No guarantee of causation; also difficult to determine the party responsible
 - Parties are usually minors
 - Difficulties in anticipating someone's response to verbal/emotional assaults
 - People may be less likely to report this behavior if it is attached to a criminal penalty
 - Could make children grow up unable to deal with conflict without the justice system
 - Arguments against criminalization:
 - Deterrence factor -- promoting the idea we don't want this type of behavior in the community

The Justification of Punishment

I. Three facets of punishment call for justification:

- General justifying aim (why have social institutions that impose punishment)
- Distribution (why impose punishment on a particular individual)
- Degree (what justifies the amount of punishment)

II. Purposes of punishment in the law

- Philosophies in criminal law are intertwined in federal statutes, Constitution, and state states
- Purposes of punishment come in more in understanding how severe a punishment should be
 - Comes in during sentencing
 - Comes into the decision of whether to criminalize something in the first place

III. Utilitarianism

- Jeremy Bentham: punishment ought to be admitted only as far as it promises to exclude some greater evil
 - If the apparent magnitude of punishment outweighs the apparent magnitude or value of the pleasure the criminal expects to be the consequence of the act, he will be deterred from performing it (deterrence)
- Specific deterrence (that person) v. general deterrence (society)
 - B < PL to figure out if criminal penalties are necessary to deter a particular type of behavior

IV. Retribution

- Retribution
 - Backward-looking
 - Idea of just desserts; societal impulse to recognize that something was horrible as a society
- Moral culpability
 - Actor meaning to cause harm is deserving of punishment; more concerned with mens rea
 - Manifestations of this purpose of punishment in our law today:
 - MPC gets at the idea that we should punish the subjective actor exactly the same for attempt and accomplishment.
- Harm focused
 - Causal actor with respect to a harm is deserving of punishment; more concerned with harm element
 - Ideas of retaliation and vengeance
 - Manifestations of this purpose of punishment in our law today:
 - Attempt is punished far less than accomplishment

V. Incapacitation and Rehabilitation

- Incapacitation
 - Lock the prisoner away so that they cannot commit more crimes
- Rehabilitation
 - Currently not a huge part of the debate

BUILDING BLOCKS OF CRIMINAL LAW

Legality

- I. No punishment without law
 - People cannot be convicted or punished unless their conduct was defined as criminal (usually through statute)
- II. Important corollaries:
 - A. **No retroactive lawmaking**
 1. *Keeler v. Superior Court* (1970)
 - Facts: Man said to ex-wife “you sure are pregnant. I’m going to stomp it out of you.” He struck her and shoved his knee into her abdomen. The fetus was delivered stillborn. Murder was defined as “unlawfully killing a human being with malice aforethought.”
 - Issue: Was the fetus a “human being” within the meaning of the statute?
 - Holding: The fetus was not a human being within the meaning of the statute. To define it as such would deprive Petitioner of due process of law.
 - Rationale: Legislature intent: intended the term to have the settled common law meaning of a person who had been born alive; excluded the act of feticide. On the fair warning question, the Court said that “an **unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like a ex post facto law.**” -- “makes an action done before the passing of a law, and which was innocent when done, criminal; and punishes such action,” or that “aggravates a crime, or makes it greater than it was, when committed.” The court said this would be a judicial enlargement of the statute unforeseeable to the Petitioner.
 - Dissent: The words human being should be interpreted to promote justice and carry out the purposes of the legislature (dissent argues that legislative intent did not exclude feticide). Also, absurd that defendant did not get “fair warning” -- he knew that his act could constitute homicide.
 2. *Rogers v. Tennessee* (2001)
 - Facts: Rogers stabbed Bowdery with a butcher knife. Bowdery went into cardiac arrest and then a coma; died 15 months later. TN statute said homicide could be prosecuted as murder only when the victim had died within a year and a day of the defendant’s acts. The Court said that the common-law rule was no longer applicable.
 - Issue: Does the ex post facto clause prohibit the retroactive application of a decision abolishing the year and a day rule by judicial decree?
 - Holding: **Judicial alteration of a common law doctrine of criminal law violates the principle of fair warning and hence must not be given retroactive effect where it is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.”**
 - Rationale: The Ex Post Facto Clause does not apply to courts. The TN court’s abolition of the year and a day rule was not unexpected and indefensible. It was a relic of common law. The majority of jurisdictions have abolished this rule. This wasn’t unfair or arbitrary judicial action.
 - Dissent: Court violates fair warning principle: fair warning means fair warning of what constituted the crime at the time of the offense, not fair warning that the law might be changed. Even if I agreed with the Court that Due Process is violated only when there is lack of fair warning, there was no fair warning here. Even if it was predictable that the law would be changed, it was not predictable that it would be changed retroactively.
 - Significance: After Rogers, subsequent courts held that change could not apply retroactively or that change should be done by legislature and not by courts.
 - B. **Statutes should be understandable to reasonable law-abiding people so people have notice that their conduct is prohibited**
 1. *Commonwealth v. Mochan* (1955)
 - Facts: Defendant called victim’s house at all times of day and night with lewd accusations against the lady of the house. The defendant appealed because he said the conduct charged was not a criminal offense against any Pennsylvania statute, and should not also constitute a misdemeanor at common law.
 - In PA, a judge can make something a misdemeanor under common law if it “openly outrages decency and is injurious to public morals”
 - Issue: If behavior is not a crime in statute or by PA case law, could it still be a crime at common law?

- Holding: Defendant's acts potentially injuriously affect public morality; therefore, this offense can be classified as a common law misdemeanor.
- Rationale: The defendant's statements could've been heard by the operator or anyone on the defendant's telephone line. At least two other people in the household heard some of the obscene language over the telephone.
- Dissent: It is up to the legislature to determine what injures public morality. Until the legislature says that what defendant did is a crime, the courts should not declare it as such. This is making an unwarranted invasion of the legislative field.
- Significance: **Can't prohibit behavior if there is no law on the books that makes it criminal.** No notice in this case; we want law to be prospective rather than retrospective. *Mochan* had no idea this was a crime. This is the antithesis to the rule of lenity.
 - Contrary to *Mochan*, nearly all American jurisdictions have now abolished the common law doctrine that courts can create new crimes. However, doctrine still stands in a few states. S. Ct. has never held it unconstitutional for state judges to create new common law crimes.

2. *City of Chicago v. Morales* (1999)

- Facts: Chicago enacted an ordinance which prohibits criminal street gang members from loitering with one another or with other person in any public space. Statute creates an offense if (1) police officer reasonably believes that at least one or two of the people in a present place is a city gang member, (2) if the persons are loitering (remaining in any one place with no apparent purpose), (3) officer orders all of the persons to disperse and remove themselves from the area, (4) person disobeys the officer's order. If any person, whether a gang member or not, disobeys they are guilty of violating the ordinance.
- Issue: Does the ordinance violate the Due Process Clause of the 14th Amendment for vagueness?
- Holding: The statute is unconstitutionally vague, and thus violates due process.
- Rationale: This ordinance covers activity that is not just intimidating. **Vagueness violates a statute for (1) failing to provide notice that will enable people to understand what conduct it prohibits, (2) authorizes and encourages arbitrary and discriminatory enforcement.** In this case, we have both: the ordinance fails to give the ordinary citizen notice of what is forbidden and what is permitted. Additionally, this gives the police too broad of power which has too much potential for abuse.
- Concurrence: This is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers. However, concurrence provides suggestions to make the ordinance less vague -- like requiring loiterers to have a "harmful purpose"
- Dissent: Ordinance penalizes a loiterer's failure to obey a police officer's order to move along. There is nothing vague about an order to disperse. This is within police's power to protect the public peace. This decision constrains police power.
- Significance: There was a new ordinance after this decision that took a lot of the concurrence's suggestions. There could still be issues of discretion in designating areas and in designating who is dangerous/has a dangerous person.

C. **Statutes should be crafted so that they don't delegate basic policy matters to police officers, judges, and juries on an ad hoc basis. Instead, want legislatures making those policy calls.** (See discussion in *Mochan, Morales*)

- *Mochan* dissent: Legislature is supposed to reflect the will of the people; they are elected. **Until the legislature says this "offends public morality" the courts should not decide as such.**
- *Morales*: The statute was struck down in part because it authorized and encouraged arbitrary and discriminatory enforcement. The legislature should provide guidelines to law enforcement for how to enforce the statute. This takes away some of the discretionary decisions from police and limits the opportunity for discrimination.

D. **Rule of lenity: If statutes are ambiguous, should be read in favor of the defendant**

- Rule of lenity: Two versions:
 - **"When there are two equally plausible interpretations... the tie must go to the defendant."** More common approach today.
 - Courts should adopt the narrowest plausible interpretation of a criminal statute. This was more common in the past.
- The rule of lenity gets at ideas of notice, enforcement discretion, judicial discretion, and purposes of punishment. The modern reason to for it is to get ambiguity fixed by the legislature (Scalia is a proponent of this).
 - Note: MPC says no to the rule of lenity. MPC's default rules are supposed to fill in the gaps in the law.

1. *McBoyle v. United States* (1931)

- Facts: Petitioner was convicted of transporting an airplane that he knew to have been stolen. Under the National Motor Vehicle Theft Act, “the term ‘motor vehicle’ should include an automobile, automobile truck, automobile wagon, motor cycle, or *any other self-propelled vehicle not designed for running on rails.*”
- Issue: Did the National Motor Vehicle Theft Act apply to aircrafts?
- Holding: When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute shouldn’t be extended to aircraft simply because this is consistent with a similar policy.
- Rationale: Though an airplane is a self-propelled vehicle, the enumerated list before the catch-all implies a land vehicle. Everyday speech also calls up the picture of a thing moving on land. Airplanes weren’t mentioned during the debate by Congress. **Fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.**
- Significance: Lenity is a default rule that is easily corrected if courts get it wrong. Congress can change the statute to make it more clear if the Supreme Court interprets a criminal statute wrong. This is one of the functions of the rule of lenity.

2. *Smith v. United States* (1993)

- Facts: Statute imposed a sentence on anyone who “during and in relation to a drug trafficking crime uses or carries a firearm.” Smith tried to trade a gun for cocaine.
- Issue: Did Smith “use” the firearm in relation to a drug trafficking crime?
- Holding: “Use” should be interpreted to include use of gun as a form of payment.
- Rationale: Though the statutory language normally evokes an image of use of a gun as a weapon, there is “no reason why Congress would’ve drawn a fine metaphysical distinction between a gun’s role in a drug offense as a weapon and its role as an item of parter; it creates a grave possibility of violence and death in either capacity.”

III. Vagueness as a constitutional limit on substantive criminal law (test in *Morales*)

- **Failure to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits** (plurality finding in *Morales*)
- **Authorize or encourage arbitrary and discriminatory enforcement** (majority finding in *Morales*)

Culpability and Elements of the Offense

I. Elements of the offense

A. In every criminal case:

1. Break the statute down into elements
2. What was the conduct required (actus reus)?
 - Failure to act can serve as actus reus, in limited consequences
3. What was the defendant's state of mind (mens rea)?

II. Actus Reus/Omissions

A. Actus Reus

1. Must be **voluntary**

a) *Martin v. State* (1944)

- Facts: Officers arrested appellate at his home, where he was drinking, and took him onto the highway where he manifested a drunken condition by using loud and profane language. He was convicted under a statute that said “Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, and manifests a drunken condition by boisterous/incident conduct shall be fined.”
- Issue: Does defendant’s “appearance” have to be voluntary?
- Holding: Yes, defendant’s appearance on the highway must be voluntary to fulfill the actus reus component of the act. Appearance here was not voluntary because he was compelled to appear by police officers.
- Rationale: Defendant was involuntarily and forcibly carried to that place by the arresting officer. The “plain terms” of this statute presuppose voluntariness. This gets at the idea of culpability. **The core element of the act was not voluntary.**

- ##### b) **MPC § 2.01**: Requirement of voluntary act; omission as a basis of liability; possession as an act
- (1) A person is not guilty of an offense unless his liability is based on conduct which includes a **voluntary act** or the omission to perform an act of which he is physically capable.

- (2) The following are not voluntary acts:
 - (a) A reflex or convulsion;
 - (b) A bodily movement during unconsciousness or sleep;
 - (c) Conduct during hypnosis or resulting from hypnotic suggestion;
 - (d) A bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual
- (3) Liability for the commission of an offense may not be based on a omission unaccompanied by action unless:
 - (a) The omission is expressly made sufficient by the law defining the offense; or
 - (b) A duty to perform the omitted act is otherwise imposed by law
- (4) Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

- **One core act is usually enough for actus reus under the MPC, but need to look at the statute and use basic theories to see if the part that is voluntary is sufficient in the example (for culpability)**

- Court cannot criminalize being (*Jones v. City of Los Angeles*)

B. **Omissions**

1. In an omissions case:
 - a) Is there a duty?
 - Are there one or more sources of a legal duty?
 - b) If no, then no liability
 - Unless you can make an argument for expansion through status relationship or other category
2. **MPC § 2.01(3)** (see above)
3. Need a **legal duty**
 - a) Imposed by **statute** (legislature creates duties)
 - b) **Status relationships** (e.g. husband/wife; parent/child)
 - This is a common-law pocket; judges create these status relationships
 - Courts have expanded these status relationships, but have also determined where they go too far
 - c) **Contractual duty** to care for another
 - All types of contracts count, including employment, informal, etc.
 - d) **Voluntary assumed care and secluded helpless person** to prevent others from rendering aid
 - e) **Created the peril**
 - Whenever defendant's act, though without his knowledge, imperils the person/liberty/property interest and the defendant becomes aware of the events creating the peril, he has a duty to take reasonable steps to prevent the peril from resulting in the harm in question.
 - Tort law reflects this general principle.
4. Justifications for raising the standard to legal duty
 - Libertarian ideology: not the government's business to encourage citizens to help one another
 - This could lead to more problems on the logistical side; higher caseloads for law enforcement/prosecutors, increased enforcement discretion, etc.
 - Incentive for people pulling away from issues of child abuse, DV, etc. because they don't want to get involved and be held legally responsible
 - People are afraid of getting hurt themselves
 - Fear of being called in as a witness
 - Fear of repercussions
 - Bystander effect: sometimes if people do not know they are personally responsible, they will just assume someone else will help
 - Criminalizing people for not realizing a crime is going on
 - Line-drawing problems
5. Justifications for lowering the standard
 - Help promote moral value/importance of helping behavior
 - Utilitarian argument that it would reduce the amount of harm to victims/prevent other crimes
 - **Could expand this through:**
 - **Status relationships**
 - *Carroll* case: Courts expand liability to step-parents because they provide parental duties. Step-parent is functionally in the same situation as a parent/child relationship.
 - *Beardsley* case: Failure to help man's mistress. Court says that there is no status relationship here.

- Few courts today would say that a formal marriage is always necessary to establish a familial duty. However, a de facto marriage may be required.
 - *State v. Miranda*: live-in father failed to protect a four-month-old child from a fatal beating inflicted by his girlfriend, the child's mother. Court did not extend parental liability in this case.
 - Could potentially expand to roommates, same-sex marriage situations, etc.
 - To create an additional category when you already have a statute is very expansive.
6. *Jones and Pope*: Illustrations of limits to liability based on omissions
- a) *Jones v. United States* (1962)
- Facts: Defendant was found guilty of involuntary manslaughter for failing to provide for a ten-month-old baby. The baby's mother lived in house with defendant. It was unclear whether defendant was being paid to take care of the baby. Defendant had means to provide food and medical care but did not.
 - Issue: Was Defendant under a legal duty to supply food and necessities to the baby?
 - Holding: Case was overturned for jury instructions. Need to find a legal duty.
 - Rationale: Citing to *Beardsley*, the court said that "duty must be a legal duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death." There are at least 4 situations in which failure to act may constitute breach of a legal duty. Statute imposes a duty, Status relationship, Contractual duty to care, Secluded helpless person as to prevent others from rendering aid. 3rd or 4th is applicable here.
 - Significance: This is a categorical issue. Whether Jones fell under those categories is a matter for the jury to decide.
- b) *Pope v. State* (1979)
- Facts: Pope was found guilty for child abuse. Pope took in Norris and her child from church because they had no other place to go. In Pope's presence Norris beat and tore and the infant and eventually the child died from the beating. Gov't says she had the temporary care custody, and responsibility for a minor child and failed to intervene to save the child.
 - Issue: Did Pope have a legal duty to care for the child (by her responsibility for the supervision of the child)?
 - Holding: The evidence was not sufficient to prove that Pope fell within the class of persons to whom the child abuse statute applied.
 - Rationale: Person can be convicted of felony child abuse under the statute if was a parent, adoptive parent, in loco parent, or *responsible for the supervision of a minor child under eighteen years* AND cause by commission or omission abuse to the child. The mother was always present in this case, and Pope had no right to usurp the role of the mother. Pope isn't considered responsible for the child because Pope shouldn't have to make the judgment of whether mother is mentally capable to care for her child.
 - Significance: Don't want to discourage people from acting in good faith.

C. Possession

- Most courts interpret possession offenses to require that the accused be aware that she has the thing she is charged of possessing.
- MPC 2.01(4): says accused has to be aware of his control of the thing possessed for a sufficient period to have been able to terminate his possession,
- Some courts, however, invoke a "strict liability" type standard for possession.

III. Mens Rea

A. Basic Conceptions and Applications

- Mens rea: broad view is moral fault. Technical view is kind of awareness or intention that must accompany the prohibited act, under the terms of the statute defining the offense.
 - Many defenses are mens rea defenses (duress, legal insanity, accident, mistake, etc)
- Elements of a crime under the MPC:
 - Conduct elements: verb elements; what the defendant allegedly did
 - Result elements: the harm element
 - Attendant circumstances: everything else; e.g. nighttime element in burglary
 - We have to ask mens rea with respect to each element
 - Awareness or intent element: can resort to the presumption that someone intended the natural/probable consequences of their action

1. Defining "Malicious" -- Common Law

a) *Regina v. Cunningham* (1957)

- Facts: Defendant stole a gas meter. He didn't stop the turn the tap to stop the leakage of the gas. The escaped gas endangered the life of the victim, who was asleep in the bedroom next door.
 - Issue: Did defendant maliciously endanger victim's life within the meaning of the Offenses against the Person Act?
 - Act: "Whoever unlawfully and maliciously administers to or causes to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony."
 - Holding: It is incorrect to say that the word malice merely means wicked. The conviction depends on whether the defendant foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it.
 - Rationale: In any statutory definition of a crime, malice must require (1) an actual intention to do the particular kind of harm that was in fact done, or (2) recklessness as to whether such harm should occur or not. Malice postulates foresight of consequence. The key is that defendant had to be **aware of the risk -- subjective awareness** (generally bare minimum for criminal liability). If aware, the jury has to ask the magnitude of the risk and whether it was justifiable. The jury at the trial level was instructed that malicious is equated with wicked, which is incorrect.
 - Significance: **Prevailing approach at common law: malice means foresight of the prohibited consequences (recklessness)**. Default rule = defendant was aware his actions posed a "substantial risk" of causing the prohibited harm but proceeded anyway.
- b) *Regina v. Faulkner* (1877)
- Facts: Sailor went into ship to steal some rum. He lit a match to see better in the dark. Some of the rum caught fire and the fire spread, completely destroying the ship. He was charged with violating the Malicious Damage Act by "maliciously" setting fire to the ship.
 - Issue: The trial judge instructed the jury that "if the prison was engaged in stealing the rum and the fire took place, defendant should be found guilty." Proper definition of malice?
 - Holding: The act must be **intentional and willful, though the intention and will may be held to exist in, or be proved by, the fact that the accused knew** that the injury would be the probable result of his unlawful act, and yet did the act reckless of such consequences.
 - Rationale: To take the trial judge's proposition would be expanding culpability way too far. Court says that he has to have culpability with respect to the particular injury to the property. Gets at the standard of subjective awareness that the risk exists, and proceeding anyway.
2. Intro to MPC mens rea standards
- a) In general, MPC hates the idea of using criminal law for utilitarian purposes. Focuses on subjective blameworthiness.
- MPC outlines mens rea standards in **2.02: General Requirements for Culpability**
 - Every time a statute is from a jurisdiction following the MPC:
 - Break the law into its elements
 - Look to see if there is a mens rea term
 - If yes, 2.02(4)
 - If none, 2.02(3) -- recklessness (at a minimum)
- b) **Purposely 2.02(2)(a)**: A person acts purposely with respect to a material element of an offense when: (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**.
- With respect to conduct/result: precise reason the defendant committed the act was to cause the particular harm.
 - In certain circumstances, can infer purpose from knowledge.
 - Attendant circumstances: can't be the purpose that attendant circumstance is present but can be aware of/hope that it is the case (e.g. aware of/hopes it's nighttime when committing burglary).
- c) **Knowingly 2.02(2)(b)**: A person acts knowingly with respect to a material element of an offense when: (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.
- Virtual certainty that this will lead to resultant harm
 - Don't want the harm to happen, but it's practically certain that it will happen.

- Knows about attendant circumstances/conduct, so aware or practically certain that conduct will cause such a result.
 - d) **Recklessly 2.02(2)(c)**: A person acts recklessly with respect to a material element of an offense when he **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, considering the nature and purposes of the actor's conduct and the circumstances known to him, its disregard involves a **gross deviation** from the standard of conduct that a law-abiding person would observe in the actor's situation.
 - Conscious (subjective awareness) disregarding a substantial and unjustifiable risk
 - Defendant should have the awareness that risk is substantial, though some courts say it is enough that a reasonable person would know.
 - Whether taking the risk is justifiable or not gets at the reasonable person standard.
 - (a) Difference b/w recklessness and knowledge is probability of the result occurring.
 - e) **Negligently 2.02(2)(d)**: A person acts negligently with respect to a material element of an offense when 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, considering the nature and purpose of the actor's conduct and the circumstances known to him, involves a **gross deviation** from the standard of care that a reasonable person would observe in the actor's situation.
 - Culpability for punishment purposes is usually lacking.
 - **Negligence is not a culpable standard in criminal law UNLESS the legislature makes it explicit.**
 - f) **2.02(3) Culpability required unless otherwise provided**: When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts **purposely, knowingly, or recklessly**.
 - **Default standard of recklessness**. Solves all statutory interpretation problems for statutes with no mens rea term.
 - g) **2.02(4) Prescribed culpability requirement applies to all material elements**: When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose clearly appears.
 - If the law has a culpability requirement with respect to one element, then you **assume it applies to everything UNLESS** a contrary purpose plainly appears.
3. Criminal negligence v. civil negligence
- Criminal negligence is not a definitive standard, but generally this represents a gross deviation from reasonable standard of care, to the point of creating a **substantial risk**.
 - a) *State v. Hazelwood* (1997)
 - Facts: Defendant was captain of the oil tanker *Exxon Valdez*. Ran his ship aground on a reef and spilled 11 million gallons of oil into ecologically sensitive waters.
 - Issue: Should the defendant captain be held criminally liable for these actions [warranting jail time]? Should the standard be civil or criminal negligence?
 - Holding: **Negligence, rather than gross negligence, is sufficient to provide assurance that criminal penalties will be imposed only when the conduct at issue is something society can reasonably be expected to deter. In this case, ordinary negligence standard is sufficient.**
 - Rationale: Criminal negligence requires a greater risk: risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care of a reasonable person. Defendant doesn't have to actually be aware of the risk of harm. Utilitarian argument: would give an incentive to act more carefully. The legislature just said negligence. Additionally, in this case, there is no private party to enforce the civil negligence claim.
 - Dissent: Punishment is too severe for conduct which involves only civil negligence.
 - Significance: Negligence comes in when the results are very harmful (as in this case). Not super common in criminal law.
 - b) *Santillanes v. New Mexico* (1993)
 - Facts: Defendant cut his seven year old nephew's neck with a knife during an altercation. He was convicted under a statute for "negligently causing a child to be placed in a situation that may endanger the child's life or health."
 - Issue: Is the civil liability standard of negligence appropriate in this case, or is a higher standard needed?
 - Holding: **The statute requires criminal negligence instead of ordinary civil negligence.**

- Rationale: Though the statute does not specify a mens rea state, moral condemnation is attached to this crime so the crime should reflect a mental state warranting such contempt.
- Significance: This is the level of negligence usually required in criminal statutes. There must be something higher than civil negligence.

4. Summary of *Cunningham* and illustration of MPC Requirements

- **Purpose:** If def. **wanted** Wade to inhale the gas
- **Knowledge:** If def. **hoped Wade would not** inhale the gas but **knew it was virtually certain** she would
- **Recklessness:** If def. didn't know that gas would be released but **considered the possibility and decided to take a chance.** *Cunningham* adopts this as the definition of malicious, which is the majority view at common law.
- **Negligence:** If def. **didn't notice** other house was occupied but **could reasonably tell** if he had looked.
 - Civil version: *Hazelwood* -- unreasonable risk
 - Criminal version: *Santillanes* -- Grossly unreasonable and substantial/unjustifiable risk.
- **Strict liability:** If def. **didn't notice** other house was occupied and **reasonable person could not tell** even if he looked. Trial judge in *Cunningham* seems to accept this as long as def. was doing something he had no business doing.

5. **Willful blindness:**

- a) MPC 2.02(7): *Requirement of Knowledge Satisfied by High Probability:* When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
- (1) *U.S. v. Giovanetti:*
- Facts: Leasing to gamblers; made no inquiry about intended use of the house.
 - Holding: Not convicted because he did not **deliberately avoid the unpleasant knowledge** -- he did not act to avoid learning the truth.
 - *Giovanetti* was an MPC jurisdiction.
- b) Common law:
- (1) *U.S. v. Jewell* (1976)
- Facts: Defendant was driving with 100 lbs of marijuana in the car. Did not know about the marijuana but knew that there was a secret compartment and knowledge of the facts indicating that it contained marijuana. Defendant was trying to avoid positive knowledge of the marijuana.
 - Issue: Does knowledge require actual knowledge?
 - Holding: Defendant must be actually aware but if not, his ignorance must be solely and entirely a reason of conscious purpose to avoid the truth to establish knowledge.
 - Rationale: MPC analysis: Knowledge is established if a person is aware of a high probability of its existence, unless he believes it does not exist. Actual belief is enough to negate high probability. Non-MPC (**Jewell is not bound by MPC but does cite MPC as persuasive**): **lack of knowledge is solely because of a conscious purpose to avoid the truth** (majority view)
 - Dissent: **True ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge** (minority view)
 - Significance: Ostrich instructions. Acts or omissions to avoid the truth come in.

B. **Mistake of Fact**

1. *Regina v. Prince* (1875)

- Facts: Defendant unlawfully took an underage girl from the possession of her parents without her possession. Defendant was under the impression that she was 18, not 14. Jury said that this was a reasonable belief. The statute said "whoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father or mother/guardian, shall be guilty"
- Issue: Should this mistake of fact be an excuse?
- Holding: **A mistake, even when reasonable, should not be a defense when it relates to the age of a minor in a sexual offense.**
- Rationale: There is no mens rea in the statute. This case rests on the concept of **moral wrong**: taking someone without the lack of parents' consent is a wrong in and of itself. **Even under the facts as defendant believed them, this was still immoral (just a lesser moral wrong).**
- Dissent: A mistake of facts, on reasonable grounds, to the extent that if the facts were as believed the acts of the prisoner would make him guilty of no criminal offense at all, is an excuse.

- This is the **legal wrong** theory. If you're doing something that isn't a crime at all, have to have mens rea. But **if under the facts as you believed them to be, you'd just be doing a lesser crime, this doesn't mean you should receive a lesser sentence.**
 - Significance: Moral wrong/legal wrong is still the dominant view in the US today for statutory rape. We are more interested in protecting children; we err on the side of insulating youth. This provides the incentive to ask the parents how old a child is and to chill people from engaging in certain types of conduct.
2. **Moral/legal wrong in practice: *State v. Benniefield* (2004):** (imagine this is in CO) Defendant was convicted of possessing drugs within 300 feet of a school. Court said he could be convicted of the more serious school-zone offense as long as he knew he possessed drugs, without any proof that he knew/should have known he was near a school. This is the prevailing approach.
 - Reasons to impose liability in this case:
 - Promotes the purpose of getting drugs away from children -- utilitarian purpose of deterring harm.
 - Moral wrong argument: selling drugs is a moral wrong even if not a legal wrong (in CO).
 - Reasons against imposing liability:
 - Legal wrong theory: No intention to sell in a school zone; if marijuana is legal elsewhere this is acceptable conduct outside of the school zone.
 - High punishment means we need a mens rea element because culpability is even more important. More significant the consequences, more it matters that we want a mens rea requirement.
 3. MPC approach:
 - Claims about mistake must be resolved by determining whether the mistake negates the mens rea required for the statute in question.
 - Effective measures of defendant's liability should be his culpability, not actual consequences of his conduct.
 4. *Prince* hypo
 - Under facts as def. believes them to be, conduct is innocent
 - E.g: Believed he had Annie's parents' consent
 - Under facts as def. believes them, conduct is immoral
 - E.g: Did not have consent, but believed Annie was 18
 - Under facts as def. believes them, conduct is illegal
 - E.g: Two statutes: one punishes taking out of possession girls under 14 and other girls 14-16. He believes she is 16; turns out she is 13.
 5. *People v. Olsen* (1984)
 - Facts: Shawn was 13 years old and 10 months. By her facts, Garcia told Shawn to let appellant make love to her or he would stab her. Appellant had sexual intercourse with Shawn. Garcia stabbed Mr. M (father of Shawn). By appellant's facts, Shawn invited Garcia to have sex (after they had already had sex). The next night Shawn invited Garcia and appellant in. Shawn had sex with appellant and Garcia denied threatening Shawn with a knife.
 - Issue: Is reasonable mistake as to the victim's age a defense to a charge of lewd or lascivious conduct with a child under 14 years of age?
 - Holding: **Reasonable mistake should not be a defense to a charge of lewd or lascivious conduct with a child under 14 years of age.**
 - Rationale: in *People v. Hernandez*, held that an accused's good faith, reasonable belief that the victim was 18 or more years of age was a defense to the charge of statutory rape. However, in *People v. Lopez* said that a mistake of act relating only to the gravity of the offense will not shield a deliberate offender from the full consequences of the wrong actually committed. The statute lists a lesser punishment for those who honestly and reasonably believed the victim was 14 years of age or older. This indicates that the honest belief wasn't supposed to be a defense to this particular charge.
 - Dissent: when the offense carries serious sanctions and the stigma of official condemnation, liability should be reserved for persons whose blameworthiness has been established.
 - Significance: With these cases, look at the specifics of the statute and do the legal wrong/moral wrong analysis to figure out if the defense matters or not.
 6. Protecting minors and statutory rape
 - Statutory analysis
 - In common law jurisdictions, have to figure out what/if mens rea is necessary.
 - What is the underlying "moral wrong"?
 - What are key elements of the statute that put defendant in the context of already committing a "legal wrong"?
 - Bottom line: need to establish culpability

- Sexual contact forms the core harm
 - Age requirement is almost always treated as a strict liability element
- a) *B (A minor) v. Director of Public Prosecutions* (2000)
- Facts: 15 year old boy asked a 13 year old to perform oral sex. The girl refused, and B was charged with inciting a child under the age of 14 to commit an act of gross indecency (Indecency with Children Act).
 - Issue: What mens rea does the defendant need with regards to the age of the child?
 - Holding: **“Honest belief” requirement negates mens rea if person is mistaken about age of victim.**
 - Rationale: The statute said nothing about the mental element. Court says that baseline of recklessness should establish culpability (similar to MPC).
 - Significance: Alternative approach to *Prince* adopted in 2000. House of Lords is adopting a presumption that they only want to get the culpable people, not those who were genuinely mistaken (even if unreasonable). Said that *Prince* is out of line with the modern trend in criminal law which is that a defendant should be judged on the facts as he believes them to be.
- b) State of *Prince* in England
- Move towards *B (A minor)* approach in England. In *B (A Minor)*, court says that some of the reasoning in *Prince* is at variance with the common law presumption regarding mens rea.
- c) *Garnett v. State* (1993)
- Facts: Mentally retarded twenty-year-old man impregnated a thirteen-year old. Charged with second-degree rape under a statute which contained a provision that defendant had to be at least four years older than victim. The girl had previously told the man that she was 16 years old and he had acted with this belief.
 - Issue: Does Maryland’s second degree rape statute allow for a mistake-of-age defense?
 - Holding: Maryland’s statute does not allow for a mistake of age defense.
 - Rationale: **Statutory rape is a strict liability crime designed to protect young persons/young women from pregnancy.** In other jurisdictions which use this defense, this is unavailable when the sex partner is under 14 years of age.
 - Dissent: This statute destroys the concept of fault and renders meaningless the presumption of innocence and the right to due process.
- d) State of *Prince* in the U.S.
- In statutory rape prosecutions, traditional insistence on imposing strict liability for mistakes about age is beginning to erode. More than 20 states now permit the defense of mistake under some circumstances. But even in those situations, nearly all the states that allow the defense do so only when the mistake is *reasonable*. More than half the states do not permit a mistake defense under any circumstances.
 - MPC allows a defense for honest mistake but provides for strict liability when a child is below ten. When greater than 10, mistake is an affirmative defense.
 - Alaska is the only American court that has held strict liability in statutory rape to be unconstitutional.
 - Two developments prompted reconsideration of strict liability:
 - (a) Increasing importance of mandatory sentencing laws
 - (b) *Lawrence v. Texas* (unconstitutional for a state to punish private sexual activity by consenting adults, whether married or not). If the acts defendant intended were not illegal, there is no lesser crime and hard to argue that this is a moral wrong.
- e) Exercise in Legal Wrong v. Moral Wrong
- NY Destruction of Property Statute: “A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding one thousand five hundred dollars.”
 - Person with ATV accidentally runs over his property line, crushing a neighbor’s precious \$3,000 flower thinking he’s still on his property
 - If not MPC jurisdiction, what’s the mens rea?
 - “With intent to damage property of another person” -- since he thought it was his, no mens rea
 - Next part has negligence standard -- “no right to do so nor any *reasonable* ground to prove that he has such right.”
 - Defendant has to prove that he had a reasonable belief the flower was his
 - Legal wrong theory: negligent destruction of property is a “legal wrong” and the value term is strictly a strict liability element that adds more punishment

- Moral wrong theory: destroying property of any amount is a moral wrong that gets at culpability of defendant (value requirement, like in legal wrong context, is a SL element with no mens rea term at all).

C. Strict Liability

1. Strict liability offenses

- People have done nothing legally or morally culpable
- Liberals and conservatives alike dislike SL (targets people who are not morally culpable, and targets businesspeople and businesses with regulatory violations)
- Under the MPC
 - MPC drafters didn't like SL
 - 2.02 (1) talks about the minimum requirements of culpability
 - SL comes in during the MPC only for a violation (violations that do not result in criminal imprisonment)
 - 2.05 left room for drafters to add SL offenses, but they would have to do that clearly and outside of the MPC

2. Strict liability offenses get at whether people would be on notice

- People are more likely to be on notice for behavior that's part of a regulatory scheme (e.g. public welfare offenses)
- Strict liability outside of the context of public welfare is generally not okay

3. *Morisette v. United States* (1952)

- Facts: Defendant took spent bomb casings and sold them at a market for \$84. He was convicted under a statute which made it a crime to "knowingly convert" government property ("knowingly converts to his use or the use of another... thing of value of the United States"). Defendant said he thought that the bomb casings had been abandoned by the air force.
- Issue: Should strict liability be expanded to traditional crimes, and not just public welfare offenses?
- Holding: Just because a statute for a traditional crime eliminates express mention of mens rea, this doesn't mean that mens rea is not an element.
- Rationale: Crimes in cases like *Balint* were public welfare offenses. In this case, there is a very large penalty attached to a *traditional* type of crime. **Key differences between traditional and public welfare offenses: (1) low penalty v. high penalty (more serious the punishment, higher we want mens rea requirement for the court; public welfare offenses typically have low penalties that don't have stigma attached to it) (2) Harms are greater, more likely to have SL, (3) No root in common law crime, more likely to have SL (4) Part of existing regulatory scheme, more likely to have SL. (5) Defendant is in a good position to be able to prevent the harm, more likely SL.**
- Significance: Sets precedent in the federal system. For SL, generally do it because criminal penalties are a greater incentive for requiring people to get it right. This seems unfair in traditional crime settings but in public welfare settings the danger is the same regardless of intent, and companies are more likely to cooperate in the face of criminal prosecution.

4. Public welfare offenses:

- **Group of offenses where social utility outweighs what the potentially innocent individual suffers.**
 - Puts people on notice. Makes them alert and extra careful.
- a) *U.S. v. Balint* (1922)
 - Facts: Defendants were indicted for violating the Narcotic Act by selling derivatives of opium and coca leaves without the order form required by the act.
 - Issue: Did the defendants have to know that they were selling prohibited drugs?
 - Holding: **Proof of knowledge that they were selling prohibited drugs was not required by the statute.**
 - Rationale: The Act's manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes with the inhibition of the statute. Congress weighed the injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger and decided the latter was more important to avoid.
- b) *United States v. Dotterweich* (1943)
 - Facts: Dotterweich and the corporation were prosecuted for shipping misbranded or adulterated products in interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act.
 - Issue: Did the statute require Dotterweich to know/should have known the products were misbranded?
 - Holding: The statute required no mens rea at all with respect to whether those charged knew or should've known the shipment was mislabeled.

- Rationale: **Deterrence-Utilitarian balancing test:** Congress has preferred to place the burden upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the prosecution of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent people.

c) *Staples v. United States* (1994)

- Facts: Defendant possessed a gun which wasn't previously capable of automatic firing. A part of the gun wore away so it was now capable of automatic firing. Defendant was convicted under a statute which said "possession of an unregistered firearm was punishable by up to 10 years in prison."
- Issue: Did defendant have to know of the characteristics of his weapon that made it a firearm?
- Holding: Absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.
- Rationale: Congress intended the act to regulate the circulation of dangerous weapons. The government argues that this is a public welfare offense. However, there is a long tradition of widespread lawful gun ownership in this country. Congress couldn't have intended to subject a law-abiding citizen to a 10-year term of imprisonment if what was genuinely and reasonably believed to be a conventional semiautomatic weapon wore down into a fully automatic weapon.
- Significance: **Can't apply public welfare rationale to felony offense unless a clear statement from Congress says so.**

d) *United States v. Freed* (1971)

- Facts: Prosecution for possession of an unregistered grenade. Defendant knew that the items in possession were grenades.
- Issue: Did defendant have to know the weapons were unregistered?
- Holding: Government did not have to prove the defendant also knew the grenades were unregistered.
- Rationale: The defendant knew he was dealing with hand grenades (particularly dangerous type of weapon). Possession of this wasn't entirely innocent in itself. **People should've been on notice that they are dealing with products that are inherently dangerous.**
- Significance: *Staples* court draws distinction between this and guns, which have many lawful purposes.

e) *X-Citement Video* (p. 291)(shipping child pornography)

- Facts: Defendant was convicted for violating the Prosecution of Children against Sex and Exploitation Act: Any person who "(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped in interstate or foreign commerce, if... (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; shall be punished by up to 10 years imprisonment"
- Issue: Should a conviction under this statute require proof that the defendant knew that the person shown in the visual depiction was a minor, or only that he knew the thing he shipped or received was a "visual depiction?"
- Holding: Court held that the statute must be construed to **require proof of knowledge**, not just that the defendant had shipped or received something he knew to be a visual depiction, but also that he knew that the depiction involved a minor engaged in sexually explicit acts.
- Rationale: We should go against the most clear grammatical meaning because to give the statute its most grammatically correct reading would be ridiculous. Additionally, this is not a public welfare case. This would get too many innocent people in the meaning of the statute.
- Dissent: The only grammatical reading is the opposite. Knowing modifies transports or ships in interstate; plain meaning.
- Significance: Child porn is a very regulated industry. More courts are willing to accept no mens rea at all, or just knowledge of the conduct.

D. Mistake of Law and the Cultural Defense

1. Mistake of law

a) General rule: mistake of law is no defense (*Marrero* p. 304)

- Facts: Corrections officer at a federal prison brings his gun into a social club. Statute said that "no person could possess a loaded firearm" except for "peace officers -- correction officers of any state correction facility or of any penal correctional institution." *Marrero* worked at a penal correctional

institution, so he says that he got to carry a gun. Government argues that “state” modifies “any penal correctional institution.”

- Issue: Can defendant’s personal misreading or misunderstanding of this statute excuse criminal conduct in the circumstances of this case?
 - Holding: **Where government is not responsible for the error, mistake of law should not be available as an excuse.** Any broader view fosters lawlessness.
 - Rationale: A person is not relieved of criminal liability for conduct because he is engaged in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense UNLESS mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment (d) an interpretation of the statute or law relating to the offense officially made or issued by a public servant, agency, or body legally charged or empowered with the responsibility or privilege of administering, enforcing, or interpreting such statute or law. Defendant argues that his interpretation of the statute is enough under (a). However, the underlying statute never authorized defendant’s behavior; he just thought it did. There is no mistake in the law in itself. Court said that defendant can’t just interpret the statute for himself; needs an official to interpret it, and then if he bases his opinion on the interpretation it is excusable.
 - Dissent: It is wrong to punish someone whose good-faith reliance on the wording of a statute led him to believe what he was doing was lawful.
 - Significance: If one reads the statute wrong or honestly does not know behavior was a crime, can still be prosecuted.
- b) Exceptions to general rule/distinctions:
- Overview
 - Statutory language
 - Legislature decides that they want to make knowledge of the law an element of the offense
 - *Cheek*-like exceptions
 - If you have to do something knowingly/willfully, this extends to something the statute doesn’t say explicitly -- reading into implicit features of statutes
 - Official source
 - Equitable estoppel idea: part of this category
 - *Lambert* category
 - Constitutional exception
- (1) **Material element** -- when mistake negates mens rea
- (a) *Regina v. Smith (David)* (1974)
- i) Facts: Defendant damaged war panels and floor boards to retrieve stereo wiring (his own property) from his rented apartment with the landlord’s permission. He was accused of violating an Act with said “without lawful excuse destroys or damages any property belonging to another...”
 - ii) Issue: Did defendant's belief that he had the right to do what he did a lawful excuse?
 - iii) Holding: Defendant’s belief was lawful excuse of law. Has to be “property of another”
 - iv) Rationale: Property of another was a material element of the crime. No offense is committed if a person destroys or causes damage to property belonging to another if he does so in the honest though mistaken belief that the property is his own, and provided that the belief is honestly held it is irrelevant to consider whether or not this is justifiable.
 - v) Significance: Because “property” of another is relevant to the definition of the offense, defendant didn’t meet the mens rea for the offense.
- (b) *People v. Weiss* (1938):
- Facts: Defendants were charged with kidnapping a person suspected of murdering the Linburgh child. Under the statutory definition, kidnapping was committed when a person “willfully seizes, confines, inveigles, or kidnaps another without authority of law... with intent to cause him to be confined or imprisoned against his will.”
 - Issue: Can defendants bring in testimony to show that they believed a law enforcement officer had authorized them to seize the murder suspect?
 - Holding: This evidence can come in because this would show that defendants lacked the requisite intent to confine the victim “without authority of law”
 - Rationale: Good faith belief in the legality of the conduct would negate an express and necessary element of the crime of kidnapping.

- Significance: Reinforces the idea that **if defendant doesn't meet mens rea requirement with respect to material elements because of mistake, they are not guilty.**
- (2) **Crime requires awareness you're breaking the law**
- (a) *Cheek v. United States* (1991)
- Facts: Convicted of willfully failing to file income tax returns for a number of years: "anyone is guilty of a felony who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof." Sincerely believed that under the tax laws he owed no taxes.
 - Issue: Is objective reasonable misunderstanding the only mistake of law that negates statutory willfulness?
 - Holding: Petitioner's beliefs that wages were not income and that he was not a taxpayer within the meaning of the IRC should be considered by the jury in determining whether Cheek had acted willfully.
 - Rationale: Petitioner also claimed that some parts of the IRC were unconstitutional. This belief reveals **knowledge of the provisions at issue**. Therefore, claims that the IRC were unconstitutional should not be considered by the jury. However, in thinking that he did not have to pay taxes, the true belief should be considered by the jury.
 - Significance: In squibs that follow this case -- see below (corrosive liquids case, food stamps case, date rape drugs, safe drinking water, firearms dealing), the idea is that **people should be on notice that they have to find out what their legal duties are**. We don't allow mistakes of law in these cases because we want them to make the effort, especially when they are fairly sophisticated actors.
- (b) *Liparota*
- Facts: Statute governing food stamp fraud provided "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by the statute or the regulations" is subject to fine and imprisonment.
 - Holding: Court hold that **prosecution must prove the defendant knew of the existence and meaning of the relevant regulation**.
 - Significance: Reflects a concern that this would over-criminalize a broad range of apparently innocent conduct.
- (c) Compare:
- i) *International Minerals*
- Facts: Statute made it a crime for a person to "knowingly violate" a regulation of the ICC regarding the transportation of corrosive liquids.
 - Holding: Prosecution must prove **only that the actions the defendant knowingly committed violated that regulation**, not that he knew of the existence/meaning of the applicable regulation.
- ii) *Ansaldi*
- Facts: Defendant was charged with selling date rape drug. Under statute, unlawful to "knowingly or intentionally distribute a controlled substance." Defendant knew he was distributing date rape drug but not that this was controlled.
 - Holding: **Knowledge of, or intent to violate, the law is simply not an element of this offense.**
- iii) *Overholt*
- Facts: Defendant was charged with "willfully" violating the Safe Drinking Water Act by unlawfully disposing of contaminated wastewater.
 - Holding: Court said that **defendant did not have to be aware of the specific law he was violating.**
- (3) **Statutory exception/official interpretations**
- MPC 2.04
 - i) Code has a limited defense for situations in which a defendant reasonably believes that his conduct does not constitute an offense.
 - (1) In regulatory offenses, penal sanctions are appropriate only for deliberate evasion or defiance.
 - (2) Defense is only available when the defendant acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous.
 - NY Law 15.20: effect of ignorance or mistake upon liability.
 - *Albertini*

- Facts: Defendant was convicted of trespass for engaging in a protest demonstration on a naval base. Defendant said that his conduct was protected by the First Amendment. Ninth Circuit ruled in his favor. Gov't filed a petition for cert. Before S. Ct. decided whether to review the case, he engaged in a second protest demonstration. After second demonstration, S.Ct. reversed the Ninth Circuit decision.
 - Holding: (for second protest) he had a due process right to rely on the previous Ninth Circuit decision ruling that his conduct was lawful.
 - Compare:
 - *Hopkins*
 - Facts: Defendant was convicted of violating a statute making it unlawful to erect/maintain any sign intended to aid in the solicitation of performance of marriages. State's Attorney had advised him before he erected the signs that they would not violate the law
 - Holding: Court said the evidence of the State Attorney's advice is irrelevant because **the advice of counsel, even though followed in good faith, furnishes no excuse to a person for violating the law and cannot be relied upon as a defense.** He was aware of the penal statute, aware of what he wanted to do, and he should erect the sign at his own peril.
- (4) *Lambert* and Due Process -- Unconstitutional
- (a) *Lambert v. California* (1957)
- Facts: Defendant was convicted of an offense punishable as a felony in the state of CA. Required to register by statute if going to stay in LA for a period of more than five days.
 - Issue: Does the CA registration act violate Due Process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the possibility of such knowledge?
 - Holding: **Actual knowledge of the duty to register or the proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.**
 - Rationale: In this case, the actor is unsophisticated and this is just an omission (a passive offense). Typically in criminal law, you have to publish a law to establish notice. Court is worried about sticking a bunch of people with law violations. This is a bureaucratic law designed for police efficiency; not the same effect on public safety as public welfare offenses.
 - Dissent: There isn't a constitutional line between acts and omissions. This case is a deviation from strong precedent.
 - Significance: Huge slippery slope case. This is why *Lambert* holding is narrowed to such a small category of cases.
- (b) Compare *Wilson* (1998)
- Facts: Wife gets restraining order against Wilson. Statute prohibits those who have a restraining order against them from owning a firearm. Wilson already owned a gun and failed to get rid of it.
 - Issue: Did defendant have to have knowledge of the firearm provision?
 - Holding: A knowing violation of the statute only requires proof of knowledge by the defendant of the facts that constitute the offense.
 - Rationale: Restraining orders are generally taken out because someone was violent.
 - Significance: **We are more likely to relax culpability when the harm is greater.** Stronger public policy argument than *Lambert*.
 - Impact on sex offender laws: even if a sex offender isn't told on registry laws, held accountable; this likely reflects a belief that sex offenders pose a greater risk to society. *Lambert* hasn't had much of an effect (e.g. *Bryant* case where defendant moved from SC to NC and Court said that there was general notice that one isn't allowed to move without registering)
2. Cultural defenses
- Casebook cases are highly unsympathetic
 - Culture defense could be used through judge and prosecutorial discretion
 - Also could be used to rebut the existence of mens rea
 - The argument is that people from other cultures aren't on notice about regulatory laws here
 - However, we put people on notice through billboards, speed limit signs, etc.

SUBSTANTIVE OFFENSES

Homicide and the Grading of Offenses

I. Background

- A. Homicide is currently divided into murder/manslaughter, and is divided into different degrees (e.g. first and second degree murder)
 - Mens rea distinguishes culpability in all of these cases
- B. At common law:
 - 1. Basic principles of the law of murder:
 - Malice aforethought
 - Malice
 - Number of different mental attitudes
 - Generally meant intent/knowing. Expanded to felony murder and depraved heart killings.
 - Forethought
 - Forethought could mean a second before
 - Over time, forethought evolved to mean greater time to deliberate
- C. Over time: Broke down these categories to reflect killings that are worse than others
 - First line: first-degree murder and second-degree murder (purely statutory line)
 - Intentional killings line between premeditated, willful, and deliberate, and those that are not

II. Premeditation/Deliberation

A. Murder

- 1. First and second degree and the meaning of premeditation
 - Why is premeditation deserving of increased punishment?
 - Gets at culpability
 - However, people who have had a long time to think about the killing may not be as culpable as defendants in impulse killings (e.g. mercy kills or otherwise killing a terminally ill patient)
 - *State v. Forrest*: defendant kills his terminally ill father. Convicted of first-degree murder and sentenced to life imprisonment. May not be as culpable as someone in an impulse killing.
 - Utilitarian considerations
 - Easier to deter premeditated crime than impulse crime
 - Some states have followed the MPC and rejected premeditation as the basis for identifying murders that deserve the greatest punishment.
 - a) ***Commonwealth v. Carroll (1963)***
 - Facts: Carroll had an argument with his wife. She had some psychological disorders and had abused the children before. The wife asked him to keep a gun above the bed to make her feel safe. Wife and he got into an argument. Following the argument, he grabbed the gun above the bed and shot her twice (about five minutes after the argument).
 - Statute in this case: “Willful, deliberate, and premeditated.”
 - Issue: Murder in first or second degree? Is five minutes enough to establish premeditation [necessary for first-degree murder]?
 - Holding: Killing was first-degree -- **“no time is too short for a wicked man to frame in his mind the scheme of murder.”**
 - Rationale: Whether the intention to kill and the killing were within a brief space of time or a long space of time is immaterial if the killing was in fact intentional, willful, deliberate, and premeditated. From his own statements and testimony, it is clear that defendant remembered the gun, deliberately took it down, and deliberately fired two shots into the head of his sleeping wife.
 - Significance: Premeditation has to be getting at **something other than intentionality**. Doesn't have to be planning, but there must be a space of time. A lot of jurisdictions follow the “no time is too short” logic.
 - *Carroll* seems to equate first and second degree murder
 - b) ***State v. Guthrie (1995)***
 - Facts: Defendant and his co-worker were joking around. Defendant was in a bad mood. Co-worker flipped a dishtowel at defendant's nose. The defendant pulled a knife from his pocket and stabbed the victim in the neck. He also stabbed the victim in the arm as he fell to the floor. Victim said “I was just

kidding.” Defendant said “you should’ve never hit me in the face.” Defendant suffered from psychiatric disorders, including body dysmorphic disorder, and he suffered a panic attack right before the stabbing.

- Statute: must be intent, and must be some period for deliberation
 - Issue: First-degree murder? Is premeditation the same as willful and deliberate (mere intent to kill)?
 - Holding: There must be **some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation under our first-degree murder statute**... Any other intentional killing, by its spontaneous and non-reflective nature, is second-degree murder.
 - Rationale: The jury instructions at trial had said “premeditated murder” means intent to kill need only exist for an instant. However, this doesn’t get at the distinction between first and second degree murder. There must be some period (though it doesn’t have to be any particular period) between the formation of the intent to kill and the actual killing which indicates an opportunity for some reflection for first-degree murder.
 - Significance: Court says here that there has to be more planning/advanced thinking. Tries to draw a line between first- and second- degree murder.
 - When this case was retried, the Government won first-degree murder. Guthrie stabbed the guy again after the guy told him he was just kidding, paused and removed his gloves, manner of killing. This all gets at reflection. Arguably planning/design here but no motive (no previous incidents like this)
- c) *Guthrie* jurisdictions:
- (1) *People v. Anderson*, CA Supreme Court’s view:
 - Evidence sufficient to sustain a finding of premeditation generally falls into three basic categories:
 - i) Facts regarding the defendant’s behavior prior to the killing which might indicate design to take life (**planning activity**)
 - ii) Facts about the defendant’s prior relationship with the victim which might indicate reason to kill (**motive**)
 - iii) Evidence that the manner of killing was so particular that the defendant must have intentionally killed according to **preconceived design**
 - Verdicts of first degree murder are generally sustained when:
 - All 3 of these types
 - Strong evidence of planning
 - Strong evidence of motive and planning
 - Strong evidence of motive and design
 - However, CA has no backed away and said that there is no specific combination which is essential and that other types of evidence may also suffice.
 - Note: In *Anderson* no evidence of planning or motive, but 60 stab wounds in a 10-year-old girl (design). Court said design was not enough for first-degree because this suggested an “explosion of violence” rather than a preconceived design to kill.

III. Provocation

- MPC: murder 210.2(a) unless **extreme emotional disturbance**.
 1. 210.2: Murder
 - (1) Except as provided in 210.3(1)(b), criminal homicide constitutes murder when
 - (a) It is committed purposely and knowingly; or
 - (b) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape.
 - (2) Murder is a felony in the first degree [but a person convicted of murder may be sentenced to death]
 - Extreme emotional disturbance: 210.3 (manslaughter)
 - Common law: distinction between murder and manslaughter is the issue of provocation
 - In common law, if one of the extenuating circumstances was so that defendant was in a state of passion engendered in him by **adequate provocation** (provocation which would cause a reasonable man to be in a heightened state of passion and lose his self-control), manslaughter instead of murder.
- B. Manslaughter
1. Common law: Voluntary manslaughter and an “adequate provocation”
 - *Girouard v. State* (1991) -- majority view

- Facts: Giourard had a knife under his pillow. He and his wife got into a fight and he stabbed her 19 times. Giouard argues that the words she said before he killed her should be considered adequate provocation. Afterward he felt remorse, tried to kill himself, and then called to police.
- Issue: Was verbal provocation adequate to mitigate second-degree murder to voluntary manslaughter?
- Holding: No; **words can constitute adequate provocation only if they are accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm.**
- Rationale: For provocation to be adequate it must be “calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason.”
- Significance: These jurisdictions that do second-degree murder look a lot like adequate provocation. Second-degree expands the concept of adequate provocation for jurisdictions that abide by traditional common-law categories.
 - Many jurisdictions follow the idea that words alone are not adequate provocation.
 - *Girouard* follows the predominant common-law position that only a few circumstances can serve as legally adequate provocation (e.g. battery, sudden mutual combat, adultery)
- Other “Words alone” cases: can argue to expand the category
 - Prevailing view that words cannot suffice has been softened in many jurisdictions to allow an exception when the words provoke, not simply because they are insulting, but because they disclose facts that could be sufficient had the defendant observed them directly.
 - *State v. Bordeaux*: Case where defendant just learned his mother was raped years ago
 - Words alone; heard these and then killed the victim
 - In a jurisdiction where words aren’t taken into account, argue for the defendant: not just words, but talking about event that happened, could limit this to words that indicate a situation which would be an adequate provocation. Argument for not expanding into this category: concerns about vigilante justice, truth/falsity of what was said
- ***Maher v. People* (1862)** -- minority view
 - Facts: Defendant was told by a friend that his wife and another man (decedent) were having sex in the woods. He saw his wife and another man going to the woods together, and then followed them after they left the woods and killed the man.
 - Issue: Were these words adequate provocation to mitigate the charge (had death ensued) from murder to manslaughter?
 - Holding: Evidence of adultery is adequate provocation because this would make a reasonable person act irrationally.
 - Rationale: If act of killing is committed under influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time had elapsed to “cool,” then the law must regard the offense as a less heinous character than murder. 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.**
 - Significance: More expansive view of adequate provocation. Expanded common-law categories. It is a question for the jury to decide whether the facts as a whole demonstrate sufficient provocation.
- Provocation: justifications and excuses
 - Provocation as partial justification
 - Individual is to some extent morally justified in making a punitive return against someone who intentionally causes him serious offense. Idea of moral wrong by both parties.
 - If this is a justification theory, the parts of the defendant’s situation that we take into account might have to be limited to what the victim knew about the defendant.
 - Provocation as partial excuse
 - Behavior was not morally acceptable, but the defendant wasn’t as culpable because of the provocation.
 - Legal scholarship says this is generally an excuse-like situation. Victims are usually not at fault.
- Sexual infidelity as provocation
 - Law traditionally regarded sexual infidelity as adequate provocation
 - Today, courts that permit this to qualify for heat-of-passion defense often interpret the boundaries of the category narrowly
 - *State v. Simonovich*: Defendant was not entitled to voluntary manslaughter instructions because had not discovered his wife in the very act of intercourse.
 - *Dennis v. State*: Proper to instruct the jury that the circumstances could qualify as legally adequate provocation only if the defendant had seen sexual intercourse, not other acts of sexual contact

- *State v. Turner*: Voluntary manslaughter instructions were not required because defendant and her victim were not married
 - Common law, 39% chance of getting the cause of killing based on infidelity/marriage ending to the jury. MPC, 88%.
 - Homosexual advances as provocative acts
 - Trial judges sometimes allow defendants to raise a provocation defense when they have killed in appellate courts.
 - Several appellate courts have ruled claims of this sort to be insufficient as a matter of law.
 - This promoted the idea that a reasonable person would react in these situations
 - Cooling time
 - Common-law view is that a significant lapse of time between provocation and act of killing renders provocation inadequate.
 - Cooling time -- can sometimes argue that event immediately preceding the homicide “rekindled” earlier provocation, but many courts refuse to take note of rekindling.
2. MPC 210.3 and *Casassa*
- MPC 210.3: Manslaughter
 - (1) Criminal homicide constitutes manslaughter when:
 - (a) It is committed recklessly; or
 - (b) A homicide which would otherwise be murder is committed under the influence of **extreme mental or emotional disturbance** for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.
 - (2) Manslaughter is a felony of the second degree
 - About 20 states have some version of the MPC’s extreme emotional disturbance test. This test has the **potential to reduce from second-degree murder to manslaughter homicides by people who had significant mental trauma over a period of time, not a single provocative event.**
 - *State v. White*: woman struck man with a car after mounting stress because of ex-husband failing to provide child support or financial assistance. Court said that EED defense may be based on “a significant mental trauma [that] has affected the defendant’s mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.
 - *State v. Elliot*: defendant had fear of his brother. One day, for no apparent reason, he killed him. Court held that EED is a homicide situation that was brought about by significant mental trauma that caused defendant to brood for a long period of time and react violently, seemingly without provocation.
 - *People v. Cassassa* (1980)
 - Facts: Victim rejected defendant from casual dating. He snuck into her apartment, disrobed and lay in her bed. He was armed with a steak knife and after victim rejected him, he stabbed her several times in the throat and submerged her body in the bathtub to make sure she was dead. Defendant claims that he was under extreme emotional distress.
 - Legislature adopted the language of the MPC. Only substantial difference is that extreme emotional disturbance in NY is affirmative defense, placing the burden of proof upon defendant.
 - Issue: Was defendant under the influence of extreme emotional disturbance, allowing defendant’s charge to be mitigated from second-degree murder to manslaughter?
 - Holding: **Determination of whether there was reasonable explanation or excuse for a particular emotional disturbance should be made by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, and assessing from that standpoint whether the explanation or excuse for his emotional disturbance was reasonable.**
 - Here, excuse was too peculiar to the defendant to be reasonable.
 - Rationale: Reasonableness should not be entirely subjective. MPC guidelines -- must have (1) acted under the influence of extreme emotional disturbance and (2) there must have been a reasonable explanation or excuse for the disturbance. Reasonableness is to determined from the **viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.**

- Significance: This is broader than common law because we have to view the circumstances the way the defendant believed them to be, however inaccurate.
 - In these cases, subjective element is relatively easy. Objective component is more difficult because you have to consider which factors of the circumstances come in (e.g. cultural values [could argue this could come in as part of the circumstances helping assess the situation]).
- Reasonable person requirement
 - What kinds of things come in?
 - Physical disabilities and other external circumstances generally always come in
 - E.g. blindness, shock from traumatic injury, extreme grief
 - Idiosyncratic moral values never come in
 - Middle ground:
 - Cultural values
 - Battered women syndrome
 - Mental disorder
 - Age
 - Gender

IV. Unintentional Killing

A. Unintentional killing as involuntary manslaughter

- *Commonwealth v. Welansky* (1944): civil v. criminal negligence
 - Facts: Defendant owned a nightclub in Boston. Bartender noticed that a lightbulb was out and directed a kid to light the bulb, which caused a fire. The emergency exit was blocked and many people died.
 - Issue: Was this conduct enough to meet the standard of criminal negligence?
 - Holding: Commonwealth did not have to prove he caused the fire by wanton or reckless conduct. It was enough to prove that death resulted from wanton or reckless disregard of the safety of patrons in the event of a fire from any cause.
 - Rationale: To constitute wanton or reckless conduct, as distinguished from mere [civil] negligence, **grave danger to others must have been apparent and the 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. Even if a particular defendant did not realize the grave danger, cannot escape the reckless/wanton standard if an ordinary man under the same circumstances would have realized the gravity of the danger.** Common law conduct does not become criminal until it passes the orders of negligence and gross negligence and enters into the domain of wanton or reckless conduct.
 - Significance: Evidence this meets standard for criminal negligence: high body count is evidence that risk was high (also number of people in the club at the time)
- *Hall* (p. 469): the MPC distinction between reckless and criminally negligent homicides
 - MPC § 210.4: negligent homicide
 - (1) Negligent homicide: **whether the defendant was aware of the unwarranted risk he was creating.**
 - (a) Manslaughter if actor was “reckless” -- consciously disregarded a substantial and unjustifiable risk that his conduct would cause the death of another, and if the risk was of such a nature and degree that its disregard involved a gross deviation from the standard of conduct a reasonable person would observe
 - (b) Negligent homicide if actor should have been aware of such a risk, but was not.
- *People v. Hall* (2000)
 - Facts: Hall was skiing and flew off a knoll and killed another skier.
 - Issue: Did Hall’s conduct constitute reckless manslaughter?
 - Holding: A reasonable prudent and cautious person could have entertained the belief that Hall consciously disregarded a substantial and unjustifiable risk that by skiing exceptionally fast and out of control he might collide with and kill another person on the slope.
 - Rationale: The charge of reckless manslaughter requires that a person **consciously disregard a substantial and unjustifiable risk that the death could result from his actions.**
 - Substantial: A risk of death that has less than a fifty percent chance of occurring may nonetheless be a substantial risk depending on the circumstances of the particular case. The more valuable an activity, the higher the risk needs to be substantial. Here, an activity for personal enjoyment.
 - Subjective awareness of substantial risk:
 - Objective inquiry
 - Unjustifiable: Objective question; would a reasonable person find that this risk is justified.

- Significance: *Hall* court says that justifiable question is an objective one. Subjective awareness is an objective inquiry in *Hall*, but some courts look at subjective awareness of substantial risk as a subjective inquiry.
 - Eventually *Hall* was convicted in remand of negligent homicide, not reckless manslaughter.
- *State v. Williams* (1971): omissions and negligent homicides
 - Facts: Defendants were Native Americans. Baby had abscessed tooth and over the new few weeks it got worse. Didn't take baby to the hospital because they were worried the baby would be taken away. Baby died.
 - Issue: Were defendants guilty of statutory manslaughter?
 - Holding: **Failure to act in this case is ordinary or simple negligence, and such negligence is sufficient to support a conviction of statutory manslaughter.**
 - Rationale: At common law, in the case of involuntary manslaughter, breach had to amount to more than mere ordinary or simple negligence -- gross negligence was essential. Under the statutes in this case, ordinary or simple negligence is enough. Ordinary negligence is a failure to exercise ordinary caution necessary to make out the defense of excusable homicide. Ordinary caution = kind of caution a reasonable person would exercise in the same conditions.
 - Significance: Manslaughter statutes involved in this case were eventually repealed.
 - Tough case: Native American fear element was very real
 - Question of whether to bring this element into the negligence determination
 - More that the defense brings in about the specifics of their situation, more it looks like this was reasonable.
- Objective standards result in punishment in the absence of subjective awareness.
 - Justifications:
 - Allowing losses to rest where they fall
 - Public safety benefits
 - Additional motive to take care before acting
 - Criticisms:
 - Retributive perspective: without subjective awareness, not culpable
 - Arguably not good for deterrence since people wouldn't be deterred from this form of unintentional behavior

B. Unintentional killing as murder

- *Malone*, Russian Poker, and the "malignant heart"
 - Depraved Heart killings
 - Generally where someone engages in a truly pointless activity which poses a great risk to human life
 - Defendant is aware of risk to human life and disregards the risk
 - *Commonwealth v. Malone* (1946)
 - Facts: Two youths played Russian Roulette. Defendant loaded the chamber. On the third round he hit the other kid, who died two days later. When defendant pulled the trigger, he did not expect to have the gun go off.
 - Issue: Is this murder or involuntary manslaughter?
 - Holding: This was murder because it was the **intentional doing of an uncalled for act in callous disregard of its likely harmful effects on others.**
 - Rationale: Malice is necessary for murder, and this can take the form of a "wicked, depraved, and malignant heart." When an individual commits an act of gross recklessness for which he must reasonably anticipate that death to another is likely to result, he exhibits depraved heart, which proves the malice state of mind.
 - Significance: In this type of case, doesn't really matter what the costs of living were. Court here says there was 40% chance of living, but wouldn't matter even if the chance of dying was 1/50 because this activity is so pointless.
 - MPC standard: **unintended killing is murder when it is committed recklessly and under circumstances manifesting an extreme indifference to the value of human life** (§ 210.2)
- 1. *Fleming*, drunk driving, and "malice aforethought"
 - *United States v. Fleming* (1984)
 - Facts: Fleming was driving at high speeds and lost control of his car, killing someone who was driving in the opposite direction. His BAC was .315 percent.
 - Issue: Was this murder rather than manslaughter?

- Holding: Evidence regarding defendant's conduct was adequate to sustain a finding by the jury that **defendant acted with malice aforethought, making defendant's conduct murder.**
 - Rationale: Malice aforethought makes a homicide murder rather than manslaughter. Malice may be established by **reckless and wanton conduct that is a gross deviation from a reasonable standard of care**, so that the jury can infer that the defendant was aware of a serious risk of death or serious bodily injury.
 - Significance: Great majority of courts hold that egregiously dangerous driving can support a conviction of murder. MPC and case law say if only reason you were not aware of a serious risk was because you were drunk, this is not a defense to a crime involving recklessness.
2. Felony murder
- Felony murder can elevate what would generally be negligent homicide or involuntary manslaughter to first-degree murder.
 - This gets especially expansive in the case of group crime
 - MPC felony murder
 - Joins depraved heart with felony murder. If an individual is engaged in/attempts to commit robbery, rape, or deviant sexual intercourse by threat, arson, burglary, etc. and someone dies, it is assumed that defendant had extreme indifference to human life.
 - Some jurisdictions just say felony murder and don't limit the types of felonies, and either follow the legislature or have courts decide on their own.
 - Felony murder question on test:
 - All felonies covered or just some?
 - Inherently dangerous list of felonies v. all
 - Weak causation jurisdiction or stronger causation jurisdiction (most cases)
 - But for cause v. proximate + but for cause
 - Other limits:
 - In furtherance of the felony (see below)
- a) *Regina v. Serne* (1887)
- Facts: Defendants set a fire which resulted in the death of defendant's son.
 - Issue: Was this felony murder?
 - Holding: Definition of the felony murder law must be narrowed; **any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which causes death, should be murder.**
 - Rationale: Murder is unlawful homicide with malice aforethought. Killing of another person by an act done with an intent to commit a felony, or an act done with the knowledge that the act will probably cause the death of some person, suffice for malice.
 - Significance: At this time, felony murder included any act known to be dangerous to life or cause death. However, in England the death penalty was granted for any felony. Today felony murder has greater significance because it changes the sentence.
- b) *People v. Stamp* (1969) -- must be **causally connected** to the killing
- Facts: Defendant burglarized and robbed a man, who began suffering chest pain and died of a heart attack.
 - Holding: The **felony-murder doctrine is not limited to those deaths which are foreseeable**. A felon is held **strictly liable for all killings committed by him and accomplices in the course of a felony. As long as the homicide is the direct causal result of the felony, the felony-murder rule applies whether or not the death was a natural or probable consequence**
 - Defendant takes his victim as he finds him
- c) Causation and felony murder
- Some jurisdictions just ask for but for cause, not proximate
 - Most ask for but for + proximate cause
- d) In furtherance of the felony
- Lethal act after commission of the felony
 - *People v. Gillis*
 - Facts: Homeowner detected the defendant trying to break in. Defendant ran away. 10-15 minutes later, trooper chased the car. Defendant sped away and collided with another vehicle killing two of its occupants.

- Holding: Since Gillis was fleeing from the burglary he was guilty of first-degree murder, a **necessary act to complete the crime**, (this was **in furtherance of the felony despite being arguably after the felony was committed**)
- Lethal acts arguably unrelated to the felony
 - *People v. Cabalero*
 - Facts: Lookout during a robbery panicked at the approach of a car and fired shots at the occupants. Leader of the group, angered by co-felon, shot and killed him.
 - Holding: First-degree felony murder for all the participants because the **shooting helped ensure the success of the ongoing robbery.**
- Lethal acts by persons resisting the felony
 - *State v. Canola* (1977) -- killing by a non-felon
 - Facts: Owner of jewelry store, in attempt to resist an armed robbery, began shooting in response to a second conspirator's shots. Both the owner and the felon were fatally shot. Defendant and two others were indicted on two counts of murder.
 - Issue: Could defendant be responsible for the murder of co-felon?
 - Holding: It is regressive to extend the applicability of the felony murder rule to the lethal acts of third persons not in furtherance of the felonious scheme (going with agency theory).
 - Rationale: **Killing the owner was definitely in furtherance of the felony. Whether defendant could be responsible for co-felon depends on whether the court was looking at this under agency theory or proximate cause.** Agency view says that co-felon would not fall under felony murder rule because this was behavior committed by someone other than the defendant and his co-conspirators. Proximate cause theory would attach liability for anything proximately resulting from the unlawful theory.
 - Significance: **Who does the killing under each theory makes all the difference in these cases.**
 - Agency theory v. proximate cause
 - First question: what does the statute say?
 - Felony murder is defined by statute
 - Second question: if the statute is ambiguous, have to decide whether you want an agency theory or proximate cause theory
 - Defense favors the agency theory
 - Prosecution favors proximate cause
 - Agency theory
 - Focuses on the shooter: **identity of killer is the central issue**
 - Anyone the co-felons kill will be a murder outside of their felony circle, and they will all be responsible.
 - If identity of shooter is someone inside, co-felons cannot be held liable.
 - Substantial majority of states adhere to this theory
 - Proximate-cause theory
 - Focuses on **foreseeability**: whether the killing (regardless of who did it) is within the foreseeable risk in committing the felony
 - A number of states have adopted the proximate cause approach

V. Causation

- A. Causation comes in for **any crime that has a result element**, not just homicide. However, homicide is the most likely scenario where one needs to find causation.
 - Each element must be proven beyond a reasonable doubt. If causation cannot be proven beyond a reasonable doubt, then the defendant is not guilty.
 - **Mere possibility of survival is not proof beyond a reasonable doubt in many jurisdictions**
 - *Murrow* case: Parent finds out father beat daughter and waits 4 hours to get medical attention. State only proved possibility she would've survived if treated earlier. So government did not prove beyond a reasonable doubt that but for causation existed.
 - In other jurisdictions, as long as defendant reduced victim's chance of surviving, this is sufficient for causation
- B. Two types of causation:
 1. Actual/but for cause
 2. Proximate cause: foreseeability
- C. *Acosta* and the difference between actual and proximate cause

- *People v. Acosta* (1991)
 - Facts: Helicopters crashed during a high-speed chase. Acosta said that a collision between airborne helicopters was not a foreseeable result of his conduct.
 - Issue: Did Acosta's actions proximately cause the helicopter crash and resulting deaths?
 - Holding: Acosta's actions actually and proximately caused the crash.
 - Rationale: Threshold question is but for/actual cause. But for Acosta's conduct of fleeing the police, helicopters wouldn't have crashed. Then, proximate cause (which has various tests). In this case, issue was whether the death of the helicopters was foreseeable. Because this was a possible consequence which reasonably might have been contemplated, this was a proximate cause.
 - Dissent: helicopters were not in the "**zone of danger**" by any stretch of the imagination (citing *Palsgraf*)
 - Significance: **Proximate cause is categorical question.** Here, foreseeability means the possible consequences that reasonably might have been contemplated.

D. More on proximate cause

- *People v. Arzon* (1978)
 - Facts: Defendant intentionally set fire to a couch, causing a serious fire on the fifth floor of an abandoned building. There was another independent fire that had broken out on the second floor, and fireman died when trying to respond to the fire.
 - Issue: Is there a causal link between the underlying crime and the death?
 - Holding: There was a causal link between the underlying crime of arson and the resultant harm (death to fireman).
 - Rationale: It was **foreseeable** that firemen would respond to this situation, thus exposing them to a life-threatening danger. Fire was an **indispensable link in the chain of events** that actually resulted in the death. Additionally, defendant put them in a position where they were **vulnerable precisely because of what the defendant did** (similar to *Kibbe*)
- *People v. Kibbe*
 - Facts: Defendant had abandoned a helplessly intoxicated robbery victim by the side of a dark road in below freezing temperatures without clothes.
 - Holding: While the deceased was actually killed by a passing truck, conduct was sufficiently linked to the ensuing death to warrant criminal liability.
 - Significance: Standard that an individual is criminally liable if his conduct was a **sufficiently direct cause** of the death, and the **ultimate harm is something which should have been foreseen as being reasonably related to his actions.**
 - Causal chain has to be in a reasonable relationship
- *Stewart*
 - Facts: Victim had been operated upon for a stab wound in the stomach inflicted by the defendant. Afterwards, surgeon performed hernia procedure on him and he died.
 - Holding: Prosecutor must prove that defendant's conduct was an actual cause of death (forged a link in the chain of events which actually brought about the death).
 - Significance: Reaffirms the standard that an individual is criminally liable if his conduct was a **sufficiently direct cause** of the death, and the **ultimate harm is something which should have been foreseen as being reasonably related to his actions.**
- *Warner-Lambert*
 - Facts: Defendant corporation and officers/employees were indicted because of explosion that killed several of employees in the factory.
 - Issue: Did defendant's actions cause the explosion?
 - Holding: Evidence before the grand jury was not legally sufficient to establish the foreseeability of the immediate, triggering cause of the explosion.
 - Rationale: Corporation used two potentially explosive substances in its manufacturing process. Defendants' actions must be a **sufficiently direct cause of the ensuing death.** Here, the defendant did not foresee the direct cause of death.
 - Significance: This is a good case for the defense -- it's not enough to foresee death; matters how one would foresee death.
- 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*)
- E. Causation and mens rea
- Causation is not in every case. Only comes up when in the statute defining the crime, producing some result is an element.
 - Need a crime/negligence to get at causation. If defendant isn't negligent/criminally responsible at all, we do not get to the causation question.
- F. Subsequent **intentional** human actions
1. Those **intended to produce the result**
 - a) Freely chosen subsequent acts:
 - *People v. Campbell* (1983)
 - Facts: Campbell and Basnaw were drinking heavily. Campbell encouraged Basnaw to kill himself. Campbell offered to sell Basnaw his own gun. Eventually just gave it to him for free with five shells. Basnaw killed himself.
 - Issue: Did the suicidal actor break the chain of causation?
 - Holding: Yes; the defendant had no present intention to kill, and did not kill another person.
 - Rationale: Even though result was exactly what the defendant wanted to happen, the defendant did not cause the death because **Basnaw was an intervening actor who freely chose to kill himself.**
 - Significance: After looking at but for and proximate cause, **must see if an intervening actor breaks the chain of causation.**
 - *People v. Kervorkian* (1994)
 - Facts: Kervorkian assisted in the deaths of victims. Victims were in serious pain and sought defendant's assistance in ending her life. Defendant tried to insert the chemicals into Victim 1 but was unsuccessful, so he returned with a carbon monoxide mask. He showed Victim 1 how to open the gas valve. For Victim 2, he inserted a suicide needle into her arm and told her how to activate the device.
 - Issue: Did Kervorkian commit murder by assisting with the suicides?
 - Holding: Only where there is probable cause to believe that death was the direct and natural result of a defendant's act can the defendant be properly bound over on a charge of murder.
 - Rationale: **Distinction between active participation in suicide and involvement in the events leading up to the suicide.** Aiding in the context of involvement of suicide means participating in the final overt act that causes death, but not where a defendant is involved merely in the events leading up to the commission of the final overt act, such as issuing the means.
 - Significance: Later Kervorkian was convicted of murder because he himself had administered the fatal injection to another patient.
 - *Campbell* and *Kervorkian* reflect generally prevailing American law. **One who successfully urges or assists another to commit suicide is not guilty of murder, as long as the deceased was not forced or deceived. Deceased's actions were fully voluntary.**
 - *People v. Minor* (2010)
 - Facts: Decedent convinced defendant to hold a knife against the steering wheel while the decedent repeatedly lunged into the knife, causing fatal wounds.
 - Issue: Murder or assisted suicide?
 - *People v. Roberts*
 - Facts: Defendant's wife was trying to commit suicide. Husband put the poison within her reach.
 - Holding: This is considered different than *Campbell/Korvorkian* because **the wife could not have committed suicide but for his help.**
 - Significance: The more someone is physically in control of victim when they kill themselves, more likely that they caused the victim's death.
 - b) Notes on subsequent human actions
 - The law of causation treats physical events that follow from a person's actions as caused by him or her, but it does not treat human action that follows from an initial actor's conduct as caused by that actor, even when the subsequent human action is entirely foreseeable.
 - Human actor is viewed differently because human action is viewed as a freely chosen decision by an intervening actor
 - Anything that casts doubt on the "freely chosen" aspect allows linkage back to the defendant.
 - When the intervening human actor makes a knowing, intelligent, intentional, voluntary decision, this breaks the chain of causation.

- c) Subsequent acts constrained by duty, duress, exigency can limit the notion of voluntary human choice.
 - *Stephenson v. State* (1932)
 - Facts: Stephenson was Grand Dragon of the KKK. Abducted deceased, subjected her to various forms of sexual assault. Woman tried to commit suicide and became ill. Eventually she died. Medical cause was a combination of shock, loss of food and rest, action of poisons and infection, lack of early treatment. No cause individually could have caused her death.
 - Issue: Was decedent's human action of attempting suicide an intervening act?
 - Holding: To say that there was no causal connection between the acts of appellant and the death of the victim would be a travesty on justice. Evidence was sufficient to show that appellant rendered the deceased distracted and mentally irresponsible and that such was the natural and probable consequence of such unlawful and criminal treatment and that the appellant was guilty of murder as charged.
 - Rationale: **When suicide follows a wound inflicted by the defendant his act is homicidal, if deceased was rendered irresponsible by the wound and as a natural result of it.** The wound does not have to be physical. Appellant's control over the deceased was absolute and complete. Evidence shows that defendant was entrapped at all time and thus was not capable of making a voluntary choice.
 - Significance: Length of time element is really relevant here
 - Courts will ask how much the decision was voluntary, which gets at how much control the victim was under by the defendant when it happened.
 - Longer time period, less likely to bring it in.
- d) Subsequent victim behavior
 - *Regina v. Blaue*: Jehovah's witness was stabbed but refused a blood transfusion and died. Voluntary decision or not?
 - Religion is a pre-existing condition. Could argue that **defendant takes victim as found.**
 - Could argue that there is no choice; religion dictates no free will as to this type of decision

G. Subsequent actions that **recklessly** risk the result

- For these cases, have to ask:
 - Was the accused intentional or reckless/negligent in risking the result?
 - Was the intervening actor intentional or reckless/negligent?
- *Commonwealth v. Root* (1961)
 - Facts: Drag racing case. Defendant and deceased were driving and deceased tried to pass the automobile by swerving his car to the left.
 - Issue: Did the defendant's actions recklessly risk the result?
 - Holding: No liability because **defendant's reckless conduct was not a sufficiently direct cause of the competing driver's death.**
 - Rationale: Deceased was aware of the dangerous condition created by the defendant's reckless conduct in driving his automobile at an excessive speed along the highway but, despite such knowledge, he recklessly chose to swerve his car to the left and into the path of an oncoming truck, thereby causing his own death.
 - Significance: Though Root put victim in particularly vulnerable state, other driver made decision to participate and decision to pass other car -- knowing, voluntary, intentional.
- *People v. Kern* (1989)
 - Facts: Group of white teenagers assaulted several black men. Teenagers chased the men with threats of death. One of the men tried to escape by running across a highway but was struck by a car and killed.
 - Issue: Did the defendant's actions recklessly risk the result?
 - Holding: Defendant's actions were a sufficiently direct cause of the ensuing death.
 - Rationale: Only reasonable alternative left available to the decedent were to seek safety by crossing the parkway.
 - Significance: Put the victim in a particularly vulnerable state. Victim was not acting voluntarily.
 - **To the extent that second person's action is constrained and involuntary, better cause for holding person 1 responsible for the resultant harm.**
- *State v. McFadden* (1982)
 - Facts: Drag race where other racer lost control of car and swerved into lane of oncoming traffic. Killed a third party. Other driver also died.
 - Issue: Did the defendant's actions recklessly risk the result?
 - Holding: **Foreseeability requirement is enough to determine proximate cause; don't need direct causal connection standard of Root.**

- Rationale: Vicarious liability rationale as to the third party, but as to the other driver, defendant's reckless commission of drag racing had to be a proximate cause of the deaths. The acts and omissions of two or more persons may work concurrently as the efficient cause of an injury.
- *Commonwealth v. Atencio* (1963)
 - Facts: Deceased, his brother, and defendants spent the day drinking wine in deceased's room. They started playing Russian roulette. Deceased put gun to his head and pulled the trigger. He died.
 - Issue: Did the defendant's actions recklessly risk the result?
 - Holding: Because defendants actively participated in the game, they could have been found to be a cause and not a mere condition of the death.
 - Rationale: Defendants were **actively engaging in this activity**, not just merely present. There was a duty on the defendant's part not to cooperate or join the game.
- *Campbell* in this context
 - Facts: Campbell and Basnaw were drinking heavily. Campbell encouraged Basnaw to kill himself. Campbell offered to sell Basnaw his own gun. Eventually just gave it to him for free with five shells. Basnaw killed himself.
 - Issue: Did the defendant's actions recklessly risk the result?
 - Significance: Arguably, yes -- gave him a loaded gun knowing Basnaw was depressed. However, Basnaw was not constrained.

Rape

I. Introduction

- Law of rape has been changing at rapid pace in the past several decades
- Latest MPC draft: proposed changes to rape provision
 - Redefines sexual intercourse to oral conduct + penetration (anal or vulval by any object or body part)
 - Nonconsent redefined to refusal to consent to sexual intercourse communicated by words or actions (verbally expressed refusal establishes nonconsent in the absence of subsequent words or actions indicating positive agreement)
- Distinction between aggravated rape (felony of first degree) and rape (felony of second degree)
 - Aggravated rape:
 - Using a weapon, acting with assistance or participation of one or more persons present at the time, causing serious bodily injury, or knowingly/recklessly causing a person to engage in a commercial sex act involving intercourse
 - Rape:
 - In addition to remaining categories, includes those who lack substantial capacity to express nonconsent because of mental disorder or disability (temporary or permanent) and those who are undressed or in the process of undressing for the purpose of receiving nonsexual professional services and have not given consent to sexual activity.
- Sexual intercourse by coercion -- felony of second degree, adds capacity to nonconsent because of intoxication (regardless of the identity of the person who administered such intoxicants)
 - Specific relationships that are nonconsensual (prison warden/prisoner, etc)
- Tricky area of criminal law because underlying conduct (sex) is fine when both parties are consenting
 - Line between consensual sex and rape depends on: force, consent, and mens rea attached to these elements
- Key issues in rape:
 - Statutory construction issue
 - Centerpiece of reform in rape law -- argue that certain conduct should get into the statute
 - Can expand coverage through statutory interpretation
 - Particularly important in mens rea
 - Statutes often say nothing

II. Actus Reus

A. Force and Resistance

- Proof of force was and still is an essential prerequisite for a criminal conviction of rape in most American jurisdictions
 - Traditionally, intercourse without consent was not a crime. Today, minority number of jurisdictions criminalize all instances of nonconsensual intercourse.
 - Majority of states require force and victim's nonconsent before an act of penetration becomes a felony.

- Reasons for using proof of force as prerequisite:
 - Alerts the actors in the situation
 - Helpful if rape is considered a crime of violence
 - Corroboration reasons; force could help if juries have to choose which version of the facts to believe
- Issues with using proof of force as prerequisite:
 - People are generally bad at judging whether someone is lying
 - A lot of the traits associated with lying are characteristics of someone under stress telling a difficult story, like a rape victim
 - Unnecessary if rape is a crime about sexual autonomy
- Force must be physical
- Varying requirements of resistance:
 - One state requires “resistance to the utmost”
 - About a dozen require “significant resistance”
 - Half the states require “reasonable resistance”
 - A lot of this is implicit, and not explicitly written into the statutes
 - For jurisdictions with a force requirement, there is not a lesser crime of sex without consent
- *State v. Rusk* (1981)
 - Facts: Female gave defendant a ride home from the bar. Defendant asked female to come in repeatedly, and when she refused many times, he reached over and turned off the ignition to her car and took the car keys. Because she was scared, female went inside. Once inside, told him she wanted to go home. He kept saying “no” and then she cried, he lightly choked her, and she asked “If I do what you want, will you let me go?” He said yes. Defendant performed oral sex and then vaginal intercourse. Afterward she asked if she could leave and he said yes, and returned her car keys. She reported the incident afterward. Rusk’s facts were different.
 - In Maryland, person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person.
 - Elements:
 - Vaginal intercourse with another person (conduct)
 - By force or threat of force (attendant circumstance)
 - Against the will and without the consent (attendant circumstance)
 - Issue: Was there force or threat of force?
 - Holding: Jury could rationally find that the essential elements of second-degree rape had been established beyond a reasonable doubt (including force).
 - Rationale:
 - Force: **To satisfy force, evidence must warrant a conclusion that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety.** The question is whether any trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
 - Resistance: **Lack of consent is established through proof of resistance or by proof that the victim failed to resist because of fear.** Degree of fear necessary to obviate the need to prove resistance includes but is not necessarily limited to fear of death/serious bodily harm, or a fear so extreme as to preclude resistance, or a fear which would render her mind incapable of continuing resist or a fear that is so overpowering that she does not dare resist. Victim’s fear **must be genuine**, but the majority of jurisdictions have required that victim’s fear be **reasonably grounded** to obviate the need for proof of actual force or physical resistance.
 - Dissent: Whether the victim’s fear is reasonable becomes a question only after the court determines that the defendant’s conduct under the circumstances was reasonably calculated to give rise to a fear on her part to the extent that she was unable to resist.
 - Significance: Court cannot substitute its own view of the evidence for that of the judge and the jury. **The reasonableness of the force/resistance is a question of fact for the jury to determine.** Mens rea is critical for a fair number of facts, and it is also critical whether the facts are looked at from the defendant’s perspective or from a reasonable person in her perspective.
 - Facts which would aid in defending Rusk:
 - She didn’t scream/call for help (lack of resistance can mean either consent or no force)
 - Drove herself to the house with Rusk
 - Removed her own clothing

- Did not attempt to flee
- He did not make any threats to her bodily safety
- Facts which would aid in prosecuting Rusk:
 - Took her car keys in an unfamiliar neighborhood at night
 - Light choking
 - Fearful for her life (subjective fear)
 - Silence after “If I do this, you won’t kill me?”
 - Communicated plans with friend before leaving the bar (just giving him a ride home)
 - Pulled her by the arms to his bed (potential force)
 - Look in his eye that made her fearful
 - Only met him that night
- *State v. DiPetrillo* (2007) -- majority/traditional approach is physical force
 - Facts: 19-year-old employee in 30-year old defendant’s business was asked to work late on night. Defendant grabbed her by the wrist, pulled her into his lap, and began kissing her. She initially kissed him back but then protested. He then stood over her and continued kissing her and put a hand under her shirt. At this point she was in fear and repeatedly told him to stop. He began fingering her and she said “we have to stop,” put on her clothing, and then walked away.
 - First-degree sexual assault: RI’s rape provision required proof of sexual penetration by “force or coercion” (second-degree was sexual contact by “force or coercion”).
 - Issue: Was there force on the part of defendant?
 - Holding: Guilt based on physical force does not necessarily constitute a separate and independent finding of guilty beyond a reasonable doubt. There is uncertainty about whether defendant was convicted on a finding of force and coercion by physical force or psychological force.
 - **Physical force is the requirement here; psychological does not come into evaluating physical force.**
 - Rationale: Facts that point to force: moving over the chair and standing over her, victim’s repeated statements of “we have to stop.” Whether authority matters is tricky. *Burke* said that authority mattered when the man was a police officer because victim could be afraid because this person is armed and speaks in terms of command. However, these facts are different -- unwilling to expand this analysis to context of an employment relationship.
 - Dissent: Psychological pressure resulting from the authority + application of minimal force should have established force in this case.
 - Significance: Opening the door to psychological forms of force generates debate about whether this would open the door to too much liability, evidentiary issues, etc. Concern about criminalizing supervisor (or other) relationships de facto.
- B. Relationship between force, nonconsent, and victim’s fear/resistance:
 - Questions to ask:
 - Was force established beyond a reasonable doubt?
 - Was lack of consent established beyond a reasonable doubt?
 - Was victim’s fear reasonable?
- C. Nonphysical threats and deception
 - *State v. Thompson* (1990)
 - Facts: High school principal allegedly forced one of his students to submit to sexual intercourse by threatening to prevent her from graduating high school.
 - A person who knowingly has sexual intercourse without consent with a person of the opposite sex commits the offense of sexual intercourse without consent
 - Without consent: compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping
 - Holding: Defines force as “physical compulsion, the use or immediate threat of bodily harm/injury.” Intimidation, fear, or apprehension does not necessarily mean force.
 - *Commonwealth v. Mlinarich* (1988)
 - Facts: Victim was 14-year old placed in defendant’s home. victim submitted to defendant’s sexual advantages after he threatened to send her back to detention home if she refused.
 - Holding: Rape requires actual physical compulsion or violence or a threat of physical compulsion/violence sufficient to prevent resistance by a person or reasonable resolution.
 - Dissent: Legislature did not mean force in the limited sense of “to do violence to” and did mean force in the more general sense of “to constrain or compel by physical, moral, or intellectual means or by the exigencies of the circumstances.”

- Solutions to the problems of non-physical threats:
 - Threats of non-physical harm can be punished less severely than a rape using physical harm/threat of physical harm
 - MPC 213.1(2): Conviction for “gross sexual imposition” in cases where submission is compelled by threat of force or “by any threat that would prevent resistance by a woman of ordinary resolution.”
 - Extending rape to situations in which consent is obtained by duress, coercion, extortion, or using a position of authority
 - Defining force as physical, intellectual, moral, emotional, or psychological force, either express or implied
- Absence of consent
 - Conceptions of non-consent include:
 - Verbal resistance plus another behavior that makes unwillingness clear
 - Verbal resistance alone
 - Verbal resistance or passivity, silence, or ambivalence (anything other than affirmative permission by words or conduct)
 - All words and actions other than express verbal permission (everything other than saying yes)
 - Defective consent:
 - Consent must be “freely given,” so a person must have the capacity to give valid consent and it must be voluntary.
 - Maturity
 - Statutes draw a bright line specific age of consent
 - Mental retardation -- MPC imposes liability when defendant knows that person suffers from a mental disease or defect making her incapable of appraising the nature of her conduct.
 - Incapacity -- drugs or alcohol
 - All states impose liability for rape when a defendant has intercourse with a person who was completely unconscious.
 - Nearly all states impose liability when defendant has intercourse with a person who was severely incapacitated by drugs/alcohol he gave her without her knowledge.
 - Many states do not impose liability if someone other than the defendant secretly drugged the victim.
- Deception
 - Fraud
 - Old standard (*Boro* case, below): fraud in the factum v. fraud in the inducement
 - Fraud in the factum
 - Lying about the very nature of the act (people don’t know it’s sexual intercourse)
 - Impersonating a person’s husband is included in this
 - Very recently expanded to the Israeli article (Arab guy pretended to be a Jew and was prosecuted for rape)
 - Fraud in the inducement
 - Generally okay
 - *People v. Evans* (1975)
 - Facts: 20-year-old college student met defendant, who was posing as a psychologist doing a magazine article. Defendant invited the student to a bar where defendant and a girl said they were conducting a psychological experiment. After several hours she was induced to come to an apartment. After a couple of hours defendant attempted to take off her clothes and make a move. Victim warded off the advances. Then defendant told her that he was disappointed she failed the test and tried to make doubt rise in her mind. he said “look at where you are... how do you know that I am really who I say I am?... I could kill you. I could rape you.” Victim got frightened and then defendant told her a story about how she reminded him of his lost love. Defendant put her hand on his shoulders and then he grabbed her and said “you’re mine.” They had intercourse. She stayed the night and they had sex again in the morning.
 - Issue: Does having sexual intercourse by the means described constitute rape in the first degree (essential element being forcible compulsion).
 - Essential facts are the threats (“I could kill you, I could rape you”).
 - Holding: To establish intent, must take threat from the defendant’s perspective. Since defendant did not mean for this to be a threat, Court can find neither forcible compulsion nor threat beyond a reasonable doubt, so defendant is not guilty on the rape charges.
 - Rationale: Prevailing view is that **there is no rape which is achieved by fraud**. It is clear that victim was intimidated and that defendant did not resort to actual physical force. It is entirely possible that

victim construed the statement as a threat even though it might not have been intended as one. However, we must look at the defendant to establish criminal intent.

- *Boro v. Superior Court* (1985)
 - Facts: Victim received a call from a person who described himself as a doctor. Defendant told victim that he had the results of her blood test and that she had contracted a dangerous disease. He said that either she had to go through a painful surgical process or have sexual intercourse with an anonymous donor who had been injected with a serum which would cure the disease. The latter procedure was less expensive. The victim agreed to the nonsurgical alternative because she believed it was the only choice she had.
 - Charged with rape “where the person is at the time unconscious of the nature of the act and this is known to the accused.”
 - Issue: Was victim unconscious of the nature of the act?
 - Holding: **This type of fraud was fraud in the inducement, not fraud in the factum.**
 - Rationale: At the time of penetration, it was victim’s belief that she would die unless she consented to sexual intercourse with the defendant. Defendant said that victim was aware of the nature of the act. Victim says there wasn’t awareness as to the nature of the act because she thought this was a medical treatment.
 - **If deception causes a misunderstanding as to the fact itself (fraud in factum), there is no legally recognized consent because what happened is not that for which consent was given.**
 - Significance: 20 years after this decision, CA amended the statute to specify that “a victim will be considered unconscious of the nature of the act’ when she was “not aware of the essential characteristics of the act due to fraudulent representation that the sexual penetration served a professional purpose when it served none.”

III. Mens Rea

- A. Mens rea is required for each of the elements
- B. Resistance can come in to show defendant’s mens rea, but is not required in many statutes.
- C. *Commonwealth v. Sherry* (1982)
 - Facts: Victim, an RN, and defendants (doctors) were employed at the same hospital. Defendant was a host at a party. Different versions of the facts. According to the victim, she was pushed by defendants into a bathroom together. They shut the door and turned off the lights. Later, the defendants grabbed her and said that they were going to Rockport. Victim verbally protested but did not physically resist. She asked to be taken home once at Rockport but the defendants took her into the house. They all smoked pot in the house and then the three men took off their clothes once they were all in a bedroom together. The victim verbally protested. She was frightened and told them to stop. Each defendant separately then had intercourse with the victim in the bedroom. Later, the defendants took her back (on the way they stopped to view a beach, eat breakfast, and get gas).
 - Issue: What mens rea standard does defendant need to meet for rape?
 - Holding: **Do not need actual knowledge of non-consent; if evidence points to actual knowledge, this is enough to establish mens rea for rape.**
 - Rationale: Defendant wants the standard to be knowledge, stating that mistake should no be punishable; no actual knowledge of victim’s lack of consent. However, no American court recognizes mistake of fact without consideration of its reasonableness as a defense. When a woman says no, any further action is unwarranted and the person proceeds at his peril (assumes the risk).
 - Significance: Any resistance which demonstrates her lack of consent is enough. Can show non-consent verbally and through body language.
- D. *Commonwealth v. Fischer* (1998)
 - Facts: Defendant and victim were two college students. The two went to appellant’s dorm room and engaged in intimate contact. The victim said that the first time was just kissing and fondling. Appellant said that they engaged in rough sex. For the incident in question, victim says that appellant locked the door, pushed her onto the bed, straddled her, held her wrists above her head and forced his penis into her mouth. she struggled throughout this incident. She repeatedly stated she did not want to engage in sex. When she attempted to leave, appellant blocked her path. Only after kicking him in the balls was she able to escape. On appellant’s facts, he says that victim said it would have to be a quick one. He said he did hold the woman’s arms about her head and put her penis at her mouth. When she said no, he answered “no means yes.” When victim said she honestly didn’t wanted it he removed herself from her body but they lay side by side and continued to kiss and fondle one another. At some point she abruptly left the room. After the incident, victim was nervous and shaken.
 - Issue: What mens rea standard does defendant need to meet for rape?

- Holding: Mistake of fact can be an appropriate defense for some date rape cases, but not this one.
 - Rationale:
 - Binding precedent: *Williams*
 - Reasonable belief that the victim had consented to sexual advances is not a valid defense. If the element of the defendant's belief as to the victim's state of mind is to established as a defense then it should be done by the legislature, not the Court.
 - Date rape cases may be treated differently, but this is not one of these "new" types of cases. This case is a case where a young woman is alleging physical force.
- E. Arguments for mens rea standards in rape:
- Argument for knowledge standard:
 - Mistake should not generate culpability; like property, took something defendant thought was his
 - Argument for reckless standard:
 - Would make consent the whole ball game
 - Alaska is one the few American jurisdictions to require proof of recklessness (victim doesn't have to resist at all. State must prove that defendant acted recklessly regarding victim's lack of consent)
 - Argument for negligence standard:
 - Objective standard may make it easier to apply, particularly where there is a defendant who doesn't know there is a risk of non-consent (*Fischer*)
 - Victim's subjective experience is more important than other crimes; harm of guessing wrong is a large harm and we allow negligence in homicide
 - **Most jurisdictions are at a negligence standard for consent, but most jurisdictions also have a force requirement**
 - Argument for gendered reading:
 - The fact that men and women view sexual experiences differently comes in through jury instructions or defendant's arguments, or when there are two stories with no corroborative physical evidence
 - Should the prosecutor have to be convinced of victim's truthfulness beyond a reasonable doubt?
 - Prosecutorial discretion: sometimes prosecutors won't bring cases because they don't believe in credibility of witness

Blackmail

- I. Blackmail/extortion
- Parallel track with sex offense trajectory in MPC
 - Blackmail goes further than property offenses to cover fraud
 - Example of where two legal things are brought together to create a crime
- II. Line between zealous advocate and criminal
- *State v. Harrington* (1969)
 - Facts: Attorney is trying to help his client in divorce proceeding. He sets up defendant to cheat on his wife and gets pictures of it. Attorney letter says he will use the pictures to shame defendant and make a terrible proceeding if he doesn't agree to terms of the settlement.
 - Blackmail statute: A person who maliciously threatens to accuse another of a crime or offense, or with an injury to his person or property, with intent to extort money or other pecuniary advantage, or with intent to compel the person so threatened to do an act against his will, shall be imprisoned in the state prison not more than two years or fined not more than \$500.
 - Issue: Does attorney's behavior amount to blackmail?
 - Holding: **A demand for settlement of a civil action, accompanied by a malicious threat to expose the wrongdoer's criminal conduct, if made with the intent to extort payment, against his will, constitutes the crime of blackmail.**
 - Rationale: Respondent's participation was done with preconceived design. Plenty of evidence that he acted maliciously and without just cause. Additionally, this was done with intent to extort a contingent fee to the respondent's personal advantage.
 - Significance: **Whether a threat to sue can be extortion depends on statutory construction.** Blackmail statutes vary a great deal. Variations in types of threats required.
 - **Threats of personal and property injury or threats to accuse crime are always enough.**
 - **Threats to make disclosures that would defame the victim are often included.**
 - **Threats to expose matters that are not defamatory depends on the statute.**

- Additionally, **variation in what the blackmailer seeks to obtain by his threats.**
 - Purpose is limited by many statutes to obtaining property or other things of value.

III. Line between vigilant shopkeeper and criminal

- *People v. Fichtner* (1953)
 - Facts: Defendants manage a store. Smith had left the store without paying for a jar of coffee, which he concealed in his pocket. Defendants caught him and obtained \$25 from one Smith with his consent, induced by a wrongful use of fear by threatening to accuse him of the crime of petit larceny and exposing the crime in newspapers and over the radio unless he paid them a sum of money and admitted that during the course of several months he had taken merchandise from the store in that amount. Plaintiff said he was induced to sign the paper and make the payment. Defendants said they honestly believed that over the several months plaintiff had stolen merchandise in the sum they were asking for.
 - Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of fear.
 - Fear may be induced by an oral or written threat, to accuse him or any relative of his or any member of his family with any crime, to expose/impute to him any disgrace.
 - Issue: Was this behavior blackmail or getting restitution?
 - Holding: The law does not authorize the collection of just debts by threatening to accuse the debtor of crime, even though the complainant is in fact guilty of the crime.
 - Rationale: The extortion statutes were intended to prevent the collection of money by the use of fear. It makes no difference whether the debtor stole any goods, nor how much he stole. Defendants can be convicted even though they believed that the complainant was guilty of theft in an amount either equal to or less or greater than any sum of money obtained from the complainant. It doesn't matter that they used good faith in enforcing payment of the money alleged to be due.
 - Significance: After this case, law changed to reflect an affirmative defense if defendant reasonably believed threaten charge to be true and that his sole purpose was to compel the victim to take action to make good the wrong. It is an affirmative defense that benefit did not exceed an amount which the defendant reasonably believed to be due as restitution for the harm caused by the crime.
- Kilganon & Singer (NY Times article on Stores' Treatment of Shoplifters)
 - Suspected shoplifters are photographed holding up the items they are accused of trying to steal. Workers at the store threaten to display the photographs and call the police unless the accused thieves hand over money.
 - NY law allows shopkeepers privileges that fall between the prerogatives of police and a citizen's arrest. Law details civil recovery statutes by which retailers may use the threat of a civil lawsuit to recover settlements.
 - However, threatening to report that someone has committed a crime can be a form of extortion, especially because accused shoplifters are deprived of basic civil rights like right to lawyer and freedom from coercion.
 - Fear of being deported further adds coercion.

IV. MPC 223.4: Theft by Extortion

- 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 to 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 the property is not demanded or 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.
- 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 compensation for property and lawful services.

V. Threat must be sufficiently specific

- Affirmative defense: if you are asking for money comparable to what you have lost, this is an honest claim of restitution (even if it's not the price it actually was, as long as they had an honest claim to that amount/reason for that amount)

VI. Key things while looking at blackmail statutes:

- What does the threat have to be?
- What does the statute says the person has to get in return for the threat?

VII. Tobi the bunny

- Should blackmail include threats to your own property?
- MPC 223.4(7): Any other harm which would not benefit the actor
 - Own property doesn't come under this because **one always benefits from controlling their own property.**

ATTEMPTS

Mens Rea

- I. Why do we criminalize attempt?
 - Utilitarian rationale of stopping crimes from happening, retributive rationale that those who try but fail are not less guilty than those who try and succeed
 - Tension between protecting people who change their mind and encouraging police to stop crimes before completion
 - Typically punishment for attempt is reduced factor of completed crime (actor who intentionally seeks to cause a harm is traditionally punished much less severely if his attempt proves unsuccessful)
 - MPC proposes punishment same for attempt as for the crime committed
 - Exceptions: crimes punishable by death or life imprisonment (serious felonies)
 - MPC focus on subjective intent; actors who fail at attempt are as guilty as actors who succeed; additionally, reflects utilitarian worry about type of evidence in attempt
 - No crime of attempt; attempt is listed as “attempt of _____”
 - Mens rea is linked to mens rea of the crime to which attempt is connected
- II. *Smallwood* and the special intent requirement
 - Attempt is a **special intent crime**
 - To satisfy attempt mens rea, the actor needs to have a **specific intent to produce the proscribed result**, even when recklessness or some lesser mens rea would suffice for conviction of the completed offense
 - **Attempted murder requires a specific intent to kill but it is sufficient for murder that defendant engages in conduct knowing of a high probability that in doing so he will kill someone.**
 - Note: you can attempt voluntary manslaughter (but this would be attempted murder which is mitigated by provocation or something else)
 - *State v. Raines* (1992)
 - Facts: Raines and friend were traveling on a highway when defendant fired a pistol into driver’s side window of a car. The shot killed the driver. Evidence showed that Raines shot at driver’s window knowing the truck driver was immediately behind it.
 - Holding: Intent to kill may be proved by circumstantial evidence. **Intent to kill can be inferred by use of deadly weapon directed at a vital part of the human body.**
 - *Smallwood v. State* (1996)
 - Facts: Smallwood was aware his was HIV positive and was told by his doctor to practice safe sex. He sexually assaulted three victims without using a condom in any of his attacks.
 - Issue: Were the facts of the case sufficient to infer an attempt to kill?
 - Holding: **There is not enough evidence here to infer an attempt to kill.**
 - Rationale: State likened Smallwood’s HIV-positive status to a deadly weapon and argued that engaging in unprotected sex when one is knowingly infected with HIV is equivalent to firing a loaded firearm at that person (court rejects this argument). It was established in a previous case that most people who carry the virus will progress to AIDS. Required intent in this case is the **specific intent to murder**. Intent to kill can be inferred by use of a deadly weapon directed at a vital part of the human body.
 - Magnitude of the risk: it is permissible to infer that one intends the natural and probable consequences of his act. In this case, no evidence that death by AIDS is a probable result of these actions to the same extent as firing a deadly weapon at a vital part of someone’s bod
 - No additional evidence from which to infer an intent to kill.
 - Significance: In *State v. Hinkhouse* (1996), defendant had actively concealed his HIV-positive status from women he was sleeping with, had lied to several of them, and had refused requests to wear condoms. There was also evidence that he told at least one of the victims that he would spread the virus to other people if he were HIV-positive.
 - These specific actions are necessary to infer such an intent and exclude other possible intents.
 - Rationale: Smallwood is not as culpable as the person committing sexual assaults with the intent of killing his victims.
- III. MPC § 5.01: Criminal Attempt
 - A. **5.01(1)**: A person is guilty of attempt to commit a crime if, **acting with the kind of culpability otherwise required for commission of the crime**, he:
 - a) **Purposely** engages in conduct which would constitute the crime if the **attendant circumstances** were as he believes them to be; or

- (1) Note: this is the standard to use when there is no result element. Have to purposely engage in the conduct (not reckless/negligent). Everything else is an attendant circumstance -- **need the same mens rea as one would need for the underlying crime**
 - b) When causing a particular result is an element of the crime, **does or omits to do anything with the purpose of causing or with the belief that it will cause such result** without further conduct on his part; or
 - (1) Note: this is the standard to use when the actor is trying to bring about a specific result
 - c) **Purposely does or omits to do anything which**, under the circumstances as he believes them to be, is an act or omission constituting a **substantial step** in a course of conduct planned to culminate in his commission of the crime
- B. MPC mens rea in sum:
- Result element: **Purpose/belief**
 - Conduct element: **Purpose**
 - Attendant circumstance: **Same as underlying offense**
- C. Exception: 5.05(2):
- *Mitigation*: If the particular **conduct** charged to constitute a criminal attempt, solicitation, or conspiracy **is so inherently unlikely to result or culminate in the commission of a crime** that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this section, the court should impose a sentence for a crime of lower degree.
- D. Note: MPC mens rea pretty much is the same for common law
- However, common law treats attendant circumstances differently in some jurisdictions

Actus Reus/Preparation

- I. 4 tests which get at the idea of how far along one has to be for attempt
- Reflects police goals about getting people earlier in the process
 - Four tests:
 1. **Last step test**
 - Have to wait until the latest possible act before commission of the crime
 2. **Dangerous proximity**
 - Must be so near to accomplishment that the crime would be committed if not for interference; likely earlier on the spectrum than last step or res ipsa
 3. **Res ipsa test (unequivocal)**
 - Generally at the last step or a step right before, where there is no alternate explanation for the act so the action can speak for itself
 4. **Substantial step test**
 - Must be strongly corroborative of the actor's purpose
 - Allows for possibility of interference earlier in the process than the other tests
- B. Preparation versus attempt:
- Common law has recognized the distinction between attempt and acts of preparation
 - Some common-law crimes consist solely of preparatory behavior: solicitation, conspiracy, burglary, assault, etc.
- II. *Eagleton* and the last step test
- *R. v. Eagleton* (1855)
 - Last step test: **Accused must have taken the last step which he was able to take along the road of his criminal intent.**
 - Rationale: When an actor has stopped short of the last step, he still has an opportunity to change his mind and remains within the region of innocent preparation.
 - Notes: The act of pulling the trigger would be attempted murder, but not the act of loading the pistol, looking for the enemy, lying in wait, and even pointing the pistol at him.
- III. *Rizzo* and the dangerous proximity test
- *People v. Rizzo* (1927)
 - Facts: Rizzo had the intention to commit robbery, if he got the chance. He wanted to rob someone of a pay roll. Rizzo claimed to be able to identify the man and point him out to others, who would do the actual holding up. At the time they were apprehended, they were looking for the man but had not discovered him yet.
 - Dangerous proximity test: acts are to count for attempt only if they are **so near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference.**

- Rationale: Distance must be relatively short between actions and the unachieved goal of the crime if the defendant is to be held guilty of attempt.
- IV. *McQuirter* and the equivocality/res ipsa test
- *McQuirter v. State* (1953)
 - Facts: A black man was found guilty of an attempt to commit an assault with intent to rape. Appellant was with her children and she testified that he followed her down the street.
 - Res ipsa test (unequivocality): **how clearly the defendant's acts bespeak his intent** (formulated in *King v. Barker* 1924).
 - Rationale: An act done with intent to commit a crime is not a criminal attempt unless it is in itself sufficient evidence of the criminal intent. There must not be alternate explanations for the action.
 - Notes: Confession can trump res ipsa (if an act is not unequivocal in itself, but then is corroborated by a confession, this establishes mens rea).
- V. *Jackson* and the MPC substantial step test (5.01(c)(3))
- *United States v. Jackson* (1977):
 - Facts: Appellants conspired to commit an armed robbery. Def 1 recruited 2 to rob the branch. On the 14, def 2 drove over with Jackson who had a car with sawed-off shotguns, revolver, pair of handcuffs, and masks. Jackson put a false license plate on the car. They rescheduled the robbery for the following week. Def 1 had told the FBI agents of the robbery. At the time defendants were apprehended, a car with a cardboard license plate and people who fit the description was moving toward the bank.
 - Substantial step test: Defendant must have engaged in **conduct which constitutes a substantial step toward commission of the crime. Substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.**
 - Rationale: Must be strongly corroborative of criminal purpose; focuses on what the actor has already done rather than what the actor has left to do. This was an attempt to preclude attempt liability for minor preparatory acts but also permit the apprehension of dangerous persons at an earlier stage than the other approaches.
 - A. MPC 5.01(1)(c): ...purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission **constituting a substantial step** in a course of conduct planned to culminate in his commission of the crime
 - B. MPC 5.01(2): Conduct which may be held substantial under (1)(c):
 1. Conduct should not be held to constitute a substantial step under 1(c) **unless** it is **strongly corroborative to an actor's criminal purpose**. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actors' criminal purpose shall not be held insufficient as a matter of law (will go to the jury):
 - a) Lying in wait, searching for, or following the contemplated victim of the crime;
 - b) Enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its 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 the commission of the crime, which are specially designed for such lawful 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 the crime, at or near the place contemplated for its commission, where such possession, collection, or fabrication 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.
- VI. Abandonment
- Court **traditionally denied any defense of abandonment**, and many courts continue to adhere to that view.
 - This is why many courts insist that the threshold of criminality be placed very close to the last act.
 - Some states recognize renunciation as a complete defense (voluntary and complete renunciation of the criminal purpose)
- VII. Practice problems:
- *United States v. Harper* (1994)
 - Facts: Defendants have stun guns, ammunition, and surgical gloves. Go to the ATM to withdraw 20 dollars but don't take out the money. The theory is that they are waiting for the technician to get there so they can then rob him.
 - MPC test: Hard for the defendant. Need a good, credible explanation to make this evidence insufficient as a matter of law; it's most likely going to the jury

- Dangerous proximity test: Technicians hadn't arrived yet; were about 90 minutes away at the time. Defense can likely argue that this was not dangerously proximate.
- Res ipsa test: Other explanations for having these materials on them and for this behavior. Could argue that the act does not speak for itself.
- Last step: Not the last step; defendant would definitely win on this one.

GROUP CRIMINALITY

Accountability for the Acts of Others

I. Accomplice liability

- When one is responsible for acts committed by others
- Do not view this from a causation lens; assumption is that everyone is an independent moral agent
- Mens rea is the most confusing part of accomplice liability
- There is no crime of “aiding and abetting” -- it is just a theory of liability; people are convicted of substantive crimes like rape, homicide, assault, etc.
- For **sentencing purposes**, predominant approach is to treat the one who committed the crime and the aider/abettor exactly the same (there was for a brief time a thought in common law that because of respective roles there would be differentiation).
- For **felony murder**, if principal wants to commit a robbery and accomplice agrees to be a lookout, and something unexpected happens and somebody dies, A could be charged with felony murder as long as he has the intent to aid/encourage the felony. A just needs to have the same mens rea that P needs to have. P didn't need mens rea because on the hook for felony murder. Therefore, A is too.

II. Mens Rea

- Mens rea and the comparison with attempt under the MPC:

	Conduct (action or omission, 1.13(5))	Attendant Circumstances	Results
Attempt	Purposely engages in conduct that would constitute crime if circumstances were as deft believes them 5.01(1)(a) OR Purposely engages in an act or omission constituting subst'l step in a course of conduct 5.01(1)(c)	Same mens rea as underlying offense 5.01	Purpose or Belief will occur (so cannot attempt an unintentional crime) 5.01(1)(b)
Accomplice Liability	Purpose to facilitate “commission of the offense”/ conduct 2.06(3)(a); cf. <i>Hicks</i> (need to intend to encourage or abet the criminal conduct)	Ambiguous See note 4, p.678	Same mens rea as underlying offense (so can be an accomplice to an unintentional crime) 2.06(4); see <i>McVay</i> (p.674); <i>Roebuck</i> (p. 675)

A. Mens rea questions:

1. Has defendant met all the elements? (conduct, attendant circumstances, result)
2. What if defendant was an accomplice, but unbeknownst to her, an additional crime was committed?
 - Under relative foreseeability, can use accomplice liability to put people on the hook for other crimes people commit
 - Different for felony murder
3. Can the person be brought as an accomplice?
 - If not, as a conspirator?

B. Should knowledge one is assisting a crime be sufficient?

- Specific intent is generally required to hold a person liable as an accomplice; **must actually intend his action to further the criminal action of the principal.**
- Majority/MPC view: Need **intent/purpose** to promote commission of crime; **not enough to know or expect it will happen**
 - *Hicks v. United States* (1893)
 - Facts: Hicks and Rowe were American Indians. They were at a dance and Hicks was with Colvard. Rowe came over to them and put up a gun to Colvard's head. At one point Hicks said “take off your hat and die like a man.” Rowe shot Colvard and Hicks and Rowe rode away today. The police found Rowe and killed him (so no charge against Rowe).

- Issue: Can Hicks be held liable for Rowe's shooting of Colvard?
- Holding: Case remanded for jury instructions, which emphasized mere presence (which does not indicate whether he was aiding/abetting the crime).
- Rationale: Must find either that Hicks had a duty to act and didn't, or that Hicks had to intend to **facilitate the crime (aid/encourage the crime)** with his words/actions.
 - Additionally, if Hicks was present for the purpose of aiding or abetting but did not do it because it was not necessary, he is still guilty. Here, no evidence of prior conspiracy.
- Significance: At common law, one actually has to aid/encourage. MPC wants to get people for **trying to aid/encourage**.
- *Hicks* variations:
 - Hicks hears that Rowe has set out to kill his old enemy, Colvard, and goes along to enjoy the spectacle.
 - No mens rea, no actus reus
 - Same situation as (1), except that while watching Rowe's assault on Colvard with satisfaction, he shouts words of encouragement to Rowe as "Go get him!" and "attaboy!"
 - He satisfies actus reus
 - He does not have mens rea to facilitate the crime
 - Same situation as (1) except that Hicks resolves to make certain Rowe succeeds -- by helping him if necessary
 - No evidence for actus reus (unless he tells Rowe in advance he will help him if necessary)
 - He arguably satisfies mens rea
 - Same situation as in (3) except that Hicks tells Rowe on the way that he will help him if it seems necessary
 - He satisfies actus reus because he does something to help/encourage the crime
 - Satisfies mens rea because of intent to help/encourage the crime
- *State v. Gladstone* (1970)
 - Facts: Thompson was hired by the PD to attempt to buy weed from Gladstone. Gladstone said he didn't have any weed but gave the name of someone who did have enough (Kent) and gave the address to Thompson, drawing a map to direct him there. There was no evidence of communication between defendant and the other seller.
 - Issue: Did defendant have the mens rea to establish the commission of the crime charged?
 - Holding: No proof of aiding and abetting.
 - Note: The charge was with respect to Kent's sale of marijuana, not the buyer's purchase of marijuana.
 - Rationale: No proof of requisite nexus between the two: "necessary that a defendant in some sort associate himself with the venture, that he participate in something that he wishes to bring about, that he seek by his action to make it succeed." There was no evidence that the defendant ever communicated to Kent the idea that he would in any way aid him in the sale of marijuana, or said anything to Kent to encourage him to do so, or did anything other than describe Kent to another person as an individual who might sell some marijuana. There was no evidence that he would derive any benefit/reward from such a sale.
 - Significance: **Even though he knew the buyer was going to purchase the drugs, there isn't anything to infer that his purpose was that the buyer purchase the drugs.**
 - Can't just have knowledge of the crime; need to find the intent to encourage/aid the offense.
- MPC original proposal 2.04(3)(b):
 - (1) A person is an accomplice of another person in the commission of a crime if... acting with knowledge that such other person was committing or had the purpose of committing the crime, he **knowingly, substantially facilitated its commission**.
 - (a) Required knowledge that there is a purpose to commit a crime and that one's own behavior renders aid.
 - (b) When a true purpose is lacking, the accessorial behavior must **substantially facilitate commission of the crime** and that it do so **with the knowledge of the actor**
 - (2) These proposals were rejected by the ALI; code now requires that the actor have **the purpose of promoting/facilitating** the commission of the crime
- Minority view: Knowledge is sufficient, particularly when crime is serious
 - *United States v. Fountain* (1985)

- Facts: Prison inmate was convicted of aiding and abetting another inmate in murdering a guard. When the inmate reached the aiding inmates cell, he thrust his hands through the bars and the defendant pulled up a shirt to reveal a knife in his waistband. The other inmate got the knife and stabbed the guard.
- Issue: Was knowledge that the defendant would use a knife to attack the guards enough?
- Holding: Knowledge is enough to convict of major crimes.
- Rationale: It was enough that he knew he helped the inmate obtain the knife and that the inmate would use it to attack the guards.
- When is evidence sufficient to infer intent? Variations on *Gladstone*:
 - Present at the sale, touting of product
 - Accomplice contacts seller personally and discusses sale with seller and buyer
 - Accomplice gets a kickback
 - Accomplice initiates contact with buyer, serves as lookout
- When can you be an accomplice to an unintentional crime?
 - MPC/most jurisdictions say it's sufficient to purposely facilitate the conduct that causes the result if the mens rea with respect to the result is the same as the underlying offense
 - Some non-MPC jurisdictions say you cannot be an accomplice to negligent/reckless crimes

III. Mens rea for results

- Dominant approach is that one needs intent to commit the crime, but how one thinks about intent as it breaks down into particular elements gets at the problem in applying this rule

A. Mens rea for results

- *State v. McVay* (1926)
 - Facts: Steamer carried several passengers. The boiler producing the steam by which the vessel was propelled burst and three people were killed. Charge was brought against defendant as accessory for "feloniously and maliciously" hiring McVay, the captain.
 - Issue: Can one be an accessory for manslaughter, given that manslaughter is unintentional/accidental?
 - Holding: Involuntary manslaughter means that defendants exercised no conscious volition to take life, but their negligence was of such a character that criminal intention can be presumed.
 - Rationale: The doing of the act charged or failure to perform the duty was voluntary and intentional; defendant procured McVay to act in a grossly negligent matter. There is no inherent reason why, prior to the commission of such a crime (manslaughter), one may not aid, abet, counsel, command, or procure the doing of the unlawful act or of the lawful act in a negligent manner.
 - Significance: **With reckless/negligent homicide, the actor has to want to facilitate the commission of the reckless/negligent activity which causes the homicide.**
- Minority view: **some jurisdictions say you can never aid an unintentional crime**
- Majority view for result: **same mens rea required for offense**
- *People v. Russell* (1998)
 - Facts: Three defendants battled each other in a shootout in a mall. A public school principal was fatally wounded by a single stray bullet. The prosecution said each of the shooters intentionally aided the defendant to fire the fatal shot (charging them with second-degree, depraved indifference murder).
 - Issue: Can the other defendants be held liable for the murder even though they did not fire the fatal shot?
 - Holding: If defendants took up each other's challenge, shared in the venture and unjustifiably, voluntarily, and jointly **created a zone of danger**, then **each is responsible for his own acts and the acts of the others.**
 - Additionally, the jury could determine that all three defendants acted with the mental culpability required for depraved indifference murder and created the lethal crossfire that caused the death of the principal.
 - Rationale: Depraved indifference murder requires proof that the defendant, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct creating a grave risk of death to another person, and thereby caused the death of the other person. Although defendants couldn't tell who fired the fatal shot, the fact that defendants set out to injure or kill one another does not rationally preclude a finding that they intentionally aided each other to engage in the mutual combat that caused the principal's death.
 - Significance: **Intentionally facilitating conduct that is inherently dangerous (like drag racing) creates a "community of purpose," and it doesn't matter whether the defendants were at odds with one another.**
 - *People v. Abbott* (1981): Two defendants were engaged in a drag race when one (Abbot) lost control and smashed into another automobile. The court found that though Moon did not strike the victim's car,

he was Abbott's adversary and intentionally participated with him in an inherently dangerous and unlawful activity and therefore **shared his culpability**.

- MPC on the mens rea required for result (in accord with *McVay* [common law])
 - *Commonwealth v. Roebuck* (2011)
 - Facts: Victim was lured to an apartment complex, where he was ambushed, shot, and mortally wounded. Appellant participated in orchestrating the events but he did not shoot the victim.
 - Issue: Is it possible, as a matter of law, to be convicted as an accomplice to third-degree murder?
 - Holding: An accomplice can be held accountable for contributing to the conduct to the degree his culpability equals what is required to support liability of the principal actor; an accomplice must not always intend results essential to the completed crime.
 - Rationale: Third-degree murder is an unintentional killing committed with malice. An accomplice may be held legally responsible (under the MPC) where he is an accomplice in the conduct (aids another in planning or committing the conduct with the purpose of promoting or facilitating it, and acts with recklessness); focus is on the conduct, not the result.
 - Significance: Steps in this analysis:
 - Did the defendant want to facilitate the underlying conduct that caused the harm?
 - What mens rea does the principal have to have?

B. Mens rea for attendant circumstances

- MPC: takes the position that purpose is required as to the commission of the offense, but the code is silent on whether this requirement applies to attendant circumstance elements of the offense
- Hypotheticals:
 - A (principle) has firearm while convicted felon. B (accomplice) gives principle a firearm without knowing the principal is a felon.
 - In this case, one federal court has held liability improper because the attendant circumstance is so essential to the crime. Another federal court holds that because principle is liable for knowing his felon status, no greater mens rea should be required for accomplice (strict liability).
 - Accomplice encourages principle to have sexual relations with a female who turns out to be underage.
 - Statutory rape is the crime where age of victim is almost always strict liability, so may not need defense to know. However, districts come to different results on this issue.
- Best guidance on how to treat attendant circumstances?
 - Look at the statutory requirements to decide about mens rea in the first instance
 - For the second layer, new inquiry:
 - **Could treat accomplice exactly the same as principal in relation to that attendant circumstances**
 - Emphasize utilitarian arguments
 - **Different standard: point out the facts that make the accomplice different from the principal**
 - Emphasize retributionist arguments; accomplice may need a little more (awareness or opportunity to have awareness) for culpability
 - In these cases, accomplice has to intend to commit the offense (must have the mens rea as related to a particular attendant circumstance)

C. Attempt and accomplice liability

- Lower mens rea for result element for accomplice liability than attempt (complicity mens rea is mens rea required for commission of the offense)

IV. Natural and Probable Consequences Theory

- Accomplice liability:
 1. P commits crime.
 - a) For any accomplices related to the targeted crime:
 - (1) Mens rea (intent to facilitate/encourage crime)
 - (a) Conduct
 - (b) Results (majority: same mens rea as principal)
 - (c) Attendant circumstances (case-by-case basis)
 - (2) Actus reus (encouragement/facilitation)
 2. P commits another crime
 - a) Same analysis
 - b) But if A does not satisfy the test, and 2 is an outgrowth of crime 1, A can be held liable for the crime under the minority view (*Luparello*) but not under the MPC
- B. Liability for any reasonably foreseeable offenses
 - *People v. Luparello* (1987)

- Facts: Defendant wanted to locate his former lover. He told his friends that he wanted information about her new lover at any cost. His friends visited the new lover but failed to get the information they wanted. They returned the next evening armed with a gun and a sword (without Luparello) and lured the lover outside. One of their group, who was waiting in the car, shot and killed the man. Defendant argues that he doesn't have the mens rea for first-degree murder. He may have intended other crimes (e.g. battery, assault) but not homicide.
- Issue: Can defendant be held liable for first-degree murder when the murder is the unplanned and unintended act of a co-conspirator?
- Holding: **An accomplice is guilty of the offense he intended to facilitate/encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.**
- Rationale: Perpetrator and accomplice must not share an identical intent to be found criminally responsible for the same crime. Accomplice liability is premised on an equivalent mens rea. Equivalence is found in intentionally encouraging or assisting or influencing the criminal act.
- Significance: Same underlying rationale of felony murder (utilitarian). However, this is even more expansive because it isn't just limited to felonies. **Most jurisdictions think this is too much.** For jurisdictions that do it, they have limited to **"natural and probable"** to try to give it a test that increases the likelihood that additional crime would follow.
- *Roy v. United States* (1995)
 - Facts: Peppi was a police informant who approached defendant in an attempt to make an undercover buy of a handgun. The defendant told him to return later and he was referred to another man, who took him out to another area. The other guy ended up robbing the cop. Defendant was convicted as an accomplice.
 - Issue: Was this a natural and probable consequence of the illegal attempt to sell a handgun?
 - Holding: The evidence was insufficient to show that a robbery would follow in the ordinary course of events or that it was a "natural and probable consequence" of the activities in which defendant engaged.
 - Rationale: Armed robbery is a felony punishable by life imprisonment. Selling a handgun constitutes a misdemeanor of which defendant has been independently convicted. The government's application of this theory would expand liability where he did not intend that a crime of violence be committed. The phrase "in the ordinary course of things" refers to what may reasonably ensue from the planned events, **not to what might conceivably happen**, and in particular suggests the absence of intervening factors. A **"natural and probable" consequence to the ordinary course of things presupposes an outcome within a reasonably predictable range.**
 - Significance: Natural and probable consequences test remains controversial, and the majority of courts refuse to endorse it.
 - This is a similar concept to *Pinkerton* in conspiracy law. In a jurisdiction that embraces natural and probable consequence theory, *Pinkerton* doesn't add much.
 - MPC rejects the natural and probable consequences doctrine for accomplice liability.

V. Actus Reus

A. MPC versus common law: Intent to facilitate the offense

- MPC: attempt to aid is enough to establish intent to facilitate the offense (5.01)(c)(3)
 - Expands liability in a lot of cases, but does this to emphasize mens rea/subjective capability
- Common law: defendant must actually have to aid. Otherwise, no crime was committed.

B. *Wilcox v. Jeffery* (1951)

- Facts: The Aliens Order said that "Coleman Hawkins should take no employment paid or unpaid while in the UK." Hawkins played a jazz concert in the UK. Jeffery bought a ticket to the show and was charged as an accomplice.
- Issue: Were these acts sufficient for facilitating/encouraging the performance of the criminal act?
- Holding: Defendant was at the concert not only to approve and encourage what was done, but to take advantage of it. The defendant aided and abetted.
- Rationale: The defendant paid to go to the concert for the purpose of reporting it. He paid for his ticket, and did not applaud, but also did not boo or discourage the performance. The appellant clearly knew that it was an unlawful act for Hawkins to play.
- Significance: Mere presence is not enough for accomplice liability because it can be accidental. Needs to be **presence + something more** (something more could even be "conscious" to rule out the possibility of presence being accidental).

C. *State ex rel. Attorney General v. Tally, Judge* (1894)

- Facts: Ross had seduced Jude Tally's sister in law. Her brothers followed Ross to a nearby town to kill him. Tally learned that one of Ross's relatives had sent Ross a telegram in warning. Tally then sent his own

telegram to the telegram operator with instructions on not delivering the warning telegram to Ross. The operator received both telegrams and failed to deliver the message to Ross.

- Issue: Could the judge be held as an accomplice of the brothers?
- Holding: Encouragement needs to actually provide aid; any amount of aid, even a small loss of chance, is enough for accomplice liability.
- Rationale: For defendant to be convicted, it must be that he was in preconcert with the brothers, or at least known to them, whereby they would be incited, encouraged, and emboldened (given confidence) to the deed, or that he intended them to kill Ross, contributed to Ross's death by the telegram. The assistance need not contribute to the criminal result in the sense that but for it the result would not have ensued. **It is enough if the aid merely renders it easier for the principal actor to accomplish the end intended by him and the aider and abetter, even though in all probability the end would have been attained without it.**
- Significance: Under the MPC, even if the encouragement never reached the principals, defendant could be held liable. Non-MPC, didn't actually facilitate the offense.

D. Accomplice by **omission**

- MPC provides that **a person can be an accomplice if he has a legal duty to prevent the offense and he fails to do so with the purpose of promoting/facilitating the crime**
- Complicity by omission can be found even in the absence of preconcert (*People v. Stanciel*: court ruled that mother's failure to protect her child from her boyfriend rendered mother an accomplice to her daughter's murder).

VI. Relationship between Liability of the Parties

A. MPC v. common law:

- MPC: 5.01(c)(3): if principal is acquitted, can still bring the aiding and abetting charge.
- Common law:
 - If conviction matters depends on the jurisdiction
 - May depend on purpose of principal's acquittal if no conviction
 - If justification, no crime was committed in the eyes of the common law, and there can be no accomplice liability
 - If excuse, this is particular to the principal; crime is still committed and accomplice can still be held liable.

B. *State v. Hayes* (1891)

- Facts: Defendant proposed to Hill that he join him in the burglary of a general store. Hill feigned acquiescence in order to obtain the arrest of defendant and advised the store owners of the plan. On the night of the burglary, defendant raised the window and Hill climbed through and handed him bacon. Afterward they were apprehended for burglary (permanent taking of things from the owner)
- Issue: Can defendant be guilty of burglary if he assisted a principal who himself had no intent?
- Holding: Defendant was not guilty of burglary because he did not enter the room (the necessary overt act)
- Rationale: Hill did not enter the warehouse with intent to steal. Here, an act essential to the crime charged was done by the principal, not the defendant, and the act not being imputable to the defendant, the latter's guilt was not made out. **Intent and act must combine, and all the elements of the act must exist and be imputable to the defendant.**
- Significance: We need a crime for accomplice to be held liable. Under the MPC, we could get defendant for attempted burglary because he intends to burglarize the store.

C. *Vaden v. State* (1989)

- Facts: Undercover agent posed as a hunter. Valden piloted the aircraft and maneuvered it to facilitate agent's shooting game. Valden lent gun to agent. Agent shot and killed foxes.
- Issue: Can Valden be held as aider and abetter even though he did not shoot the animals [and the shooting may not have been a crime because LE officer has a justification available to him]?
- Holding: Court held that even though principal's actions may not be deemed criminal because of law enforcement justification, this would not avail the accomplice because this type of justification is personal to the agent.
- Significance: **Under common law, matters whether principal is acquitted for certain defense.** It also **matters why the principal is acquitted.** Here, the court treats officer justification as an excuse, which means that there can still be accomplice liability.

Conspiracy

- “Elastic, sprawling, and pervasive offense”
 - Pretty much everything in federal law other than immigration offenses (“cornerstone of federal prosecution”)
 - Conspiracy is a **separately punishable offense AND a way to be guilty of other crimes.**
 - It is an **inchoate crime that aims at preparatory conduct**
 - Defined by the crime of agreeing with another to commit a criminal offense
 - **Also a form of accessory liability**
 - Can be charged with additional crimes committed by other members of the conspiracy
 - Why do we make conspiracy a crime?
 - Special dangers of group activity
 - Harder to get the culpable actor; easier for the actor to hid from detection
 - Can create greater forms of harm
 - Offense is more likely to actually happen
 - Easier to get a defendant earlier in the process, before more dangerous steps are taken
 - Procedural advantages
 - Downsides to conspiracy:
 - Big guilt by association problem for the defendant
 - Hard to say that statute of limitations has ever run in a conspiracy (hard to show when a conspiracy has ended)
 - *Pinkerton* jurisdictions (including the federal system): defendant is on the hook for everything that everyone in the conspiracy has done which was reasonably foreseeable.
 - Sentence for conspiracy could be greater than the sentence for the crime that is the object of conspiracy (in some jurisdictions)
 - Roughly a third of the states follow the lead of the MPC and make the punishment for conspiracy the same as that authorized for the object crime, except in the case of the most serious felonies

VII. Actus Reus and Mens Rea

A. Actus reus

1. The Agreement: agreement by two or more persons to commit a crime; actus reus is the agreement itself.
 - *Interstate Circuit v. United States* (1939)
 - Facts: Sherman Anti-Trust case (makes a conspiracy restraining commerce illegal). Evidence of agreement: two theater chains sent letters to each of the eight movie distributors naming the other distributors with the same conditions (amount to restraints of trade). Each distributor agreed to these conditions.
 - Issue: Is this just parallel action or something undertaken with a common understanding?
 - Holding: The distributors engaged in a violation of the Sherman Anti-Trust Act by agreeing to not compete.
 - Rationale: Strong motive to engage in collusion because they all knew of the opportunity and there are profits to be made. Risk of loss if only some were to engage in this course of action -- supports the idea that there was some understanding. Lack of alternate explanations -- cannot just be by chance, plus this was a huge revision of prior business practices.
 - Significance: **while there may not have been an express agreement, existence of the agreement can be inferred from circumstantial evidence.**
 - Urban riot hypothetical
 - During an urban riot, one teenager shouts to three of his friends “there’s great stuff in that store, and the owner’s a cheat. Let’s go get it!” All 4 run into the store and start grabbing goods. Seeing the looting, two passerby, strangers to each other, enter the store and join in the looting.
 - Are the four teenagers guilty of conspiracy with each other?
 - “Let’s go” -- they didn’t go in until one brought up the idea
 - Can have an impulsive agreement conspiracy. Prior consideration is not required; can agree to commit a crime spontaneously
 - Four went in together; implies tacit agreement
 - Preexisting relationship can be helpful
 - Two passerby guilty of conspiracy with each other?
 - If they went in together, maybe, but the two were strangers to one another (no preexisting relationship)
 - Two guilty of conspiracy with the four?
 - The two were not asked to join by the four and did not hear the teenager say anything
 - No preexisting relationship with the six

2. Overt Act

- Some jurisdictions require an **overt act in addition to agreement to conspire**
- **MPC: for most serious crimes need just the agreement (5.03(5))**: No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired).
 - **For more minor stuff, need an overt act** on the theory that the more something is dangerous, the more there is an incentive to nip it in the bud. Less dangerous stuff it's okay to wait for the overt act.
- Federal system: usually requires an overt act.
- Overt act requirement reflects the desire to find out if this is coincidental parallel conduct or a conspiracy
 - Gang membership presents an interesting dilemma
 - Ninth Circuit said that gang membership + parallel action is not enough to prove a conspiracy because a general practice of supporting one another in fights does not constitute the type of illegal objective that can form the predicate for conspiracy
 - Other jurisdictions may come to the opposite conclusion; because gangs activity inherently involves a tacit agreement of backing up individuals in gangs in situations of violence, can rightfully hold one responsible of conspiracy if gang violence breaks out.

B. Mens rea of conspiracy

- Mens rea:
 - Have to show **intent to agree** (specific intent: crime is practically certain to occur)
 - It's okay to infer intent from knowledge under certain circumstances (*People v. Lauria*)
 - When something isn't really serious, knowledge is enough, especially if you can prove defendant has a stake in the outcome.
 - Cannot conspire to commit an unintentional crime, just like you cannot attempt an unintentional crime
 - Most states require purpose in conspiracy cases, even when the object crime is a serious felony
 - *People v. Lauria* (1967)
 - Facts: Lauria had an answering service. A police operator called and posed as a prostitute, saying she was concerned with the secrecy of her activities. She was assured that the operation of the service was discreet but he did not directly acknowledge her hints of being a prostitutes. Lauria was arrested for conspiracy. He said he knew that some of his customers were prostitutes, but there must be a mutual understanding.
 - Issue: What is the criminal responsibility of a furnisher of goods or services who knows his product is being used to assist the operation of an illegal business?
 - Holding: Intent of a supplier who knows of the criminal use to which his supplies are put to participate in the criminal activity connected with the use of his supplies may be established by (1) direct evidence that he intends to participate, (2) through an inference that he intends to participate based on (a) his special interest in the activity, or (b) the aggravated nature of the crime itself.
 - In this case, insufficient evidence that he intended to further the prostitute's criminal activities and hence insufficient proof of his participation in a criminal conspiracy to further prostitution.
 - Rationale: Intent is not identical with mere knowledge that another proposes unlawful action; the step from knowledge to intent must be taken. **Both the element of knowledge of the illegal goods or services and the element of intent to further that use must be present in order to make the supplier a participant in a criminal conspiracy.** Proof of knowledge is generally a question of fact. Proof of intent can be derived from the sale itself and surrounding circumstances in order to establish the supplier's express or tacit agreement to join the controversy.
 - Intent can be inferred from knowledge when the purveyor of legal goods has a **state in the venture, no legitimate use for the goods or services exists, volume of the business with the buyer is grossly disproportionate to any legitimate demand/sales from the illegal use are a high proportion of the seller's total business.**
 - An inference of intent drawn from knowledge **should not apply to less serious crimes classified as misdemeanors; with misdemeanors, positive knowledge that the products are being used for criminal purposes does not establish an intent to the supplier to participate in the misdemeanors.**
 - Here, no evidence of stake in the venture, there is a legitimate use for the telephone answering service, and volume of the business wasn't that high.
 - Additionally, this crime was a misdemeanor.
 - a) Significance: Defendant is guilty of conspiracy if he/she:
 - (1) Knows of the crime **and**

- (2) Either:
 - (a) Intends to participate (i.e., has the purpose that the crime occur) **or**
 - (b) The crime is very serious
 - (c) He has a stake in the venture:
 - i) Charges criminals above market price
 - ii) Derives the bulk of his profits from supplying criminals
 - iii) No legitimate use for the goods supplied
 - iv) No legitimate purpose for the volume of goods supplied

2. MPC 5.03(1): Purpose [MPC requires purpose for both conspiracy and accomplice liability]

- (1) 5.03(1): Definition of Conspiracy: a person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
 - (a) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
 - (b) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime

- (2) Note: Attendant circumstances: MPC is silent, like with accomplice liability

VIII. The Duration and Scope of a Conspiracy (don't need to know for test)

- Until defendant withdraws, defendant is in conspiracy. Standards for withdrawal are very high.
- Two main types of structures for conspiracies:
 - Chain conspiracies (common in narcotics -- chain of distribution)
 - In a chain conspiracy, everyone is responsible for all of the illegal activity (drugs) along the chain.
 - Wheel and spoke conspiracies (single person is in the hub, dealing with lots of other people)
 - Hub conspires with all the spokes, but it is unclear whether all of the spokes are conspiring with each other. If "rimless" wheel, these are all separate conspiracies.

IX. Conspiracy as Accessory Liability

- When can you be liable for additional offenses other than the offense you intended to facilitate?
 - **MPC: never under conspiracy theory**
 - **In jurisdictions that follow *Pinkerton*, including the federal gov't: when the other offenses are in furtherance of the conspiracy and reasonably foreseeable**
 - *Pinkerton v. United States* (1946)
 - Facts: Walter and Daniel Pinkerton are brothers. They were indicted for violations of the IRS. There is no evidence that Daniel participated directly in the substantive crimes, though there was evidence to show that these crimes were committed by Walter in furtherance of the unlawful conspiracy allegedly existing between the two brothers.
 - Issue: Can defendant be on the hook for crimes committed by member of the conspiracy if he is found to be in a conspiracy?
 - Holding: If the substantive offense is done **in furtherance of the conspiracy and is reasonably foreseeable**, any member of the conspiracy can be held liable for this.
 - Rationale: The criminal intent to do the act is established by the formation of the conspiracy. As long as the act done was in execution of the enterprise by one conspirator, other acts in furtherance of the conspiracy are likewise attributable to the others.
 - Significance: *Pinkerton* is an analogue to *Luparello* but it has more widespread use because of its prevalence in federal law. Not very defendant friendly; just about everyone is included.
 - *State v. Bridges* (1993)
 - Facts: Defendant got in a heated argument with another guest. He recruited two acquaintances to accompany him back to the party, where he expected a confrontation. They stopped to pick up guns to hold back the guest's supporters while the defendant fought it out. When they went back to the party, the acquaintances drew their guns and began firing. One of the onlookers was fatally wounded.
 - Issue: Were these acts done in furtherance of the conspiracy + were reasonably foreseeable?
 - Holding: Co-conspirator may be held liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are **reasonably foreseeable as the necessary or natural consequences of the conspiracy**.
 - Rationale: *Pinkerton* purposed to impose vicarious liability on each conspirator for the acts of others based on an objective standard of reasonable foreseeability. Here, it could be anticipated that bringing weapons back into a party might result in a weapon being fired at the crowd.
 - Significance: Common *Pinkerton* case.
 - *United States v. Alvarez* (1985)

- Facts: Run-down motel was the scene of a drug buy that had been arranged after a long negotiation. Undercover agents were in the motel room with the drug dealers, waiting for another dealer to return with cocaine. On the arrival of the cocaine, other agents converged on the motel and a shoot-out started in the motel room. All dealers were convicted of conspiracy to commit commission of various drug offense and two of them were also convicted of first-degree murder. Three of the dealers were convicted of second-degree murder through they took no part in the shooting.
 - Issue: Can the *Pinkerton* doctrine be applied to murder?
 - Holding: Murder was a reasonably foreseeable consequence of the drug conspiracy, and therefore the conspirators can all be held liable for the shoot-out.
 - Rationale: The evidence established that the drug conspiracy was designed to effectuate the sale of a large quantity of drugs, the conspirators must have been aware of the likelihood that at least some of them would be carrying weapons and that deadly force would be used to protect the conspirators' interests. Additionally, each of the appellants had actual knowledge of at least some of the circumstances and events leading up to the murder.
 - Significance: *Pinkerton* liability may be negated by a defendant's minor role in a conspiracy or lack of knowledge about the unintended substantive offense. Some courts have used this as a restraint on the reach of the *Pinkerton* doctrine.
 - Compare *Pinkerton*, *Bridges*, and *Alvarez* with accomplice liability (*Luparello*)
 - This is **even more over-arching than accomplice liability**.
 - In *Pinkerton*, Daniel could only be charged as an accomplice if he actively encouraged the activity. Here, he is charged whether or not he endorsed the criminal activity.
- X. Reassessing the Law of Conspiracy
- *Pinkerton* has made it very important who is in the conspiracy and who is in furtherance of the conspiracy, and the scope of the tacit agreement.
 - Phillip Johnson: Conspiracy just adds confusion to the law; where there is evidence of conspiracy, the defendant may be tried jointly with his criminal partners and possibly with many other persons whom he has never met or seen. Joint trial may be held in a place he never visited, and hearsay statements of other alleged members of the conspiracy may be used to prove his guilt. The main problem is not just with the results, but with the use of a single abstract concept to decide numerous questions that deserve separate consideration in light of the various interests and policies they involve.
 - Neal Katyal: Conspiracy law strives to prevent conspiracies from forming with high upfront penalties for those who join, but also uses mechanisms to obtain information from those who have joined and decide to cooperate with the government.

Corporate Criminal Liability

- I. Why would we hold a corporation criminally liable?
- *New York Central & Hudson River Railroad Co. v. United States* (1909)
 - Facts: Federal Elkins Act required common carriers to post rates and forbade them from charging less than their posted rates. In this case, railroad company and one of its employees were convicted for paying rebates to certain companies.
 - Issue: Does Congress have the authority to charge a corporation with criminal offense or subject a corporation to a criminal prosecution?
 - Holding: "We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act."
 - Rationale: Since a corporation acts by its officers and agents their purposes, motives, and intent are just as much those of corporation as are the things done. There are some crimes which in their nature cannot be committed by corporations, but there is one large class of offenses (rebating under the federal statutes is one) wherein the crime consists of purposely doing the things prohibited by statute.
 - Significance: Functions of holding a corporation criminally liable:
 - **Expressive function**
 - Moral blame; displaying social condemnation
 - Public wants to see indictments when corporations do something beyond the threshold of civil suits
 - **Instrumental function**

- Utilitarian function of deterrence (provide an example to other corporations)
 - Encourage corporations to be more responsible for employee's behavior
- II. Why not just bring actions against the individuals?
- Sometimes can get additional stuff out of criminal prosecution above and beyond the fine
 - Criminal prosecution can lead to more of a market drop as opposed to civil sanctions alone
 - Shareholder concerns
 - Some companies don't have the shareholder concern
 - However, for some companies conviction is the equivalent of capital punishment. Some corporations don't even survive the indictment
- III. Arguments **against** holding corporation liable:
- Damaging for other employees and the shareholders (society has to bear the cost)
 - Disincentives for corporations to report these types of crimes
 - Standard of liability is very broad
 - Proportionality issue
- IV. Black-letter law for holding corporation liable (**Respondent Superior approach** -- federal government subscribes to this standard)
- Agent commits the crime (individual has actus reus + mens rea to commit the crime)
 - This crime is considered a crime of the company when:
 - Act or is acting with the scope of his or her employment
 - With the intent to benefit the company
 - Note: **this can be satisfied by acts which, in fact, do not benefit the company as long as the acts are done with the intent to benefit the company** (*Sun Diamond*)
- *United States v. Hilton Hotels Corp.* (1972)
 - Facts: Operators of hotels, restaurants, and restaurant supply companies and other businesses organized an association to attract conventions to their city. To aid collections, hotel members agreed to give preferential treatment to suppliers who paid their assessments and to curtail purchases from those who did not. An agent boycotted providers. Manger of the hotel testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality, and service. They told the hotel's purchasing agent that he was to take no part in the boycott. However, the agent violated these instructions.
 - Issue: Is a corporation responsible for acts and statements of the agents done within the scope of employment even though conduct may be contrary to their actual instructions/contrary to the corporation's stated policies?
 - Holding: **A corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate police and express instructions to the agent.**
 - Rationale: Court said that hotel was still responsible: (1) to promote sub-policing measures and make company more vigilant about policing employees (2) evidentiary issue: no proof that they told him not to do it.
 - Significance: **Acting within the scope of employment just means an employee is on the clock; they do not have to be within the "authorized" scope of employment**
- V. MPC § 2.07: Liability of corporations
1. A corporation may be convicted of the commission of an offense if:
 - a) The offense is a **violation** or the offense is defined by a statute in which a **legislative purpose** plainly appears and the **conduct is performed by an agent of corporation acting in behalf of the corporation within the scope of his employment** *except* that if the law defining the offense designates the agents for whose conduct the corporation is accountable, or the circumstances under which it is accountable, such provisions shall apply, or
 - (1) Most expansive rule (adopts broad respondeat superior theory of liability); potential reach is limited due to due diligence defense
 - b) The 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**
 - (1) Most restrictive rule of liability
- B. High managerial agents
- *Commonwealth v. Beneficial Finance Co.* (1971)
 - Facts: Defendants were convicted of bribing state banking officials. Based on acts committed by employees who were neither officers nor directors of the corporation.
 - Issue: Were defendants high managerial agents as per MPC?

- Holding: Corporation can be held liable if the **corporation placed the agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the particular corporate business, operation, or project in which he was engaged at the time he committed the criminal act.**
- Rationale: MPC commentary says that jury should consider what the authority of the person was as such officer in relation to the corporation. The mere fact that he has a title is not enough to make the corporation liable for criminal conduct. He has to have been placed in a position by the corporation where he had enough power, duty, responsibility, and authority to act for and in behalf of the corporation to handle the particular business of the corporation in which he was engaged at the time that he committed the criminal act.
 - Dispersal of funds for bribes are peculiarly within the ambit of corporate activity. None of the individual defendants would conspire to pay or would pay the substantial amount of money here involved. Dispersal of money had to come from corporate treasury.
 - Title or office should be considered but is not the decisive criterion on which to predicate corporate responsibility.
- Significance: MPC provisions reflect attempt to cut back on traditional scope of corporate liability based on respondeat superior.

VI. Punishing a corporation

- Incarceration is not available, so corporations must be punished through other means:
- Probation
 - *United States v. Guidant LLC*
 - Facts: Guidant developed manufactured and sold cardioverter defibrillators. Did not notify the FDA in the time and manner required by law. Plea agreement included fines but included a provision that both parties agreed not to include ordered restitution or probation.
 - Holding: **Probation is an appropriate form of sanction, especially when there is a strong public interest** (here, public safety).
- Fines
 - Present the dilemma of spillover effects on shareholders, creditors, employees, and consumers
 - Weak fines don't provide sufficient deterrence
 - Even when substantial fines are imposed, they will not sufficiently deter employees whose personal interests do not align with the corporation's interests.
- Compliance programs
 - Federal Sentencing Guidelines offer sentencing reductions for companies that have such programs
 - Successful program should demonstrate the "exercise of due diligence to prevent and detect criminal conduct" and "promote an organizational culture that encourages ethical conduct and commitment to compliance with the law"
 - DOJ takes into account whether an organization has a compliance program in deciding whether to file criminal charges
- DPAs and NPAs
 - Preferred course for federal prosecutors
 - Punishment is borne by employees, shareholders, etc. (e.g. Arthur Anderson (part of the Enron collapse))
 - Just an indictment can destroy a company
 - With DPAs and NPAs, market doesn't react too much.
 - DPA (deferred prosecution agreement): agreement that charges might be filed, but after some period of time indictment is withdrawn
 - NPA (non-prosecution agreement): if you agree to terms of these agreements prosecution will never file an indictment
 - Generally prosecutors demand that companies adopt compliance programs policed by independent monitors, pay fines and restitution, cooperate with investigations against employees, make personnel changes, and alter business practices.
 - Avoid collateral consequences of conviction while forcing the company to change its practices.
 - Problems with these agreements:
 - Where do they get information to find that DPA/NPA will be good going forward?
 - How do we know how good a compliance program is?
 - How good are we at assessing compliance generally?

VII. Holding Officers Liable

- Prevailing view: MPC 2.07(6)

- a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf **to the same extent as if it were performed in his own name or behalf**
- b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, **any agent of the corporation or association having primary responsibility for the discharge of the duty** is legally responsible for reckless omission to perform the required act **to the same extent as if the duty were imposed by law directly upon himself.**
- Corporate responsibility
 - Was the actor acting within the scope of his/her employment with the intent to benefit the company?
 - Two issues:
 - Entity-level: corporation did something wrong
 - Sometimes there are corporate-level duties
 - Targeting particular individuals can prove difficult
 - Why would we have a case against the company but not individuals within the company?
 - Individual proffer session with government (can't use what the individual says against them; just the company)
 - Individuals are abroad and sometimes we don't have jurisdictions against these individuals
 - Too difficult to go after individuals
- *Gordon v. United States* (1954)
 - Facts: Defendants were partners in a sewing machine business. Convicted of violating an act by selling sewing machines on credit terms prohibited by that act. Any person who "willfully" violated its provisions or any regulation or order issued thereunder should upon conviction be punished.
 - Issue: Is knowledge of one partner regarding the offense imputable, attributable, and chargeable for the other?
 - Holding: Yes, but case was overturned for legal error with jury instructions (knowledge of employees cannot be charged to employer)
 - Rationale: There was a legal error; jury was instructed that knowledge of petitioner's employees was chargeable to petitioners in determining their willfulness.
 - Significance: Supreme Court reversed the decision in *Gordon* by saying that knowledge of petitioner's employees was chargeable to petitioners in determining petitioner's willfulness.
 - Limits:
 - **Officers have to be personally culpable**
- *United States v. Park* (1975)
 - Facts: Government charged Acme and respondent with violations of the FDA. Defendants had received food that had been shipped in interstate commerce and while the food was being held for sale, they caused it to be held in a building accessible to rodents.
 - Issue: Can defendant corporate officer be held responsible even if there was no "wrongful action" on his part?
 - Holding: The Act does not make criminal liability turn on awareness of wrongdoing, but the duty imposed upon agents is one that requires the highest standard of foresight and vigilance but not what is objectively impossible. **This is a public welfare offense so strict liability is appropriate in this case**
 - Rationale: Respondeat said that providing sanitary conditions for food offered for sale to public was something that he was responsible for in the entire operation of the company. Precedent like *Dotterweich* says that the FDA imposes not only a positive duty to seek out and remedy violations when they occur, but also a primary duty to implement measures that will insure that violations don't occur.
 - Significance: **Corporate officer must have had a responsible relation to the situation (*Dotterweich*)**
 - This notion of criminal responsibility is a pretty big hit on the individual
- Compare:
 - *United States v. MacDonald & Watson Waste* (1991)
 - Facts: McDonald was a corporation engaged in business of disposing of contaminated wastes and had a disposal facility with a permit to dispose of liquid wastes but not solid. MacDonald was hired to remove solid waste. An employee supervised the transportation of the waste soil. President was convicted of knowingly transporting hazardous waste to a facility that does not have a permit.
 - Issue: What does "knowledge" mean in the case of a corporate officer?
 - Holding: Must have **actual knowledge of the criminal activity** to be held responsible.
 - Rationale: Defendant said he didn't have actual knowledge of the alleged transportation of hazardous waste.
 - Significance: Opposite view to the other cases on officer responsibility.

GENERAL DEFENSES TO LIABILITY

Overview

- I. The Concepts of Justification and Excuse
 - Justifications suggest considerations that negate culpability even when all elements of the offense are present
- II. Justification
 - Defendant committed the crime, but under the circumstances committing the crime was reasonable and they are therefore acquitted (objective standard)
 - We say that the criminal reaction was good/sensible in the circumstances
 - Successful pleading of any justification means the defendant is not guilty
- III. Excuse
 - Defendant committed the crime, and this was wrong, but something about the defendant negates culpability and warrants acquittal (subjective standard)
 - Generally successful pleading of an excuse means the defendant is not guilty, but in the case of insanity that is increasingly “guilty, but...”

Justifications

I. **Self-defense**

- A. Objective versus subjective standard that deadly force is necessary because threat of death or serious bodily injury is imminent
 - Majority view:
 - *United States v. Peterson* (1973): Self-defense is a **law of necessity**. It only arises when necessity begins, and equally ends with the necessity; never must necessity be greater than when the force employed defensively is deadly.
 - 3 conditions:
 - Threat of deadly force against the defender
 - Threat must have been unlawful and immediate
 - Defendant must have believed that he was in imminent peril of death/serious bodily harm and the response was necessary to save himself
 - These beliefs must not only be honestly entertained, but also must be objectively reasonable
 - Common law, non-MPC approach:
 - 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
 - Deadly force
 - Defendant can defend if he reasonably believes that the use of deadly force is necessary to prevent the imminent/unlawful use of deadly force by aggressor.
 - Deadly force must be **necessary**
 - If defendant could respond with non-deadly force, defendant needs to do that
 - Retreat
 - Jurisdictions differ on retreat; more than half the jurisdictions now say there is no duty to retreat (if defendant has a right to be somewhere, he can stand his ground)
 - Defendant has to **reasonably** believe that deadly force is required
 - Must be an **honest belief** AND
 - **Reasonable person** in defendant’s situation must also think that (objective reasonableness)
 - Some jurisdictions recognize **imperfect self-defense**: if defendant honestly believed that deadly force is required but a reasonable person would not, reduction from murder to manslaughter
 - Could also come in if defendant was the initial aggressor
 - **Deadly force**
 - Likely or reasonably expected to cause death or serious bodily injury
 - Has to be **imminent**
 - Must occur immediately
 - Even if inevitable, it is not imminent if it is a threat of deadly force at a later time

- *People v. Goetz* (1986)
 - Facts: In the background of sky-high crime rates in NYC, Goetz (former victim of mugging) was riding on a subway. He was approached by 4 black youths. They asked him for \$5. He did not give them the \$5 and stood up, shooting each of them in turn from left to right. He missed the last one and went back and then shoots the last shot at the last boy. He ran off the train. Standard for self-defense in NY at the time: “A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless (a) he **reasonably believes** that such other person is about to use physical force, or (b) he **reasonably believes** that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy, or robbery.”
 - Other notes about the case: 6/12 of the jurors were victims of street crime. When one of the defendants took the stand he got riled up and lunged at the attorney. Attorney got the defendant to look for the jury the way he looked to Goetz.
 - Issue: What is the proper standard for the objective reasonableness test?
 - Holding: A determination of reasonableness must be based on the circumstances facing a defendant or his situation.
 - Rationale: NY did not want a subjective standard because to completely exonerate an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards of the permissible use of force. The legislature retained this requirement to avoid giving license for such actions. The reasonableness standard brings in any relevant knowledge the defendant had about the particular person, the physical attributes of all persons involved, and any prior experiences that could provide a reasonable basis for a belief that the other person had threatening intentions.
 - Significance: NY’s statute was similar to the MPC but crucially inserted the word “reasonably” before believes. This case brought up issues of what should be included in the reasonableness standard for self-defense.
 - Which features of an offender’s situation should come in?
 - Prior violence? Prior encounters with the specific actors generally come in.
 - Mental health issues/psychological propensities? (tougher case)
 - Physical characteristics (generally come in)
 - Race issue: Big policy question of whether this should come in at all; we cannot remove race from consideration, so question is how law should respond to it.
 - Could change standards for jury pool/change jury instructions
 - Make it so that the jury cannot see the defendant
 - Change self-defense law itself
 - Change admissions of evidence standards
 - Until self-defense law is changed itself, make it common practice to issue jury questionnaires
 - Critique of the objective reasonableness standard (Restak)
 - There are no reasonable people under conditions in which death or severe bodily harm are believed imminent. The limbic system is capable of overwhelming cerebral cortex. Once aroused, limbic system can become a directive force for hours and cannot be shut off like flipping a switch.
- MPC § 3.04 + 3.05, as qualified by § 3.09
 - a) § 3.04: Use of Force in Self-Protection:
 - (1) ... use of force toward another person is justifiable when the actor believes that **such force is immediately necessary** for the purpose of protecting himself or the use of unlawful force by such other person on the present occasion.
 - (2) Limitations on justifying necessity for use of force:
 - (a) Use of force is not justifiable under this section:
 - i) To resist arrest
 - ii) To protect property, unless this is a re-entry or recaption, or force is necessary to protect against death or serious bodily harm
 - (b) Use of **deadly force** is not justifiable under this section unless one is arresting someone, the actor believes that such force is 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
 - ii) If the actor knows that he can avoid the necessity of using such force with complete safety by retreating/surrender possession of property, except that
 - (1) Not required to retreat from home/place of work unless initial aggressor
 - (2) Police officer can do this

- b) § 3.05: Use of force for the Protection of Other Persons
 - (1) Can use force to protect a third person when:
 - (a) Actor would be justified under 3.04 in using such force to protect himself
 - (b) The person he is trying to protect would be justified in using such force
 - (c) Actor believes intervention is necessary
- c) § 3.09: Mistake of law as to unlawfulness of force/legality of arrest; reckless or negligent use of otherwise justifiable force; reckless/negligent injury/risk of injury to innocent persons
 - (1) The justification is unavailable when:
 - (a) Actors' believe in the unlawfulness of the force/conduct is erroneous
 - (b) Error is due to ignorance/mistake of the law
 - (2) When the actor believes that the use of force upon or toward the person of another is necessary, but the actor is **reckless or negligent** in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, **the justification is unavailable in a prosecution for an offense for which reckless or negligence suffices to establish culpability.**

B. The imminent danger requirement and Battered Woman's Syndrome

- Imminent Danger Requirement
 - Speaks to the fact that defendant did not have any other option
 - Gives the state a monopoly on violence (want people to get authorities when facing deadly force if at all possible)
 - Evidentiary problems; unclear that aggressor is using force against defendant
- Background on Battered-Women's Syndrome
 - Wife beating was granted a long history of permissibility
 - Change in the 1980s when police departments began to mandate/encourage arrest in DV cases.
 - A few courts have moved closer to a fully subjective standard in these types of cases (standard of "otherwise reasonable person who is suffering from battered spouse syndrome" *State v. Edwards*)
 - Today the admissibility of expert testimony on BWS is largely accepted by courts and legislators.
 - Some feminists critique the BWS defense because it reinforces negative stereotypes of women and imposes a stigma of an irrational mental health disorder on a woman.
- *State v. Kelly* (1984)
 - Facts: Kelly suffered seven years of beatings during which there were many threats of serious bodily harm. One day they got in a fight in public while Mr. Kelly was drunk. He choked her, punched her, and bit her leg. Two men from the crowd separated them. Mr. Kelly ran at her with his hands raised. She thought he had come back to try and kill her and stabbed him with a pair of scissors.
 - Issue: Was it reasonable for Kelly to believe her husband had the intent to use deadly force against her? When we evaluate reasonableness objectively, should battered women's syndrome come in?
 - Holding: **Expert testimony was admissible to show an honest believe in imminent danger of death as well as relevant to the reasonableness of her belief in immediate danger of serious bodily injury.**
 - Expert testimony: can come in to state that the defendant had battered woman's syndrome, and could explain that syndrome in its detail, but only to enable the jury to better determine the honesty and reasonableness of defendant's belief. Depending on the content, the expert's testimony might also enable the jury to find that the battered wife is particularly able to predict the likely extent of violence in any attack on her.
 - The ultimate question is still reasonable person, not reasonable battered woman.
 - Rationale: Kelly undoubtedly believed he was going to kill her. However, whether her belief was reasonable depends on whether she is judged as a reasonable person or a reasonable person under these circumstances. Expert witness would have explained the battered woman's syndrome, the cyclical nature of violence, why they don't leave.
 - Significance: Arguments for and against bringing in battered woman's syndrome:
 - For bringing it in:
 - Condition is not due to any fault of the defendant's; relevant to subjective blameworthiness
 - Against bringing it in:
 - Don't want to equate reasonableness and honest belief standards
- *State v. Norman* (1989)
 - Facts: Defendant was badly abused by her husband during their 25 year marriage. The day before she killed him, her husband beat her so badly that she called the police. When they arrived they wouldn't arrest him unless she filed a complaint, which she was afraid to. An hour later she tried to kill herself. The next

morning she went to the local mental health center to talk about filing charges. She later went to the social services office to file for welfare so she wouldn't have to prostitute herself. Her husband dragged her from the interview and then beat her. Defendant left the house and took the baby to her mother's home. She returned with a pistol, went to the bedroom, and shot her husband in the back of the head (three shots).

- In NC, defendant is entitled to perfect self defense instruction when the evidence shows that at the time of the killing she believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm, and this belief must be reasonable.
 - Imperfect self-defense is allowed when it reasonably appeared to the defendant necessary to save herself from imminent death/serious bodily harm (honest belief but no reasonableness) .
 - Issue: Could defendant have reasonably believed that her husband posed an imminent threat?
 - Holding: When there is evidence of battered woman's syndrome but no evidence of actual attack/threat of attack by the husband at the moment the wife uses deadly force, this is not a justifiable use of self-defense.
 - Defendant was also not entitled to instructions on imperfect self-defense because there was no evidence that she actually believed the use of deadly force against her was imminent.
 - Rationale: Imminent does not mean inevitable. There was no evidence that her husband had ever inflicted any harm upon her that approached life-threatening injury.
 - Significance: Hard case for self-defense. Most battered woman syndrome cases happen when women are in direct confrontations with their husbands. The non-confrontational cases pose the greatest challenge to self-defense.
 - **For the most part, courts have resisted *Norman* in the imminence context**
 - Inevitability standard
 - MPC uses the standard of **immediately necessary** (broader than imminence, but still not quite *Norman*)
 - Imminence has two components:
 - Necessity
 - Could argue that even in sleep there is an imminent threat (could wake up at any point and kill her; could say this is analogous to kidnapping)
 - Kind of force defendant is exercising
 - These arguments don't get at the force argument; a sleeping person is not, at the moment, exhibiting any kind of force
 - Limits on the use of deadly force:
 - Defender can use deadly force only in response to a threat of death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat
 - Generally if someone kills/injures another in their attempt to defend themselves they are excused
 - S. Ct. says that if one reasonably believes deadly force is necessary to avoid death/serious bodily harm, they cannot be deemed reckless regardless of the extent to which he endangers bystanders
 - MPC approach says that defendant could still be reckless toward bystanders and be convicted of reckless endangerment/homicide
 - Duty to retreat (see below)
 - Initial aggressor (see below)
- C. **Duty to retreat**
- Only comes in with deadly force
 - Duty to retreat was traditional rule
 - American common law today largely adopts the "true man" rule: no retreat
 - Minority rule is duty to retreat.
 - Those that have duty to retreat have certain exceptions:
 - Do not have to retreat from own home (castle exception)
 - Only have to retreat if one can do it with complete safety
 - **Non-deadly force: no duty to retreat**
 - **Jurisdictions with retreat requirement**
 - *State v. Abbott* (1961)
 - Facts: Dispute in the driveway shared by two neighbors. There was an exchange of words started by one the neighbors. This escalated into a fistfight, and defendant landed the first punch. Other neighbors came at defendant with a hatchet. Varying versions of what happened but everyone ended up injured.
 - Issue: When does defendant have a duty to retreat?
 - Holding: The issue of retreat arises only if the defendant resorted to a deadly force (force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or

serious bodily harm). Deadly force is not justifiable if the actor **knows** he can avoid the risk of necessity of using such force with **complete safety** by retreating (MPC 3.04(2)(b)(ii))

- Rationale: A man cannot have the absolute right to stand his ground and kill in any and all situations. The MPC's principles are sound.
- Significance: Question of whether complete safety means absolute completeness or if there is some wiggle room.
 - Can open it up from complete safety to "no serious risk"
- **The "castle" exception**
 - Why should the "good" person have to do anything?
 - As long as one isn't engaged in unlawful activity and is attacked in any place he is allowed to be, he can use physical force (Florida)
 - Intruders
 - In jurisdictions with retreat rules, exception is made when defendant is attacked in his own home by an intruder
 - Guests
 - When the homeowner gets into an altercation with a guest, only a few states require retreat in this situation. A great majority permit the homeowner to kill in self-defense.
 - Co-occupants
 - Most jurisdictions (including MPC) say no duty to retreat from home even when the threat comes from a co-occupant; minority say homeowner should flee when threat is from co-occupant

D. Initial aggressor

- Common Law

- **Initial aggressor gets no defense at common law**

- *United States v. Peterson* (1973)

- Facts: Victim and two friends drove to Peterson's house. Victim was about to leave after a verbal exchange, but Peterson went back into the house and got a gun and returned to the yard. He paused to load the pistol and told victim that if he came closer he would kill him. Victim walked to the car and got a wrench, coming towards Peterson. Peterson shot him in the face.
- Issue: Can an initial aggressor get the defense of common law?
- Holding: **An actor who completes an affirmative unlawful act reasonably calculated to product an affray foreboding injurious or fatal consequences is an aggressor which, unless renounced, nullifies the right of homicidal self-defense.**
- Rationale: Victim was leaving when Peterson reappeared in the yard with his pistol. As far as victim was concerned, the confrontation had ended. Even if he had previously been the aggressor, he no longer was.
- Significance: Also gets at how long one is considered an initial aggressor; even if victim was original aggressor, he no longer was by the time Peterson came out of the house and threatened him.
 - In a few states, the nonlethal aggressor can retain his right to self-defense if he is met by an excessive, life-threatening response. But most jurisdictions deny the initial aggressor even this.

- *Allen v. State* (1994) and the **need to be "free from fault"**

- Facts: Defendant and intimate partner got in a fight. Defendant pursued the partner but she grabbed a rake and struck her on the fact. Defendant got in her car and followed her. She came at her holding a rake. Defendant got a gun from the glove compartment and shot her.
- Holding: A party has no obligation to retreat from a confrontation; however, this privilege is unavailable because she provoked the altercation.
- Significance: Some jurisdictions take this even further and say that the commission of any crime causally related to the fatal result will forfeit this defense, even when the crime itself does not provoke the victim's threatening conduct.
 - Analogous to the felony murder doctrine; if someone had a handgun illegally and used that to kill the person in an altercation, this could be enough to disallow the justification.

- MPC modification of the common-law rule

- **If one is an initial aggressor, they are responsible for whatever they do as to initial aggressor. But if it escalates, a defendant can still use deadly force.**

- Not a popular section of the MPC. Overwhelmingly, states have said no to this provision because of notions of wanting to allocate risk in a way that puts more of the risk on the aggressors and less on other people.

- § 3.04(2)(b)(i): Force is not justifiable if “the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter”
- One is not an initial aggressor forever

II. Defense of Property with Deadly Force

A. Common law:

1. **Cannot use deadly force to protect property** (can use non-deadly force)
 - Exception for home; okay to use deadly force if one reasonably believes this is necessary to prevent imminent/unlawful entry of the home
2. Some jurisdictions are different
 - Texas says deadly force is acceptable to protect property
 - Generally most states allow deadly force when defendant could not tell if the force was against the person or the property
3. *People v. Ceballos* (1974)
 - Facts: Homeowner’s garage was broken into, so homeowner set up an automatic gun to shoot at the garage so next time someone tried to break in, they would get shot. Teenagers tried to break in and were shot by the device (court said this device was unlawful but even if it wasn’t, they were going to answer the broader question of whether deadly force was acceptable in this situation absent a device)
 - Issue: Is deadly force acceptable to protect property?
 - Holding: Defendant was not justified in shooting the victim to prevent him from committing burglary. Deadly force cannot be justified to prevent all burglaries of a dwelling, including ones in which no person is, or reasonably believed to be, on the premises except the would-be burglar.
 - Rationale: Defendant said that he was trying to keep the burglar out because somebody was trying to steal his property. He seemed to also be afraid for his safety. When there is no reasonable fear of great bodily harm, there is no cause for the exaction of a human life. Burglary is not necessarily forcible and atrocious.
 - Significance: Defendant’s life had to be at risk, not just the property

B. MPC § 3.06(3)(d); § 3.06(5)

- 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**
- 3.06(5): Use of device to protect property: The justification afforded by this section extends to the use of a device for the purpose of protecting property only if:
 - b) The device is not designed to cause/known to create a substantial risk of causing death or serious bodily harm; AND
 - c) The use of the particular device to protect the property is reasonable under the circumstances as the actor believes them to be; AND
 - d) The devices is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is being used

C. *Sydnor v. State*:

- Facts: Defendant was sitting on a stoop when aggressor approached, pulled a gun, and told him to hand over a gold chain and some money. After hitting defendant on the head and threatening to kill him, took the money then defendant grabbed the gun and took it away. Aggressor attempted to flee but defendant fired at him.
- Holding: **Before using deadly force, the defendant was required to retreat** unless at the moment that shots were fired, the defendant was being robbed.

III. Necessity

- A. Necessity is a **choice of evils defense** that is usually unsuccessful; defense of last resort
- B. 19 states have statutes which set out a requirement for necessity defense. In states without statues, judges establish this.
- C. Common factors in these jurisdictions:
 1. **Choice of evils**
 - Faced between two options, defendant has to pick the less serious of the two
 - Must look at the facts as they reasonably appear to the defendant (*objective inquiry*); not what the defendant thinks that is what they should have done
 2. **Has to be preventing an imminent harm**

- MPC doesn't subscribe to this
- 3. **Defendant must anticipate a reasonable causal relationship** (Many states talk about this)
 - There must be a belief that the crime defendant is committing will causally avoid the harm
- 4. **Whether the defendant had legal alternatives**
 - Utilitarian concerns
- 5. **Legislature couldn't have anticipated the exact scenario at issue**
 - If legislature actually thought about this very choice and specifies that defendant's actions are still illegal, cannot claim necessity
 - Of course, need evidence to show that the legislature thought about this. Sometimes it is clear in the statute but other times need to show this through inference.
- 6. **Defendant couldn't have set up the emergency in the first place**
 - Clean hands doctrine for the defense
 - MPC says that if defendant recklessly set this up, cannot use it for offense that require recklessness mens rea (same for negligence)
- 7. **Defendant cannot use this defense for homicide**
 - MPC says you can, but common law says no
 - When this does exist is when there is a necessity for committing a felony and then felony murder happens. However, some jurisdictions say that you cannot use it as a defense for felony murder.
- 8. **Defendant cannot use the defense to cover economic necessity**
- 9. **Whatever the emergency defendant is facing be created by natural forces and not human forces** (Many states require this)
 - Usually human forces are for duress
 - Many jurisdictions care about the source of the emergency because of this
- D. *Unger* and the nature of balancing tests and MPC § 3.02
 - *People v. Unger* (1977)
 - Facts: Defendant ran away from prison because of repeated sexual assaults, threats of future assaults, and threats of death if he reported the offense. Defendant said that he left the prison to save his life and that he planned to return once he could find someone that would help him.
 - Issue: Does the defendant need to meet the *Lovercamp* preconditions to receive an instruction on necessity?
 - Holding: **The absence of one of the *Lovercamp* preconditions does not alone disprove the claim of necessity.** The availability of the defense should not be expressly conditioned upon the elements set forth in *Lovercamp*.
 - Rationale: *People v. Lovercamp* held that defense of necessity need be submitted only when **5 conditions are met:**
 - Prisoner is faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future
 - There is no time to complain to the authorities or there exists a history of futile complaints
 - There is no time or opportunity to resort to the courts
 - There is no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape
 - The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat
 - Significance: Greater evil question involves a balancing test (**ultimate balancing test**) which is a question for the courts, not the jury.
 - Argument for offense being the lesser evil:
 - Assaulted many times in the past; if he doesn't commit this crime he will die or experience serious bodily injury
 - He wasn't in prison for a violent offense; not likely that he would commit a violent crime
 - His escape wasn't so bad because:
 - He didn't cause any harm to anybody
 - He was trying to turn to prison after getting help
 - He did not create this situation
 - Argument for escape being the greater evil:
 - Escape was bad because:
 - He immediately stole a car after leaving prison (he was in prison for auto theft)
 - Return plans were suspect
 - Didn't abide with common law rule in *Lovercamp*

- He had other options (reporting)
- Could lead to other harms in society; providing incentives to violate the law
- States have different standards for balancing tests
 - In states where the emergency can only be caused by natural forces, *Unger*-type cases are out because the coercive force is coming from other prisoners
 - In some states necessity and duress look exactly the same because in duress it also has to be the lesser evil
 - In most states, duress doesn't have to be the lesser evil (evil could be equal or it could be greater evil if reasonable person also would've yielded to this type of pressure).
- MPC 3.02: Justification generally; choice of evils
 - (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... the justification is unavailable for any offense for which reckless or negligence... suffices to establish culpability
- *Commonwealth v. Leno* (1993)
 - Facts: Massachusetts prohibits distribution of needles without a prescription. The defendants operated a needle exchange program in efforts to combat the spread of AIDS.
 - Holding: **Necessity defense is not allowed because the legislative choice was precluded in this decision.**
 - Rationale: **Legislature already decided that the measure the defendants were trying to make is outweighed by the harm.**
 - Significance: If it weren't prohibited because the legislature already thought about it:
 - Could argue that statute is trying to prevent harms associated with needle distribution; potential increase of AIDS is not as damaging as potential for increase in heroin use from distribution of needles
 - Could argue that there is no direct causal relationship between this needle program and stopping AIDS spread
 - Could argue that there was an alternative option: could engage in political action and get the legislature to change this law
- *Schoon* and indirect civil disobedience
 - *United States v. Schoon* (1992)
 - Facts: Defendants obstructed activities of the IRS office in protest of US involvement in El Salvador. They claim that district court improperly denied them a necessity defense.
 - Issue: Can a necessity defense be invoked for indirect civil disobedience?
 - Holding: Necessity defense is inapplicable to cases involving indirect civil disobedience:
 - **Necessity can never be proved in a case of indirect civil disobedience**
 - Protestors violate a law for calling public attention to their objectives. However, mere existence of a law cannot constitute cognizable harm
 - Act alone is unlikely to abate the evil precisely because the action is indirect
 - Harm that the indirect civil disobedience aims to prevent is the continued existence of a law or policy. The possibility that Congress will change its mind is sufficient to make lawful political action a reasonable alternative.
 - **Rationale: *Schoon* factors to invoke necessity defense:**
 - **Must have been faced with choice of evils and choose the lesser evil**
 - **They acted to prevent imminent harm**
 - **They reasonably anticipated a direct causal relationship between their conduct and the harm to be averted**
 - **They had no legal alternatives to violating the law**
 - Significance: Direct civil disobedience is potentially okay (e.g. sit ins during segregation times)
- E. Economic necessity
 - **Not allowed categorically**
 - Line drawing problem: too hard to determine how dire the situation really is
 - Could argue, like civil disobedience, this would always come out the same way
 - Issue with legalizing crime for poor people

- F. Necessity defense on international scale
 - DOJ memo that authorized torture program during 9/11 used criminal law concepts to justify what they had done (torture necessary to avoid greater harms of breach of natural defense)

Excuses

I. Insanity

A. Purposes of the insanity defense

- Retributivist: not subjectively culpable
- Utilitarian: deterrence doesn't work on these actors because they are irrational (specific deterrence)
- Criminal law responded to the deinstitutionalization movement

B. Insanity v. incompetence

- Insanity: legal term referring to a mental state at the time of a criminal offense that is considered sufficient to preclude criminal responsibility
 - In most jurisdictions, the decision to raise an insanity issue is left completely within the defendant's control
 - Usually insanity results in a not guilty verdict, but in some jurisdictions defendants are guilty but mentally ill. Court retains the same sentencing authority it has in guilty verdicts, but if the court sentences a defendant to prison in these cases, he is to be given treatment.
- Incompetence: legal term that refers to a person's mental state at the time of a legal proceeding
 - 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."

C. How to define insanity:

- **Dominant formulation in the U.S. today**
 - Entirely cognitive test
- *M'Naughten's Case*
 - Facts: Defendant was indicted for the murder of secretary to Prime Minister Peel. He had mistaken the man for Peel and shot him by mistake. He told police he came to London to murder the prime minister because he was delusional.
- M'Naughten test: mental illness that comes from a "disease of the mind" and because of the mental disease/defect, must either not know the nature and quality of the act or not know it was wrong
 - At time of act
 - Disease of the mind
 - Did not know the nature and quality of the act OR if he did know it, that he did not know it was wrong
 - Nature and quality
 - E.g. thinks he was chopping a watermelon but it was actually a human head
 - Know it was wrong
 - E.g. knows he was chopping a human head but says a deity told him he had to do it to save civilization

D. MPC § 4.01

- Attempt to broaden the definition with cognitive + volitional
- MPC test:
 - At the time of act
 - As a result of mental disease or defect
 - Defendant lacked substantial capacity to appreciate the criminality of his conduct OR lacked substantial capacity to conform his conduct to the requirements of the law
 - Appreciation of criminality is the cognitive component
 - Lacking substantial capacity is the volitional component
- Limits to volition prong:
 - *United States v. Lyons* (1984)
 - Facts: Defendant was indicted on twelve counts of knowingly and intentionally securing controlled narcotics. He said he became addicted to these drugs and that because of his addiction, he lacked the substantial capacity to conform his conduct to the requirements of the law.
 - Issue: Is the volitional prong of the insanity defense enough to excuse a defendant?
 - Holding: Volitional prong of the insanity defense does not comport with current medical and scientific knowledge. A person is not responsible for criminal conduct on the grounds of insanity only if at the time of the conduct he is unable to appreciate the wrongfulness of his conduct.

- Rationale: **Evidence of mere narcotics addiction, standing alone and without any other psychological and physiological involvement, raises no issue of such mental disease/defect that can serve as a basis for the insanity defense.** Psychiatrists say they don't have enough scientific knowledge to measure a person's capacity for self-control. In addition, greater risks of fabrication or mistake on the part of the jury if we let this in.
 - Dissent: Says to bring this information to the jurors, because this goes to the core of blameworthiness. Guilt cannot be attributed to an individual unable to refrain from violating the law.
 - Significance: This brings up issues about free will/choice; how much control does one really have?
 - Additionally, this case exemplifies the changing attitudes toward the insanity defense beginning in the 1980 (after the *Hinckley* event).
 - This marked the movement back to M'Naughten (no volitional prong)
- E. Post-*Hinckley* Federal Test
- *Hinckley* incident: Attempted assassination of President Reagan. The jury, applying the MPC test found Hinckley not guilty by reason of insanity and there was huge public outcry.
 - Post-*Hinckley* Federal Test (back to M'Naughten)
 - At the time of the act
 - As a result of a severe mental disease or defect
 - Defendant was unable to appreciate the nature and quality of the wrongfulness of his acts
- F. Practical aspects of the Insanity defense
- What is the reason that someone who has a claim of legal insanity might not claim it?
 - Civil commitment can be longer than a jail sentence. It is an indefinite term of confinement
 - Civil commitment is allowable only if it is shown that they have a mental illness and they are dangerous to others
 - Dangerous must be shown by "clear and convincing evidence"
 - Acquittal by insanity changes the civil commitment process
 - Instead of having clear and convincing standard of evidence of dangerousness by the state, some states have automatic commitment statutes (lowers the standard of proof or gets rid of it altogether)
 - *United States v. Jones*: S. Ct. upheld the constitutionality of mandatory commitment
 - Whenever one pleads guilty by reason of insanity, *Jones* says a defendant can be civilly committed until he can prove he is better and no longer a danger to society
 - Not a lot of states have *Jones* model automatic commitment without hearing anymore
 - The states that don't have this model do an in-the-middle preponderance of the evidence hearing
 - Stigma attached to claiming legal insanity
 - What difference do the difference types of test make?
 - Federal test and M'Naughten test have no volitional prong, so this can make a difference if a defendant understands the wrongfulness of his act but could not exercise control over his actions
 - Do the tests as they currently stand make sense?
 - Reasons for abolishing;
 - Easy to fake
 - Fear of government and community
 - Vinnie "the Chin" Giggati -- went around in a bathrobe and pretended to be crazy. Everyone thought he was faking it to get out of the charges, but experts evaluated him and every one of them said he was not competent to stand trial.
 - Could handle volitional component through the voluntariness requirement of actus reus
 - Could handle this issue at the sentencing stage
 - Blameworthiness is considered at sentencing
 - Blameworthiness is off the books; can still hold someone responsible but reduce the punishment (dependent on whether sentencing is purely discretionary, partially discretionary, or mandatory)
 - Rehabilitation can come in during the sentencing state; discretionary regimes are built on the rehabilitative model
 - Fear of lack of bright-line rule
 - Conservatives say that people get too little time as a result of this
 - Liberals say that people don't get a break for a lot of other reasons that limit their choices in life; if we are not going to give it to those people, why give it to this limited category of mental illness?
 - Compromises:
 - Guilty but mentally ill

- Defendant is found guilty so the state can keep a hold on them, but state can mandate medical treatment during prison and make agreements that if the defendant gets better, they don't have to serve the rest of their term
- Acquittal by reason of insanity + immediate automatic civil commitment
 - This distinction matters because the juries aren't told about anything that happens after individuals are acquitted by reasons of insanity; juries may think that people go back on the street if they are acquitted
 - We don't tell them, but maybe we should

II. Expansion of Excuses

A. Issues of **addiction/social background**

- These are all Constitutional cases; would become the law of the land everywhere if passed

B. *Robinson v. California* (1962)

- Facts: Robinson is addicted to drugs. A CA statute made it a criminal offense for a person to be "addicted to the use of narcotics."
- Issue: Is this statute constitutional?
- Holding: **A state law which imprisons an addicted person even though he has never touched any drug within the state nor been guilty of irregular behavior there, inflicts cruel and unusual punishment in violation of the 14th Amendment.**
- Rationale: **Statute punishes someone for a "status,"** not the use of narcotics, purchase, sale or possession.
- Concurrence (Harlan): Addiction alone is nothing more than a compelling propensity to use narcotics; one cannot authorize criminal punishment for a bare desire to commit a criminal act.
- Concurrence (Douglas): A prosecution for addiction cannot be justified as a means of protecting society when civil commitment would do as well.
- Significance: **Something is needed in addition to the status.** Status v. act: Outlawing someone from being a prostitute is outlawing a status. Outlawing prostitution is outlawing an act.
 - Involuntariness
 - Additional is involuntary in a sense (however at some point had to make the choice to use drugs)
 - Prostitution isn't involuntary in the same way (unless it's human trafficking)
 - 8th Amendment
 - Punishing someone for what they are is cruel and unusual (same with punishing someone for conduct that is involuntary)
 - Aspects of *Robinson*: status, involuntariness, disease

C. *Powell v. Texas* (1968)

- Facts: Appellant was arrested and found intoxicated in a public place. He was a chronic alcoholic. He was charged for a particular instance of being drunk; the statute did not target him for being an alcoholic.
- Issue: Is chronic alcoholism a valid excuse to public intoxication?
- Holding: **Chronic alcoholics in general don't suffer from such an irresistible compulsion to drink and get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.**
- Rationale: Expert testimony that there is no generally accepted definition of alcoholism. Testified that when appellant was sober he knew the difference between right and wrong, and though he did voluntarily take the first drink, there is a very strong influence to drink with alcoholics.
 - **Qualifies *Robinson*:** too much escape of liability.
- Significance: S. Ct. doesn't like to say that things are cruel and unusual just because of retributive justice. They look at utilitarian/incapacitation reasons as well. S. Ct. wants to let states be laboratories and weigh the punitive goals.
 - This opinion focused on the status part of *Robinson*, not the involuntariness prong or the disease prong.
 - Possible reasons the court came out this way:
 - Concerns about too much victimization
 - Leaves the door open to overturning decisions at a future point where status of medical knowledge has changed
 - Utilitarian purposes are more important than retributive. Don't want to make a "general constitutional doctrine of mens rea."
 - Concerns about this becoming indeterminate civil commitment, which could be worse
 - At this time, mental asylums were terrible. The criminal justice system looked better.
 - Today, swing back to get people out of the criminal justice system. Alternatives to incarceration programs.

- Would call into question strict liability crimes, letting the 8th amendment invalidate lots of other types of crimes
 - Federalism concerns: losing the benefits of experimentation that the states have
- D. *State ex rel. Harper v. Zegeer* (1982): **Criminally punishing alcoholics for being publicly intoxicated violates cruel and unusual punishment.** (The state has a right to prosecute people who while drunk commit crimes, but this opinion is about specifically public intoxication)
- E. *Jones v. City of Los Angeles* (2006): LA ordinance made it an offense for any person to “sit, lie, or sleep in or upon any street, sidewalk, or other public way.” **Eight Amendment barred enforcement of this ordinance against the homeless because this was considered a status crime.**
- F. *United States v. Moore* (1973)
- Facts: Heroin addict was convicted for possessing heroin. He argues that because he is an addict he shouldn't be held responsible for possession of the drug.
 - Issue: Is drug addiction a valid excuse to possession crimes?
 - Holding: **Possession convictions must be sustained for addicts.**
 - Rationale: This rationale would lead to too much excuse from liability. If it's absence of free will which is the basis of excuse, then this should be available to the bank robber who is desperate for money, etc.
 - Concurrence: There is no broad common law principle of exculpation on grounds of lack of control
 - Dissent: If one is not a free agent, he is outside of the postulate of the law of punishment. This doesn't serve any of the purposes of punishment; the defendant should be excused if at the time of the offense he lacked substantial capacity to conform his conduct to the requirements of the law.
 - Dissent: The jury should be able to consider all of this information to determine whether the defendant was under duress or compulsion because of his addiction.
 - Significance: We haven't gone very far in dealing with these problems. Some critics say we need to expand these categories; others say that this is arbitrary so we should either include it all or not at all.

III. Duress

A. Scope of duress under common law

- *State v. Toscano* (1977)
 - Facts: Toscano made out a false medical report but he did it to protect him and his wife. Specifically, the guy said “remember, you just moved into a place that has a very dark entrance and you leave there with your wife... you and your wife are going to jump at the shadows when you leave that dark entrance.”
 - Issue: Was there sufficient evidence to claim the defense of duress?
 - Holding: **Duress should be a defense to a crime other than murder if the defendant engaged in conduct because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.**
 - Rationale: At common law duress was only recognized when alleged coercion involved a use or threat of harm which is present, imminent, and pending and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm. To excuse a crime, the threatened injury must induce such a fear as a man of ordinary fortitude and courage might justly yield to. The MPC focused on whether the standard imposed by the accused was one with which “normal members of the community would be able to comply;” failure to satisfy one or more of the common law conditions would not justify the trial judge's withholding the defense from the jury.
 - Significance: Under both MPC and common law, defendant would've had his claim of duress submitted to the jury.
- **Imminent**
 - Common law requires an imminent threat
 - MPC doesn't require imminence
- **Threat of serious bodily harm or death (to you or family member)**
 - Why does common law say duress should be limited to serious death/bodily harm?
 - Pros of limiting:
 - Not limiting would make the category overly broad; line-drawing problems
 - Serious injury/death is a qualitatively different type of harm than any other type of injury (physical or economic)
 - Utilitarian concerns
 - Cons:
 - We have an objective test, so just can assess the threat from perspective of a reasonable person. Let all of the evidence come in and let the jury decide if it was reasonable.

- Doesn't make sense from retributive justice standpoint
 - MPC requires force, but broader than common law
 - **Source must be from a person**
 - **Person of ordinary fortitude might justly yield**
 - Reasonable person standard today (objective)
 - Reasonably believed threat is real
 - Must have been **no reasonable escape**
 - **Cannot excuse killing of innocent person**
 - Some jurisdictions have bar on homicide (only reduces this from murder to manslaughter)
 - Even if reasonable person in that situation would've done the same thing
 - Philosophical argument against certain things which are not subject to utilitarian calculus (we don't let people kill one life even if it would save 10 others)
 - Some jurisdictions don't even provide this defense for felony murder if duress was acceptable for the underlying felony
 - MPC can use this in a homicide case (excuses homicide altogether)
 - Gets at subjective culpability of defendant
 - Insists on unlawful force, but does not require imminence and just asks if reasonable person would be able to resist
 - In the MPC context, have to ask what "reasonable person in his situation" means
 - **Defendant cannot be at fault in creating the situation**
 - Clean hands doctrine
 - MPC uses this with the mens rea standards (cannot be reckless; can't be negligent when underlying crime requires negligence)
- B. Broader scope under MPC § 2.09
- 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. [The presumption that a woman, acting in the presence of her husband, is coerced is abolished]
 - (4) When the conduct of the actor would otherwise be justified under 3.02, this section does not provide such defense.
 - MPC, threat itself is any threat of physical force (doesn't have to be serious bodily harm or death). Doesn't have to be to a relative; can be people you care about.
 - Also objective standard of reasonableness
- Necessity and Duress compared
 - In some jurisdictions, difference between the two is the source:
 - Human coercion: duress
 - Non-human, natural pressures: necessity
 - In the MPC jurisdictions, don't care about source of necessity but do require duress to be prompted by the threat of physical force.
 - Only time the duress/necessity distinction matters is for third party accomplices/conspirators. If the defense is a justification, everyone involved is off. If excuse, just the defendant gets off.

THE IMPOSITION OF CRIMINAL PUNISHMENT

Sentencing

I. Factors and Punishments to consider at Sentencing

A. *United States v. Bernard L. Madoff* (2009)

- Facts: Guideline range is 150 years (maximum sentence for each of 11 counts added together).
- Issue: What factors should be taken into account at sentencing:
- Holding: Madoff was sentenced to a term of imprisonment of 150 years.
- Rationale:
 - Retribution
 - The crimes were extraordinarily evil. He needs to be punished based on his moral culpability.
 - The loss figure was off the chart of the guidelines.
 - Deterrence
 - Must send the strongest possible message to those who would engage in similar conduct.
 - Victims
 - Symbolism is important for the victims. Will acknowledge for the victims that Madoff has been punished to the fullest extent of the law.
- Significance: Purposes of punishment are very important in sentencing. High-profile cases are message cases.

B. Factors relevant for all sentences:

1. Retributive Justice
2. Deterrence

C. Factors that may be taken into account:

1. Victim impact
 - When it's intentional conduct, this generally comes in
 - However, if the victim impact was not subjectively foreseeable by the defendant this leads to issues of whether defendant should get an increased sentence based on factors defendant didn't know/wasn't aware of.
2. Age
 - Important when the purpose of punishment is **incapacitation**
 - However, jurisdictions are reluctant to factor this in during sentencing stage
3. Letters from family and friends saying good things about the defendant
 - Absence of letters can say something (*Madoff*) -- especially in high-profile crimes almost always have letters
 - Could be worrisome to infer this in other cases

D. *United States v. Jackson* (1987)

- Facts: Jackson robbed a bank 30 minutes after being released from prison. His principal sentence was life in prison without possibility of parole.
- Issue: Was this sentence permissible?
- Holding: **The imposition of life in prison was permissible.**
- Rationale: Armed bank robbery on the day of release after early armed robbery convictions marked Jackson as a career criminal.
- Dissent: The sentence is too harsh. Age should be taken into account. Incapacitate him until he is harmless, but not leave them in prison to die.
 - Retributivism: He doesn't deserve life in prison; has never inflicted physical injury
 - Deterrence: specific deterrence can be established with a lesser sentence since bank robbery is a young man's game.
 - General deterrence: very few would be deterred by an incremental sentence increase. Persons would go ahead and rob a bank are unlikely to be deterred by tightening the punishment screws.
- Significance:
 - **Age-crime connection:**
 - Very few crimes that people don't grow out of over time
 - Rare crimes: sex offender pedophiles, fraud types of crime, etc.
 - Physical activity required in crimes like drug dealing
 - Career criminals tend to diminish in criminal behavior over time

- **Juveniles/young adults should be treated differently because easier to rehabilitate**
 - However, we are not good at rehabilitation. Recidivism rates are extraordinarily high.
 - Criminal history + age are really good at predicting future criminal behavior

E. Why might a system not want these characteristics to come in?

- Could be bringing in external stuff that doesn't matter; we are punishing an offense, not a person
- Certainty is best for deterrence. If this process makes punishment less certain, can damage deterrence value
- Inability of the defendant to challenge/verify the accuracy of this information
- Information we receive is not objective, and this gets at problems with evaluating based on subjective materials
- Make more room for biases to come in in a way that could be left out if we focus on the offense
 - Counterargument: federal system exasperated racial bias even though they took out all individual factors
 - In theory though, the concern was that more bias would come in through discretionary sentencing

F. Types of punishment

- *United States v. Gambera* (2004)
 - Facts: Defendant was convicted of stealing mail. Judge sentenced him to 1 day, 8 hours, of community service standing in front of a postal facility in the city with a sandwich board which said "I stole mail. This is my punishment." Also had to observe postal patrons visiting the lost or missing mail window, write letters of apology to any identifiable victims of the crime, and deliver several lectures at a local school.
 - Issue: Does the sandwich board condition violate the Sentencing Reform Act (special conditions must be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant and must be both reasonably related to and involve no greater deprivation of liberty than is reasonably necessary to afford adequate deterrence, protect the public, and provide the defendant with educational/vocational training, medical care, or other correctional treatment).
 - Holding: **The condition imposed upon Gambera reasonably related to the legitimate statutory objective of rehabilitation.**
 - Rationale: The condition was imposed to rehabilitate him; public acknowledgment of one's offense is necessary to rehabilitation. This involves reintegrative shame, not stigmatizing shame.
 - Dissent: public humiliation or shaming has no proper punishment in our system of justice.
 - Significance: Alternatives to incarceration:
 - Idea is to make the convicted aware of the nature of the crime
 - These types of methods come up in supervised release. Violation of the terms could be prison time.
 - We want to send the message of societal disapproval/restriction of liberty, which is why prison is the dominant punishment in America.
 - We don't have a lot of alternatives, but the big thing right now is specialized courts for certain types of offenses: MHC, drug court, veteran court, domestic violence court, etc.

II. Discretionary Sentencing Systems

- Classic regime in the US until the 1970s
 - Early system from England was capital punishment for everything.
 - There was a movement toward rehabilitation. Earliest prisons in the US were set up to be solitary confinement. Idea was leaving people alone with their thoughts would lead to reformation.
 - Parole board would take stock of how a person was doing and evaluate when they were doing better
 - Shift occurred in the 1970s, though lots of states still have the old model with judge/parole board retaining wide discretion.
- *Williams v. New York* (1949)
 - Facts: Judge gave death sentence even though jury recommended life imprisonment. Death sentence was based on past information (alleged crimes) contained in probation reports.
 - Issue: Was the information the sentencing judge relied upon violative of the Fourteenth Amendment?
 - Holding: **Federal Constitution does not restrict the view of the sentencing judge to the information received in open court.**
 - Rationale: Most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination.
 - Significance: This still happens today; people aren't just sentenced on things that have actually happened in the past. Sentence can be increased by anything the prosecutor says by a preponderance of the evidence.
 - Relevance of past conduct/criminal history: every sentencing regime in the US
 - Have to think about standard of evidence (generally low; preponderance of the evidence in a probation report. No cross-examination, all hearsay).

- Best you can get is *Fatico* hearing (check that information is confidential and corroborate it with evidence)
- Reasons for this system:
 - Efficiency: can't possibly do at the sentencing stage all the things we do at the trial stage
 - If the goal is rehabilitation, want to know everything about the person to fix the person
 - Retributive purposes
- Criticism of this regime:
 - Preponderance of the evidence standard (though even with the switch, burden of proof did not change)
 - Element of the offense: proof beyond a reasonable doubt
 - Exasperate biases judges might have leading to huge sentencing disparities (Judge Harsh v. Judge Lenient)
 - Indeterminate sentences are bad for deterrence (uncertain)

III. Mandatory Minimums and Guidelines

- Note: statutory maximums are set really high because people can only get up to the absolute max with a high amount of aggravating factors
- Movement to change the system came from both sides:
 - Conservatives wanted determinate sentencing so judges couldn't be too lenient. Liberals wanted determinate sentencing to minimize judicial bias.
 - Determinate means the day defendant is sentenced, they know the sentence they are going to receive
- *United States v. Vasquez* (2010)
 - Facts: Defendant was convicted for helping to distribute heroin. Statutory maximum is 20 years if government charges standard drug trafficking charges. Instead, gov't decided to bring conspiracy charge with mandatory minimum of ten years upon conviction and maximum life. Government refused to drop that charge unless Vasquez pled guilty to a lesser-induced sentencing enhancement that carried a maximum of 40 years and a minimum of 5.
 - Issue: Judge would've sentenced 2 years + 5 year probation, but could not.
 - Holding: **The mandatory minimum sentence supplanted any effort to do justice.** 5 year sentence was unjust.
 - Rationale: As a result of the decision to insist on the 5 year minimum, there was no judging going on at Vasquez's sentencing. The defendant's difficult childhood and lifelong struggle with mental illness were out of bounds, plus his attempt at gov't cooperation, etc.
 - Significance: Ultimate discretion was in the hands of the prosecutors.
 - Advantages to shifting to mandatory minimum regime:
 - Useful tool for law enforcement (utilitarian purpose)
 - Especially helpful in conspiracies
 - Limit judge's bias
 - Downsides:
 - Can't have one-size-fits-all rules for everyone
 - Legislative body can't know all the factors in advance; are going to give priority to one over others that might need to be taken into account
 - Discretion isn't taken out of the system; it's just transferred from judges to prosecutors
 - Mandatory minimums have just exasperated disparities, not help them
 - Guidelines systems (middle line)
 - Give an **out for the judge to depart under certain circumstances**
 - Federal guidelines are advisory, but they are followed 75% of the time
 - Used as anchor for decisions
 - Federal system was mandatory until 2005, when the S. Ct. decided that when it was mandatory to increase someone's sentence on an offense element, this was unconstitutional.
 - Now offense elements must go to the jury.
 - Recently, S. Ct. has also decided that if something triggers a mandatory minimum it has to go to the jury.
 - Can have different types of guidelines
 - *Deegan* regime:
 - **Step 1: What is the guideline sentence?**
 - Judges have a really hard time departing
 - **Step 2: Reason to depart from guidelines**
 - Pretty narrow window; has to fall outside of the heartland of typical cases that form basis for the sentence

- **Step 3: Judge asks whether he/she should give a sentence other than the guidelines because guideline doesn't serve the purposes of the statute that sets all this out (USC 3553)**

- (a) Factors to be considered in imposing the sentence: The court shall impose a sentence **sufficient, but not greater than necessary** to comply with the purposes set forth in paragraph 2 of this subsection. The court, in determining the particular sentence to be imposed, shall consider --
 - (1) The nature and circumstances of the offense and the history and characteristics of the defendant
 - (2) The need for the 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**)
 - (3) ---
 - (4) The kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the sentencing commission
- (b) The court shall impose a sentence of the kind, and within the range, referred to in subsection a (4) unless the court finds that there exists an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different than the one described...

- Note: The 4 purposes of punishment are all reflected in this statute. Lets the judge pick which theory of punishment to follow.

- *Deegan*

- Facts: Defendant gave birth to a baby boy and left the baby alone in the house without food or a caregiver, intentionally returning two weeks later. Deegan urged the court to vary from the guidelines because of her psychological and emotional condition at the time of the offense, her history as a victim of abuse, and the fact that she acted impulsively.
- Issue: Is there enough evidence that there is a reason to depart from the guidelines in this case?
- Holding: **The district court did not abuse its discretion by failing to impose a more lenient sentence.**
- Rationale:
 - Step 1: guidelines said 19.5-24.5 years. Crime was federal because she was on Native American reservation.
 - Step 2: Is there a reason to department from the guidelines?
 - Cultural characteristics, history of foster care, etc.
 - Neonaticide is not the same as homicide, and it carries a low recidivism rate.
 - Step 3: Purposes of punishment analysis
 - Deterrence argument: She's had her tubes tied; never going to commit this crime ever again
 - General deterrence argument: at state level punishment is much lower; no reason for federal punishment to be so high. Also, 50 states now have safe haven laws -- don't need to use criminal punishment as a deterrent anymore.
 - Rehabilitation: unnecessary since she can't have any more kids
 - "Sufficient but not greater than necessary"
 - Judge would go through all of these arguments

Proportionality

I. Proportionality and the Eighth Amendment

- A. If challenging a term-of-years sentence in a particular case (e.g. *Ewing* -- three strikes law, guy who stole golf club is given a life sentence; Court says it's enough that State of CA had a reasonable basis for believing that its sentencing policy would further penological goals like deterrence):
 - Threshold question: compare gravity of offense with harshness of penalty
 - Generally don't get past the threshold question because if a punishment serves **any** of the penological goals, it is not disproportionate

- If that leads to inference of gross disproportionality, then do intra- and inter- 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** (*Harmelin* test)
 - Unless there is a proportionality principle based on retributive justice that others cannot override, all these sentences will be upheld.
 - *Ewing* dissent:
 - **Compare the offense to more serious offenses to see if it's an outlier**
 - **See how other jurisdictions treat the sentence**
- B. If making a **category challenge** (e.g. *Graham*):
 - *Graham v. Florida*
 - Facts: Graham was involved in an attempted robbery during which one of Graham's accomplice was shot. He was given the maximum sentence authorized by law: life imprisonment without the possibility of parole.
 - Issue: Was Graham's sentence unconstitutional under the 8th amendment?
 - Holding: **Category rule gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform. Life without possibility of parole is a disproportionate sentence for juveniles who do not commit homicide.**
 - Rationale:
 - Retribution: Because juveniles have lessened culpability they are less deserving of the most severe punishments
 - Deterrence: Juveniles make impetuous decisions and are less likely to take punishment into account
 - Incapacitation: to justify life without parole on the assumption that the juvenile will forever be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. Incapacitation cannot override all other considerations.
 - Rehabilitation: life without parole sentence forswears the rehabilitative ideal.
 - Category rule is necessary because courts could not distinguish incorrigible juvenile offenders from the many that have a capacity for change.
 - Significance: established category test for juvenile non-homicide offenders.
 - Concurrence: This was cruel and unusual but it's not necessary to do a category ban.
 - Dissent (Thomas): Court shouldn't override legislative majority in favor of leaving that sentencing option available.
 - **Category test**
 - **Step 1: Consider objective indicia of society's standards**
 - Intra- and inter- jurisdictional comparison: legislation
 - Breyer's dissent in *Ewing*: other jurisdictions would have imposed a sentence that does not exceed 18 months in prison. There are only 9 states where law might make it legally possible to impose a sentence of 25 years or more. This sentence is unique in its harshness.
 - Actual sentencing practices
 - **Step 2: Court's independent judgment**
 - Culpability of offenders in light of crime and severity punishment (classes of people we think are less culpable)
 - E.g. Juveniles are different
 - Offense: how does this offense stand up to other things?
 - Non-homicides are different
 - Could never have a mandatory death sentence, and certain crimes are not subject to capital punishment
 - Punishment itself
 - Life without parole is different
 - No life without parole for non-homicide cases for juveniles
 - 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*)
 - Deterrence
 - Incapacitation: Court says this cannot override everything else
 - Retribution
 - Rehabilitation
 - **As long as state has a reason for believing punishment will serve these goals, court has allowed it**
 - Comparisons with the rest of the world

- C. Reasons court has been reluctant to do more:
- Too much potential for everyone's sentences to be second-guessed
 - Hard to determine what a retributively just sentence is
 - As a practical matter, usually these challenges lose