

# CRIMINAL LAW

## I. JUSTIFICATIONS FOR PUNISHMENT

### A. General justifications for punishment

1. **Utilitarian-** consequentialist, forward-looking. Pain inflicted by punishment is justifiable if and only if it is expected to result in a reduction in the pain of crime that would otherwise occur.

a. **general deterrence:** D is punished in order to convince the general community to forego criminal conduct in the future.

b. **specific deterrence:** D's punishment is meant to deter future misconduct by D; by incapacitating D, and by intimidating D from committing a crime again.

c. **rehabilitation:** reform the wrongdoer, rather than secure compliance through fear of punishment.

2. **Retributive-** just deserts, backward-looking. Punishment is justified when it is deserved.

a. **public vengeance:** because the criminal has harmed society, it is right for society to "hurt him back." Jus talionis- eye for an eye.

b. **protective retribution:** punishment is a means of securing a moral balance in society; rules benefit and burden everyone in a society. For those who disregard the rules, they are benefiting without accepting burdens and are free riders. A criminal owes a debt to society.

c. **victim vindication:** punishment is a way to right a wrong.

3. **Denunciation-** punishment is justified as a means of expressing society's condemnation of a crime-hybrid of utilitarianism and retribution.

a. **educative:** inform individuals that society considers specific conduct improper.

b. **expressive:** channels community anger away from personal vengeance.

c. **condemnation:** stigmatizes the offender for his offense.

**II. ACTUS REUS:** physical, external portion of a crime. The actus reus of an offense consists of a voluntary act, or omission to act where there is a legal duty to act, that causes a social harm. A person cannot be convicted on the basis of thoughts alone.

### A. General principles

1. **General rule:** a person is not guilty of a crime unless her conduct includes a voluntary act.

2. **The Act:** a bodily movement

3. **Voluntary:** "willed muscular contraction" Holmes. Involuntary acts include reflexes, convulsions, epileptic seizures.

a. **People v. Decina:** epileptic killed 4 children when the car he was driving when out of control during a seizure. Jury found that he knew he was highly susceptible to seizures and failed to take proper precautions, convicted of criminal negligence in the operation of a vehicle.

**B. Crimes of possession:** not an exception to the act requirement, it is a special instance of it. Possession = control over something.

1. in order to be guilty of a crime of possession, one of the following must be true:

a.  $\Delta$  deliberately obtained contraband

b.  $\Delta$  knowingly received contraband

c.  $\Delta$  failed to terminate control over contraband after having knowledge it was there.

(1) **Wheeler v. United States-** police came to a hotel room, where they found heroin under the pillow on a bed. Conviction upheld for possession due to "constructive possession," knowingly in a position to exercise control over the contraband.

(2) **People v. Ireland-** married couple; wife began selling pot. Husband arrested for possession, even though it wasn't his. Exclusive control does not exclude joint control and therefore joint possession.

**C. Crimes of omission:** a person can be punished for a failure to act only if he had a legal duty to act.

1. Duty to act only established by:

a. statute- ex, failure to file a tax return is criminal only if one has a statutory duty to file.

b. status relationship

c. contract

d. duty voluntarily assumed, signaling to others that no further help was needed

- e. status as landowner imposes duty
- f. tort duty to certain persons (children, employees)
- g. Δ created peril in the first place

2. *Jones v. United States*- woman's conviction for involuntary manslaughter of child in her care overturned; jury had not been instructed on necessity of finding a legal duty for her to act before finding a failure to act.

#### D. Prohibition against punishing status

1. *Robinson v. California*- SC ruled that a statute that made it an offense to be addicted to narcotics unconstitutional. No act by the Δ, just a present addiction, was required for conviction.

2. *Powell v. Texas*- Δ was charged with a violation of public drunkenness. Δ argued that the statute punished his status as an alcoholic; the statute was upheld by the SC as it punished conduct, not an illness.

E. MPC: defines voluntary by what it is not, rather than by what it is.

III. MENS REA: mental, internal portion of a crime- precise state of mind of offenders; moral blameworthiness.

A. MPC approach- § 2.02 (majority rule, but not CA or federal jurisdictions)- in order to be guilty, the Δ must have had one of the following types of culpability required for each material element of the crime. List is hierarchical- one above satisfies one below.

1. **purpose**: "conscious object" to engage in conduct of a particular nature or to cause a specific result.
2. **knowledge**: "awareness" that Δ's conduct is of that nature, or practical certainty that conduct will cause such a result.
3. **recklessness**: conscious disregard of substantial and unjustifiable risk.
4. **negligence**: Δ should have recognized substantial and unjustifiable risk.
  - a. **purpose v. knowledge**: purpose is desire to have harm occur, knowledge is callousness of whether harm occurs.
  - b. **knowledge v. recklessness**: knowledge requires awareness of extremely high likelihood the harm will occur, recklessness requires awareness of moderately high likelihood it will occur. Both only satisfied if Δ actually thinks about the risks.
  - c. **recklessness v. negligence**: recklessness requires subjective awareness of the likelihood of harm, negligence is objective- Δ should have been aware of the substantial risk.

#### B. Levels of culpability

##### 1. Common law approach

a. *State v. Peery 1947*- man who stood naked in his window acquitted of indecent exposure; court found he did not have the intent to be lewd. Court considered evidence of his good character to speak to his intent.

##### 2. general vs. specific intent

- a. **specific intent**: definition of the crime includes an intent to do some future act, or achieve some further consequence, beyond the conduct or result that constitutes the actus reus of the offense; or, provides that the actor must be aware of a statutory attendant circumstance.
  - i. example: burglary defined as "breaking and entering with intent to commit a felony"- the actus reus of this offense is complete when a person breaks and enters, he doesn't have to commit the felony inside to be convicted of burglary- so, the requisite mens rea pertains to a planned future act- commission of a felony- that is not part of the actus reus.
- b. **general intent**: definition of a crime doesn't contain any specific intent.
  - i. example: battery defined as "intentional application of unlawful force upon another"- the only mental state in its definition is the intent to apply force upon another, which is the actus reus.

3. MPC- requires prosecution prove that the Δ committed each ingredient of the actus reus of the offense with a culpable state of mind as defined in the statute.

- a. person may not be convicted solely on the ground that he acted with a morally blameworthy state of mind.
- b. distinction between general and specific intent discarded.
- c. only uses 4 terms: purposely, knowingly, recklessly, and negligently

d. *United States v. Villegas 1991*- Δ was not subjectively aware that by putting hepatitis vials in the bulkhead of a river he was placing people in immediate danger of death or injury- knowingly element was not satisfied.

### C. Defenses

1. **Mistake of Fact**- a defense if it negates the mens rea required to commit the crime.

a. **MPC approach**- if you do not have the requisite mental culpability for an offense, you cannot be found guilty.

b. **Common law approach** (incl. CA and feds)- SEE DIAGRAM. Must determine specific or general intent offense.

i. **specific intent offense**: does claimed mistake negate mens rea of the specific intent portion? If honest claim of mistake, then it is a defense.

ex., Δ takes property incorrectly believing that it has been abandoned. Larceny is defined as taking and carrying away of personal property of another with intent to permanently deprive the other of the property. Good defense, because it shows he didn't have the mental culpability to permanently deprive another of their property.

ii. **general intent offense**: is claimed mistake reasonable? If mistake reasonable, then it is a defense.

ex., Δ has nonconsensual sex with a woman, whom he incorrectly believes is consenting. The crime is defined as sexual intercourse...without her consent. If his mistake regarding her consent is reasonable, then he is not guilty, the actus reus has occurred but his state of mind is not culpable.

c. **Exceptions (mistake of fact never a defense)**

i. strict liability offenses, require no mens rea. Speeding is strict liability.

ii. sex crimes against children- mistake of age no defense.

d. *Gordon v. State 1875*- Δ not old enough to vote, honestly believed he was 21 though. His mistake of fact is a good defense for the crime of illegal voting, both specific and general intent. The specific intent is knowledge of age, he had an honest mistake in this. The general intent would be a good defense too- his mistake was reasonable.

2. **Mistake of Law**- must determine if it is a same law or different law mistake.

a. **same law mistake**: Δ claims to be mistaken about the very law he is being prosecuted for. Exculpatory if:

i. law not published/Δ not actually aware of its existence;

ii. Δ reasonably relied on a statute subsequently declared invalid;

iii. Δ reasonably relied on an erroneous court opinion;

iv. Δ reasonably relied on advice of public official charged with responsibility of enforcing the law (conflict of authority)

b. **different law mistake**: claimed mistake relates to a law other than the criminal offense for which the Δ has been charged.

i. general intent crime- no defense.

ii. specific intent crime- if claimed mistake negates mens rea portion, good defense, even if the mistake was not reasonable.

a. ex. Δ takes car to a mechanic, disputes the bill and refuses to pay. She goes back and takes her car back, then is prosecuted for larceny. There is a lien law she is unaware of that provides that a mechanic is in possession of a repaired auto until the bill is paid- therefore, the different law mistake negated her intent to steal the property of another.

c. **MPC approach**- does claimed mistake negate mens rea?

d. **Cases**

i. *People v. Wendt 1989*- Δ charged with failing to pay his income taxes. His defense was that he thought he didn't have a legal duty to file, therefore no necessary mens rea to commit the crime. Ill. SC said the violation of the statute required willfulness- the Δ only had to be aware that a failure to file would be practically certain to be caused by his conduct.

ii. *Lambert v. CA 1957*- woman convicted of violation of statute that required her to register as a convicted felon. She claimed she didn't know she had to register. SC ruled her conviction violated due process; actual knowledge of the duty to register or proof of the probability of such knowledge was a prerequisite to conviction of this statute.

**e. Cultural defense**

i. **same-law mistake of law defense**- if you are from a radically different culture, and you were actually unaware of American law, and your different culture treats the subject matter vastly differently, you may use this defense.

ii. **“mens rea” defense**- cultural background dictates why Δ not guilty of the mens rea portion of an offense.

iii. **cultural unfamiliarity as a basis for reduced sentence**- reducing the punishment based on mitigating circumstances.

(1) **“Baghdad on the Plains”**- Iraqi immigrants charged with child abuse and contributing to the delinquency of a minor for marrying off their two daughters to fellow refugees who were older. Eventually the parents pleaded guilty to child neglect; two grooms were charged with sexual assault of a minor.

**3. Intoxication** (same rule for mistake of law and mistake of fact)

**a. common law approach** to voluntary intoxication

i. **specific intent crime**- defense if intoxication negates specific intent

ii. **general intent crime**- intoxication is no defense.

iii. *US v. Williams 1971*- severely intoxicated man robbed a bank by giving a teller a note that said “this is a stickup”- Δ said he was so wasted he was unable to form the intent to steal. But because he gave a note, and they found another practice note, he was found to have formed the necessary intent.

iv. *People v. Whitfield 1994*- court allowed evidence of intoxication to be introduced to negate the malice necessary for depraved heart murder, on grounds that murder is a specific intent crime for purposes of the defense.

v. *Montana v. Engelhoff 1996*- SC upheld the constitutionality of a state statute that prohibited consideration of intoxication when considering mens rea- court said courts are only required to admit evidence that is a fundamental principle of justice.

**b. MPC approach**: intoxication is no defense for crimes which only require recklessness or negligence as culpability- culpability of getting drunk to begin with is transferred to the crime.

**IV. HOMICIDE**

**A. Introduction**- killing of a human being by another human being. SEE FLOWCHART. Murder is killing of a human being with malice aforethought; manslaughter is the unlawful killing of a human being without malice aforethought.

1. **Intentional homicide**- includes intent-to-kill murder, voluntary manslaughter, justifiable homicide.

2. **Unintentional homicide**- includes extreme recklessness murder, involuntary manslaughter, accidental homicide. If the malice aforethought in a case is extreme recklessness, it is unintentional.

**B. Murder**: the killing of a human being with malice aforethought.

1. **Malice aforethought**: exists if any of the following four states are satisfied:

a. **intent to kill**- purpose or knowledge.

b. **intent to commit serious bodily injury**- injury that gives rise to the apprehension of danger to life, health, or limb.

c. **extreme recklessness** (“depraved heart”)- any time a person intends to imperil life but does not intend to kill. Unintentional.

d. **intent to commit some other felony**- felony murder rule.

1. **Premeditation**- distinguishes 1<sup>st</sup> and 2<sup>nd</sup> degree murder: willful and deliberate.

a. Approach A: **intent to kill= premeditation.**

i. *Commonwealth v. Carroll 1963*- husband killed his unstable, abusive wife while she was sleeping, claimed he did not think about it long enough for it to have been premeditated. Court ruled intent to kill equaled premeditation, 1<sup>st</sup> degree murder.

b. Approach B: **preconceived design= premeditation.**

**i. *People v. Anderson 1968***- man killed his girlfriend's daughter, she was brutally stabbed all over. Originally convicted of 1<sup>st</sup> degree murder. CA SC overruled- 3 elements that must exist to determine premeditation: 1, planning activity; 2, motive; 3, manner of killing. The evidence did not support a finding of any of these three elements. (later narrowed)

**c. Approach C: appreciable amount of time + deliberation= premeditation.**

**i. *Austin v. US 1967***- an appreciable time must elapse between formation of the design and the fatal act within which there is deliberation.

**2. 2<sup>nd</sup> degree Murder/depraved heart or extreme indifference** (in most, but not all states, extreme recklessness murders are 2<sup>nd</sup> degree)

**a. MPC-** homicide committed recklessly under circumstances manifesting extreme indifference to the value of human life.

**b. Actual awareness of the risk involved is required.**

**i. *Commonwealth v. Malone 1946***- victim killed when he was playing Russian roulette with a friend. Δ argued he didn't intend the killing because there were only 3 bullets in the chamber and he fired 3 times (5 chambers). Δ convicted of 2<sup>nd</sup> degree murder. Conviction upheld because of his reckless and wanton disregard of the consequences.

**ii. *Berry v. Superior Court 1989***- pit bull killed a neighbor child. The dog was kept in a yard area with some pot, so he was there to protect the pot. Δ was the owner of the dog, charged with 2<sup>nd</sup> degree murder, upheld based on 3 factors: 1, the magnitude of the risk (dog bred to be a killer); 2, subjective appreciation of the risk (he had told the mother of the risk); 3, base or antisocial motive or purpose (dog protecting pot, illegal to keep a fighting dog).

**iii. *People v. Knoller 2002***- SF dog mauling case. Marjory Knoller convicted of 2<sup>nd</sup> degree murder; judge reduced the conviction to involuntary manslaughter because she had no subjective appreciation of the risk (#2 above), she had no idea the dog would do anything like it did.

**C. Manslaughter:** the unlawful killing of a human being without malice aforethought (intent to kill, intent to commit serious bodily injury, extreme recklessness, intent to commit some other felony)

**1. Voluntary manslaughter-** mitigated murder.

**a. bases for mitigation**

**i. provocation** adequate to trigger sudden **heat of passion** in reasonable person, without sufficient cooling period. Provocation negates malice aforethought. No set cooling period; jury determines what amount of time in which a reasonable person would regain control.

**ii. imperfect self defense** or defense of 3<sup>rd</sup> person

**iii. diminished capacity-** some temporary mental abnormality, not rising to the level of insanity.

**b. common law approach-** limited types of provocation recognized as adequate. Words never adequate.

i. serious assault or battery

ii. witnessing act of adultery by one's wife

iii. mutual combat

iv. unlawful arrest

v. witnessing commission of crime against close relative.

**vi. *State v. Thornton 1987***- estranged husband saw his wife kissing another man, let the air out of the boyfriend's tires, and got a gun. Shot the victim in the hip, he later died. Originally convicted of 1<sup>st</sup> degree murder; court ruled that Δ acted under legally sufficient provocation, offense lowered to voluntary manslaughter.

**c. modern approach-** jury can decide what is mitigating circumstances.

**i. *Maier v. People 1862***- in determining whether provocation is sufficient or reasonable, ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard.

**d. MPC approach:** instead of provocation, “extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.” It is up to the jury to decide, from the viewpoint of a person in the actor’s situation.

**2. Involuntary manslaughter- criminal negligence/recklessness-** a person should be, but is not, aware that her conduct is very risky, her behavior may justify being labeled “criminal negligence.”

**a. common law definition:** reckless or criminally negligent homicide.

**b. conflict of authority:**

**i.** recklessness: some jurisdictions require actual awareness of the risk

**ii.** negligence: some jurisdictions do not require awareness of the risk

**iii.** MPC- homicide committed punishes reckless homicide and negligent homicide as 2 different things.

**c. severity of risk is the difference between involuntary manslaughter and extreme recklessness murder.**

**i. Commonwealth v. Welansky 1944-** 400 people killed when fire broke out in a Boston nightclub. Opinion not clear as to requirement of actual appreciation for risk to be involuntary manslaughter. “Knowing facts that would cause a reasonable man to know the danger is equivalent to knowing the danger.”

**ii. Commonwealth v. Feinberg 1969-** Δ sold sterno in his store on skid row to people he knew were using it to get drunk. New sterno came packaged with warnings and poison labels and had more than 10x the amount of methanol. He sold it anyway to the drunks; 31 people died after being poisoned. Court ruled he was grossly negligent in selling the sterno to people whom he knew would use it for drinking. Conviction for involuntary manslaughter upheld.

**D. Felony Murder:** if an actor causes a death in the course of committing an intentional felony or in the course of fleeing, it is murder. The prosecution does not need to prove malice aforethought, as the intent to commit the felony constitutes the implied malice required for common law murder.

**1. Policy issues: arguments for and against the FM rule:**

**a. deterrence**

**i. pro:** it is intended to deter negligent and accidental killings during the commission of felonies. It encourages felons to take precautions to protect life. (CA SC approves of this purpose, not to deter the underlying felony)

**ii. con:** how does one deter an unintended act? The result of the death is unintended. It makes more sense to increase the punishment for specific felonies to deter. And, it may be fair to say that those who kill to silence witnesses don’t think they’ll get caught and so can’t be deterred.

**b. reaffirms the sanctity of human life**

**i. pro:** society’s judgment is that commission of a felony resulting in death is more serious, and therefore deserves greater punishment.

**ii. con:** in order to calculate a wrongdoer’s debt to society, we must look at culpability and not simply the harm caused. Should a felon who accidentally takes a life be subject to the severe penalties reserved for murderers? Also, we don’t punish people for accidental killings, so this argument is undermined.

**c. transferred intent**

**i. pro:** the offense is not really one of strict liability but one of intent, as the felon’s intent to commit a felony is transferred to the homicide.

**ii. con:** this is a misuse of transferred intent. Usually, the doctrine provides that an actor’s intent to commit a harm to one person may be transferred to another victim, same harm. Ordinarily the law does not recognize a transfer of intent to cause one harm to a different and greater harm involving the same victim.

**d. easing the prosecutor’s burden of proof:** prosecutor doesn’t have to show that the felon intended to kill or injure the victim or that the felon was aware that her conduct was highly dangerous to human life. Only have to show the Δ committed the felony and the death occurred during its commission.

**2. Limitations on FM**

**a. Inherently dangerous felonies:** many states limit the rule to homicides that occur during the commission of felonies dangerous to human life.

**i. abstract test** (CA included, minority)- felony is classified as dangerous by looking at the offense in the abstract, as it is defined by statute.

**(1) *People v. Hansen 1994***- Δ fired into an apartment which he believed was empty, a stray bullet killed a 13 year old girl. CA SC ruled that the felony of discharging a firearm at an inhabited dwelling house, whether occupied or not, is inherently dangerous in the abstract. Application of the FM rule to this case will further the deterrence of negligent or accidental killings in the course of the commission of dangerous felonies.

**(2) *State v. Wesson 1990***- Kansas SC applied the abstract approach and determined that the sale of crack cocaine is not an inherently dangerous felony (later overturned by statute).

**ii. particular facts test** (majority rule)- dangerousness of a felony is determined by considering both the nature of the felony in the abstract and the circumstances surrounding its commission.

**b. Merger doctrine:** if the underlying felony is an offense that is an integral part or is included in fact in the homicide itself, the FM rule does not apply. The felony is not sufficiently independent of the death and therefore merges with it- if not, prosecutors would never have to prove malice in order to obtain a murder conviction, because a homicide generally results from the commission of an assault.

**i.** many jurisdictions, not all, hold that felonious assault may not serve as the basis for FM.

**ii.** CA- a felony does not merge if the assaultive conduct involves an independent felonious purpose, i.e., if Δ's purpose is to take victim's property (a felonious intent independent of any assaultive conduct), she can seek to take the property violently or nonviolently. If FM deters, she should do it in a nonviolent manner.

**(1) *People v. Hanson 1994***- commission of the felony of discharging a firearm at an inhabited dwelling place does not merge with the resulting homicide; court unwilling to extend the merger doctrine beyond assault.

**c. Agency doctrine:** the FM rule does not apply if an adversary to the crime, rather than a felon, personally commits the homicidal act. Majority rule.

**i. minority rule rejects this:** a felon is liable for any homicide that occurs during the commission of the offense, if the killing was the proximate result of the felonious activity, regardless of who the killer was- **proximate causation approach.**

**(1) *People v. Dekens 1998***- IL SC rejected the agency doctrine. Undercover cop wanted to buy drugs from co-felons who planned to rob him. Cop ended up shooting one of the co-felons. Court said it's consistent with public policy that when a felon sets in motion a chain of events such as this he should be held responsible for any deaths which occur.

**(2) limited version:** minority rule; the victim must have been an innocent person rather than a co-felon in order to apply the FM rule when the shooter is a non-felon; based on the principle that when a non-felon kills a felon it is a justifiable homicide.

**ii. alternative to FM:** CA does not follow the agency doctrine, but it is still possible to convict a Δ of murder even though they did not actually do the killing, if they had engaged in a crime that was extremely reckless, i.e. initiation of gunplay. Accomplice theory will extend the murder charge to a getaway driver.

## E. Capital Punishment

### 1. Desirability and moral correctness of capital punishment

#### a. retribution:

**i. pro:** jus talionis, death penalty is the one crime where this can work. Victim has paid with his life, murderer should pay with his.

**ii. con:** if we feel retributive urges, should we want the state to act on them? The state should never sanction revenge killing.

**b. deterrence:**

**i. pro:** if you commit the most serious crimes, you will pay with your life.

**ii. con:** people who kill don't come from the same mold. The message of execution is lethal vengeance, not deterrence. Executions demonstrate that it is correct and appropriate to kill those who have gravely offended us. It is doubtful that a potential offender could take the risk of execution into account, as only a small fraction of homicides result in executions.

**c. incapacitation:**

**i. pro:** dead men won't ever kill again.

**ii. con:** life without parole accomplishes the same effect.

**d. danger of mistake**

**i.** who should bear the burden of proving that the system works or doesn't?

**ii.** abolitionists are taking a risk by emphasizing the possibility of mistake; if DNA testing were used in every case, what then would their argument be that people would sympathize with?

**2. History and constitutionality of the death penalty**

**a. history of race discrimination:** in GA a slave who killed a white person automatically received the DP regardless of circumstances. There were laws that authorized the DP for rape up until 20 years ago, and a disproportionate amount who received it were black men accused of raping white women.

**b. constitutional challenge to race discrimination: *McCleskey v. Kemp 1987*-** McCleskey convicted of 1<sup>st</sup> degree murder after shooting a white police officer twice in the face. In order to award the DP, the jury had to find at least one aggravating circumstance; jury found two (victim police officer, murder committed in perp. Of armed robbery). Δ's lawyer offered no mitigating circumstances during sentencing. He received DP. During his appeal, he claimed that he had been denied equal protection, introduced the Baldus study.

**i. Baldus study:** Δ's charged with killing white victims more likely to get DP than those charged with killing black victims. Black Δ's more likely to get DP than white Δ's.

**(1) prevalence of discrimination against black victims:** main finding. Is it discrimination against black victims, or for white victims? No significant discrimination either way based on the race of the Δ when considering the race of the victim.

**(2) prevalence of discrimination by prosecutors:** study says prosecutors seek DP for murderers of white victims much more often than for black victims.

**(3) importance of controlling for aggravation levels:** study created an aggravation index. Any case given a value, most mitigating to least mitigating. On most aggravated cases race effects go away. In the mid range, prosecutors have more discretion and race really comes into play. McCleskey placed himself into that range.

**ii. equal protection claim:** SC rejected on the basis that Δ had failed to prove intentional discrimination in his case specifically- ex, they are probably looking for racial epithets to prove racism.

**iii. cruel and unusual punishment claim:** SC rejected on basis that Δ didn't prove "unacceptable risk" of discrimination. It is discretion on prosecutor's part where discrimination comes into play; court won't say that discretion is invidious.

**c. possible responses to race discrimination in capital sentencing**

**i. abolition:** if racial discrimination is inevitable in DP, is it also inevitable for life w/o parole? Where do you draw lines?

**ii. moratoria:** when would it end? What is an acceptable level of discrimination in capital sentencing?

**iii. DP for only the most aggravated murders:** how do you decide most aggravated?

**3. Death penalty procedures**

**a. who is eligible for DP?**

**i. 1<sup>st</sup> degree murder + at least one special circumstance:** CA. Aggravating factors must outweigh mitigating factors. Aggravating factors are the same as special circumstances, which are already a lot of the reqs for 1<sup>st</sup> degree murder, so it doesn't narrow it much.

**ii. accomplice to 1<sup>st</sup> degree FM may be executed if:**

- (1) accomplice was at least extremely reckless with respect to killing, and
- (2) accomplice's participation in the underlying felony is major.

**iii. mental retardation**

(1) *Atkins v. Virginia 2002*- execution of the mentally retarded violates cruel and unusual punishment.

(2) states have some latitude in deciding which Δ's are retarded, with cutoffs of IQ.

(3) **rationale:** retarded Δ's are less able to assist in their own defense.

**iv. juvenile Δ's:** SC has decided that age 15 is too young, but 16 is not.

**b. how the jury chooses between DP and life w/o parole:**

**i. weighs aggravating v. mitigating circumstances.** SC requires at least one aggravating circumstance to be present. In CA not a problem, b/c all special circumstances are statutory aggravating circumstances.

(1) **weighing states (CA) v. non-weighing states:** in non-weighing states if the jury finds any mitigating circumstances it may not impose DP.

**c. guiding the jury's discretion:**

**i. Woodson:** mandatory death sentences violate 8<sup>th</sup> Amendment; jury must be permitted to consider mitigating circumstances.

**ii. Furman:** arbitrary imposition of DP violates 8<sup>th</sup> Amendment; jury lacked guidance and had too much discretion. This practice was held unconstitutional.

**iii. Lockett v. Ohio 1978-** jury must be permitted to consider as a mitigating circumstance any aspect of the Δ's character or record, or circumstance of offense, not just those enumerated in a state's statute. Δ was given the DP under a FM rule.

**iv. irreconcilable principles?** Furman says you must guide and constrain the discretion of the jury; Lockett says jury must be allowed to take any mitigating circumstance into consideration.

## V. RAPE

**A. Statutory rape:** All states establish an age of consent, below which the law regards a female's consent as impossible. Intercourse with an underage female is statutory rape.

**1. Mental culpability:** most jurisdictions require no mental culpability as to age, and therefore do not permit mistake of fact defense as to age. Strict liability offense.

**a. People v. Hernandez 1964-** CA requires negligence with respect to age. Δ had sex with a 17 year old; Δ was found to have been negligent in his belief that she was old enough to consent. Court holds that a charge of statutory rape is defensible if criminal intent is lacking.

**b. Garnett v. State 1993-** (majority approach) Δ was a 20 year old man with an IQ of 52; victim was 13. She encouraged the encounter and later gave birth to their child. He offered proof that he thought she was over the age of consent; court finds a reasonable mistake is not a good defense.

**B. Forcible rape:** sexual intercourse by physical force or threat of physical force, without victim's consent.

**2. Mens Rea:** most jurisdictions require **negligence**; some require recklessness. Δ must have substantially, consciously averted unjustifiable risk that she was not consenting and went forward anyway.

**a. majority rule:** a person is not guilty if he entertained a genuine and reasonable belief that the female voluntarily consented to intercourse with him.

**b. minority rule:** even a Δ's reasonable mistake of fact regarding a victim's lack of consent is not a defense.

**c. *Dir. of Public Prosecutions v. Morgan 1976***- case of woman who was raped by her husband and his friends. Because of the marital rape exemption at the time, husband could only be prosecuted as an accomplice. Jury instruction was that the Δ's belief must be reasonable as to her consent- husband had told the friends that she would struggle but that she wanted it anyway.

**Must prove lack of consent + negligence/recklessness regarding her consent.**

**d. *Reynolds v. State 1983***- Δ contended that he did not notice anything about the victim's behavior or demeanor that indicated she did not want to have sex. Court rules that the state must prove that the Δ acted recklessly regarding the victim's lack of consent.

**3. Actus Reus: force and resistance- common law:** required lack of consent + force, proven only by resistance to the utmost.

**a. resistance requirement**

**b. modern approach for jurisdictions with some resistance requirement: *State v.***

***Rusk 1981***- victim met Δ, he wouldn't let her drive home, she said if you do what I want will you let me go? Appellate court reversed his conviction on ground there was no resistance and no reasonable fear of imminent harm; SC found that a reasonable jury could have found he placed her in fear of harm.

**c. CA approach: *People v. Iniguez 1994***- there is no resistance requirement. Δ came up to victim while she was sleeping and had sex with her. Δ acknowledged there was no consent; but argued there was no force or fear of force. SC upheld his conviction, finding that the victim did have a **genuine and reasonable fear of bodily harm.**

**(1) CA actus reus:** lack of consent + force, or reasonable fear of force.

**(2)** some states require earnest resistance; some require reasonable resistance; most have no resistance requirement (like CA)

**b. force requirement:** force, reasonable fears of serious bodily injury, force of penetration?

**4. Marital rape:** 18 states punish marital rape at a lower level than non-marital rape.

**a. *People v. Liberta 1984***- separated husband raped his wife; convicted of rape. At the time NY had a marital exemption. Court of Appeals ruled the exemption was a violation of equal protection; legislature should want all men to be treated equally, and eliminated the exemption.

## VI. THEFT

**A. Introduction:** includes larceny, larceny-by-trick, embezzlement, false pretenses. Original theft offense was robbery- stealing by force or threat of force. There was no such crime of taking property by stealth.

**B. Larceny:** common law, **trespassory taking** and **carrying away** of the **personal property** of another with the intent to permanently deprive the possessor of the property.

### 1. Elements

**a. trespassory:** wrongful; involves the non-consensual taking of possession of the property in question. Means larceny is a crime against possession, not against ownership.

**b. taking:** caption; different from custody. Taking means taking possession, not taking temporary possession which is custody. Actual possession or constructive possession.

**c. carrying away:** most jurisdictions have deleted this requirement.

**d. personal property:** at common law, did not include services rendered; real property not included, and only tangible forms of personal property are included. MPC includes all property- anything of value, including real estate and movable property, and the unlawful transfer of intangible personal property rights.

**i. *Lund v. Commonwealth 1977***- college student wrongfully took a computer printout that listed the access numbers of other students, then used those numbers to obtain computer services to which he was not entitled; he was not guilty of theft of the computer services, but was guilty technically of larceny of the sheet of paper on which the account numbers were.

**ii. *Oxford v. Moss 1978***- student got answers to an exam to cheat; he was prosecuted and found innocent of the statute that was dishonestly appropriating property with the intention of permanently depriving the other of it- but this only applied to the paper, not the answers. Court found the information which was what he was stealing was not property.

e. **mens rea**: intent to steal; must do so with the specific intent to deprive the other of the property permanently.

## 2. Extensions of larceny

a. **larceny by trick**: obtaining personal property of another by way of an intentional misrepresentation, but **without transfer of title**. It seems to be handing of the property as in embezzlement, but it is not entrustment when not done in good faith. If the owner intends to part with title to the property as well as possession, it is not theft.

i. **State v. Robington 1950**- Δ wanted to try out a car and promised to return it at the end of a weekend or pay for it. Larceny by trick because the transferor did have the expectation of getting the property back, so title was never transferred.

C. **Embezzlement: fraudulent appropriation** of property of another by one who has been **entrusted** with possession. Different from larceny in that the property comes lawfully into possession of the taker and is unlawfully appropriated by him.

1. **People v. Talbot 1934**- Δ, a businessman, had a drawing account from which he withdrew \$186,000. He made no attempt to conceal that he took the money, and said that he didn't know it was inconsistent with the terms of his entrustment, he only intended to borrow the money. Court ruled he knew the money was for his own personal purposes so that satisfied mens rea.

2. **intent to permanently deprive**- some jurisdictions require this, CA does not.

D. **False pretenses: obtaining title** to personal property by intentionally misrepresenting a material fact with intent to defraud, and victim relies on misrepresentation. Thief uses trickery to obtain title, and not simply possession.

1. **Chaplin v. US 1946**- Δ's told victim if she gave them money they'd buy liquor stamps and they'd repay her. They never repaid her and never had any intention to repay her. Δ's convicted of false pretenses, but it was overturned because they only misrepresented their future intentions.

2. **conflict of authority**: some jurisdictions consider false representation of intentions actionable as false pretenses, others do not.

## VII. AGGRAVATED PROPERTY CRIMES

A. **Extortion**: use of a certain type of threat in an attempt to obtain property or action. Only certain types of threats qualify.

1. **types of threats**: every jurisdiction has its own list of qualifying threats. i.e., injure victim, accuse victim of a crime, reveal something disgraceful, publish defamatory material, injure family of victim, etc.

2. **distinguished from robbery**: extortion, threat of future injury. Robbery, threat of immediate injury.

3. **US v. Jackson 1999**- Bill Cosby's illegitimate daughter, whom he supported for a long time. She tried to shop around her story to a tabloid when he wouldn't give her any more money. Threatened to injure his reputation. Attorney argued "wrongful" had to be added to the definition of the crime in jury instruction; court rules that the test of wrongful is the Δ's claim of right- if the Δ is owed the money or is entitled to it, it's not wrongful. Court rules that a jury could have found she had no sincere claim of right, so it was wrongful.

4. **blackmail**: extortionate threats to reveal the commission of a crime or some other social disgrace. Paradox- criminal punishment for doing what you have a legal right to do.

B. **Bribery**: majority rule, bribery is the corrupt payment or receipt of a private price for an official action. Corrupt = shady.

1. **who can be bribed**: most statutes cover electors, jurors, and witnesses. Some codes cover commercial bribery.

2. **inchoate offense**: even unsuccessfully attempting to bribe someone makes one guilty.

3. **mens rea**:

i. **Δ is offeror**: Δ must intend to achieve what he thinks would constitute personal gain or advantage.

ii. **Δ is offeree**: Δ needs to know that the payment was intended to influence Δ's official actions.

4. **State v. Bowling 1967**- Δ was a legislator, who was offered \$4200 by a barowner to help him get a liquor license. Question was, what constitutes an official action? In helping him get a license, Δ was acting outside his official capacity as a legislator; they really were influence peddling; and were acquitted.

C. **Burglary**: unauthorized entry into a structure with intent to commit any crime therein.

**1. common law definition:** breaking and entering into the dwelling house of another at night with the intent to commit a felony therein.

**i. breaking:** used to be the opening had to be created by a burglar; door left open didn't qualify as breaking. Now, breaking not required.

**ii. entering:** sufficient that any part of the  $\Delta$ 's body enter the structure, for any amount of time. It must be unauthorized- you may enter a store, but if you enter with the intent to commit a crime this is wrongful.

**iii. dwelling house:** used to have to be a dwelling, now just building or vehicle.

**iv. at night:** no longer required by any jurisdictions.

**v. intent to commit a felony:** now, it can be a misdemeanor.

**2. CA approach:** grades burglary on basis of whether structure was an inhabited dwelling house.

**3. inchoate offense:** guilty of burglary when you attempt to break into a structure. You can change your mind about committing the offense while there, but you are still guilty of burglary.

**4. *People v. Gauze 1975*-** Can a person burglarize his own home?  $\Delta$  told victim to get his gun after a fight, then went to their shared apartment and shot him. He was convicted of assault with a deadly weapon and burglary. Burglary conviction overturned; court rules it would be punishing him twice for the crime he committed while in the house.

## VIII. CAUSATION (see chart)

**A. When is causation an issue?** Only in homicide cases. The  $\Delta$ 's conduct must be a "but for" cause and the "proximate" cause of the death. If the actor hadn't engaged in the conduct, the victim would not have died. The actor's conduct must be sufficiently related to the death and not superseded by anyone else's conduct or any other force.

### 1. Intervening actors and events

**a. dependent intervening cause:** an unusual event comes between the actor's conduct and the death, which changed the manner of dying. If extremely unusual or bizarre, no proximate cause.

**b. independent intervening cause:** unusual event is not a conscious response to the actor's conduct. If unforeseeable, no proximate cause.

**c. *People v. Kibbe 1974*-**  $\Delta$ 's wanted to rob the victim; they abandoned him on a rural road at night in freezing weather with no coat. Victim didn't freeze to death, he was hit and killed by a truck.  $\Delta$ 's convicted of extreme recklessness murder. The driver's hitting him was a coincidental intervening cause. But, it was foreseeable, so they are guilty.

### 2. Causation in the MPC:

**a. but for:** requires "but for" to be satisfied.

**b. proximate cause:** issues relating to the actor's culpability- so that if purpose or knowing is an element of the offense, the **element is not established if the actual result is not within the purpose or contemplation of the actor**. If purpose or knowing is not an element, causation is not established unless the actual result is a probable consequence of the actor's conduct.

## B. Determining the limits of causation

### 1. Acts of victims

#### a. suicidal acts of victims

**i. *Rex v. Beech 1912*-**  $\Delta$  came to victim's house and threatened to break down the door if she didn't let him in. He broke down the door and she threw herself out the window. Court rules that jury must decide if the act of jumping was the natural consequence of the conduct of the  $\Delta$  and if the bodily injury was the result of the conduct of the  $\Delta$ .

**ii. *Stephenson v. State 1932*-**  $\Delta$  kidnapped the victim and sexually assaulted her. They stopped, she bought some poison and took it. When she died a month later, it was from a combination of infections from bite wounds of the assault, exhaustion, malnutrition and the effects of the poison. Doctors were unable to conclude that any one factor was more responsible for her death.  $\Delta$  was convicted of 2<sup>nd</sup> degree murder. Court said  $\Delta$ 's conduct was the proximate cause of the death. 1, the sexual assault rendered her mentally irresponsible. 2, the jury only had to find which cause was most responsible for the death.

#### b. other self-destructive acts of victims

i. *Shirah v. State 1989*- alcohol ran out at a party; Δ stole morphine from his father and everyone drinks some. Victim drinks half the glass and od's. Δ convicted of involuntary manslaughter. Negligence with respect to the death is all the culpability required to convict. Conviction upheld, victim's voluntary drinking of the morphine was a mere concurrent cause, not a superseding intervening cause.

**2. Complementary and concurrent acts**

a. *Commonwealth v. Root 1961*- Δ challenged the victim to a race, both were traveling at 90 mph. Δ was in the lead and the victim tried to pass, and hit an oncoming truck. Δ convicted of involuntary manslaughter. Δ argued he wasn't the proximate cause of the death; court said proximate cause has no place in criminal law; but for cause was enough.

**IX. ATTEMPT**

Criminal Thought	Solicitation	Conspiracy	Attempt	Completed Offense
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**A. Introduction:** occurs when a person, with the intent to commit an offense, performs any act that constitutes a **substantial step** toward the commission of that offense (from MPC).

- 1. **complete attempt:** actor engages in all the conduct he intends but fails to achieve ultimate criminal objective; i.e. gun jamming, bullet missing.
- 2. **incomplete attempt:** actor has not engaged in all the conduct he intended, but has nonetheless taken a sufficient step toward achievement of the criminal objective, i.e. been interrupted or changes his mind.
- 3. **inherently impossible attempt:** attempt doomed to failure because the actor is laboring under some misapprehension about the relevant circumstances, i.e. shooting someone already dead.
- 4. **merger doctrine:** attempt merges into crime if successful. Assault = attempted battery.

**B. Elements of Attempt:** what constitutes a sufficient step? Focus on what has already been done.

1. *US v. Jackson 1977*- Δ's planned to rob a bank. They had in their possession sawed off shotguns, shells, masks, fake license plates, handcuffs. They spotted the cops by the bank and fled; cops found these tools in their car. They were convicted of conspiracy and attempted robbery. The objects in their possession constituted a sufficient step- court said a substantial step must be conduct strongly corroborative of the firmness of the Δ's criminal intent.

**C. Abandonment:** many jurisdictions don't recognize this as a defense. Renunciation only available in case of incomplete attempts. Not possible if someone abandons due to enhanced risk of being caught or postponing the crime for a later time.

1. *People v. Staples 1970*- Δ rented an office over a bank with the intent to rob it. He had drilled two groups of holes into the floor but stopped before the holes went all the way through. He said he stopped for fatigue, fear, and the implications of what he was doing and said his motives changed. Court rejected this and said his steps were substantial enough. CA doesn't accept this as a defense.

**D. Legal and factual impossibility**

- 1. **majority rule:** MPC approach, impossibility is not a defense.
- 2. **traditional rule:** CA follows, legal impossibility is a defense but factual impossibility is not.
  - a. **factual impossibility:** a person's intended end constitutes a crime, but she fails to consummate the offense because of an attendant circumstance unknown to her or beyond her control; i.e. pickpocket picking an empty pocket, assailant shooting into an empty bed. Had the circumstances been as the actors believed them to be, the crime would have been consummated.
  - b. **legal impossibility:** the law does not proscribe the goal that the Δ sought to achieve. Person commits a lawful act believing she is committing a crime.
- 3. *People v. Dlugash 1977*- Δ fired a bunch of shots into the face of a victim who had just been shot by someone else. His conviction was overturned on the basis that it hadn't been proven beyond a reasonable doubt that the victim was still alive when Δ shot him. Court of appeals threw out the murder conviction because there was insufficient evidence to establish that the victim was still alive when he shot him, but he should have been charged with attempted murder.

**X. SOLICITATION:** a person invites, requests, commands, hires, or encourages another to engage in conduct constituting any felony or misdemeanor. Inchoate offense. Basis for accomplice liability. Attempted conspiracy.

**A. Majority rule:** MPC- solicitation = thoughts + an intent to encourage someone else to join in and commit an offense. Attempt to conspire.

**B. mens rea:** actor must have purpose of promoting or facilitating commission of the offense. Must have the mens rea for the act they are promoting.

**C. actus reus:** actor must command, encourage or request another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime, or would establish his complicity in its commission or attempted commission.

1. actor can be liable for encouraging already ongoing criminal activity.
2. you need not be successful in persuading criminal activity to be guilty.
3. person being solicited need not view actor's words as encouragement.
4. 1<sup>st</sup> Amendment- prohibits solicitation liability unless advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

**D. Cases**

1. *State v. Schleifer 1923*- Δ was a labor organizer. In a speech to a crowd of workers, he made numerous incitements to violence. Δ moved to dismiss because it was directed to too large a group; appellate court said it didn't matter, the incitements were directed to each person present.

2. *People v. Quentin 1968*- Δ's were hippies who put together a brochure which described how to make a firebomb and a drug. Trial court dismissed holding solicitation was not intended to cover a situation where a Δ makes a general solicitation such as a printed leaflet.

**XI. ACCOMPLICE LIABILITY**

**A. Introduction:** a person will be convicted of a target offense on an accomplice theory.

1. **majority rule:** to be guilty on an accomplice theory, one must:

a. **purposefully aid the principal:** aid includes solicitation, commanding, requesting, encouraging. If the principal does not commit the target offense, an accomplice cannot be convicted on an accomplice theory, they will be convicted of solicitation.

b. **have whatever mental culpability is required for the target offense.**

c. **accessory after the fact is still a separate offense.**

**B. Extent of participation necessary:** how much aid or encouragement must the accomplice render?

1. *US v. Buttorff 1978*- Δ lectured to meetings and advised people on how to stop paying taxes. Δ was prosecuted as accomplice to those who evaded their taxes. Court ruled words are enough to satisfy the actus reus of accomplice liability. Plus, one of the Δ's went to someone's house to give them advice.

2. *Wilcox v. Jeffery 1951*- England had a law that foreigners couldn't work in the country. Δ was a jazz writer who went to see Coleman Hawkins play and wrote a review of the show. Court found him guilty as an accomplice of Hawkins in violating the law. His presence at the show was encouragement for him to perform.

**C. State of mind necessary:** accomplice must purposefully aid or encourage principal's underlying course of conduct- purposefully instead of knowingly.

1. *State v. Gladstone 1970*- undercover agent asked Δ to buy some pot. Δ didn't have any but referred him to someone else who could sell him some, and drew a map of how to get there. Δ was prosecuted as the accomplice of the eventual seller. SC overturned his conviction due to the fact that there was no relationship between the Δ and the seller. It could not be inferred that there was any understanding to aid or abet any sale of pot. He had no stake in the venture.

**D. Withdrawal of aid**

1. **majority rule:** to withdraw one must withdraw aid or notify police in a timely manner.

- a. physical aid must be physically taken back.
- b. encouragement must be withdrawn by notifying principal.
- c. not necessary to thwart the commission of the offense.
- d. timely- must be before the offense is committed.

2. *Commonwealth v. Huber 1958*- no withdrawal. Δ lent his rifle and some ether for a robbery. The robbers asked him to participate and he said no. He didn't ask for his rifle back before the robbery was committed, he went to get it after the crime was committed.

**XII. CONSPIRACY:** an agreement between 2 or more people to commit a crime.

**A. Elements**

- 1. agreement to commit a crime:** parties understand that they are working together toward mutual or common purpose. Meeting of the minds.
  - a. common law:** object of agreement need not be criminal; if something was injurious to public health or morals, conspiracy was indictable. No longer true today.
  - b. majority rule:** object must be criminal.
  - c. *Williams v. US 1954*-** all but one were members of the Charleston police force. Charged with violation of IRS code and conspiracy to illegally transport liquor. No evidence tying them all together, no evidence of an arrangement, no meeting. Court said that's not important- these were well-organized activities that couldn't have just happened by themselves. Organization does not normally occur in the absence of pre-existing agreements.
    - i. evidence:** existence of an agreement can usually be inferred from choreographed appearance of activity.
    - ii. dangers of inferring agreement from similar acts or traits-** can get out of hand, people tied together due to race, nationality, religion, etc.
- 2. purpose to enter into an agreement:** conscious object must be to enter into an agreement. You can't accidentally enter into the agreement.
- 3. overt act in furtherance of the agreement:** at least one of the co-conspirators must engage in an overt act. Does not have to be a significant step. Ex, filling a car with gas could qualify.
- 4. purpose to promote conduct constituting the target offense:** mere knowledge that a crime will be committed is not enough, you must have the mens rea of the target offense.
  - a. mens rea:** must have-
    - i. purpose to promote** the course of conduct that constitutes the target offense +  
**(1)** in CA, purpose is presumed whenever an actor has a **stake in the venture**  
**OR whenever the target crime is a felony.** Aggravated nature of the crime- if murder is the target offense, and you give/sell a tool to someone and you know it will be used in the commission of the crime, it may be inferred that you want the crime to succeed.
    - ii. other mental culpability required by target offense.**
    - iii. Corrupt Motive Doctrine:** minority rule, incl. CA. It must be proven that co-conspirators knew that the target offense was illegal. MPC rejects this.
  - b. *People v. Lauria 1967*-** man operated an answering service that call girls used. He tolerated them, knew they were prostitutes. He was arrested for conspiracy to commit prostitution. He moved to dismiss on the basis that he lacked purpose to promote or facilitate prostitution; court dismissed. Rule is, intent of a supplier may be proven by 1, direct evidence that he intends to participate, or 2, inference that he intends to participate based on his special interest in the activity or the aggravated nature of the crime.
  - c. strict liability offenses:** conflict of authority. *Crimmins*- one cannot be guilty of conspiring to run through a red light if you didn't know it was there. *Feola*- disagreed, strict liability crimes are that way for a reason (assaulting a federal officer); you are not less morally culpable if you didn't know the person you were assaulting was a police officer. MPC silent.
- 5. inchoate offense: conspiracy does not merge into target offense (unlike attempt).** This allows law enforcement to come in at an earlier stage, like solicitation. Trying to prevent "dangerous combinations."
- 6. parties to the agreement:**
  - a. majority/MPC:** recognizes unilateral conspiracy. A person can be charged with conspiracy if he or she agrees with another person to effectuate a crime. The culpable party's guilt is not affected if the other party's agreement is feigned, i.e. undercover agents. **This approach punishes it as an individual's attempt to commit a crime by forming an illegal combination.**
  - b. common law/minority:** requires at least two parties to any conspiratorial agreement. Person cannot be convicted if the other person turns out to be undercover agent. **This approach punishes the actual formation of the illegal combination.**

**c. Wharton Rule:** where it is impossible under any circumstances to commit the substantive offense w/o cooperative action between 2 people, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy. Ex, two people planning to get together to commit adultery can't be convicted of conspiracy to commit adultery, because the crime already requires two people.

**i. MPC approach:** rejects this rule. Just because an offense requires concert is no reason to take away criminal preparation to commit it. But one cannot be convicted of both the substantive crime and the conspiracy to commit it.

## B. Scope

- 1. chain conspiracy:** parties linked together in a linear fashion. Typical drug or firearm smuggling organizations are chains. Smugglers, distributors, retailer. Moving force could be at any point along the chain.
- 2. wheel conspiracy:** several subsidiary parties are connected to a main central party. Ringleader is the hub and subsidiaries are the spokes. Harder to prove that the wheel is a single conspiracy; harder to prove purpose to promote the success of each other.
  - a. *Kotteakos v. US 1946*-** one main figure, Brown, figured out how to scam the FHA to underwrite loans. Govt. prosecuted 32 people for conspiracy to defraud, and found one conspiracy. SC overturned, the wheel metaphor didn't work even though it was easy to see Brown as the hub. But there was no rim connecting the others to each other besides the hub. Therefore, it was several 2-person conspiracies.
- 3. proving a single conspiracy**
  - a. majority rule:** parties are part of a single conspiracy as long as there exists a "community of interest" among them.
    - i.  $\Delta$  need not know of the existence** of each co-conspirator.
    - ii.  $\Delta$  need not have purpose to promote** the criminal acts of each co-conspirator, but merely to promote the general agreement.
  - b. MPC approach:**
    - i.  $\Delta$  must know of the existence** of each co-conspirator, but not precise identity. Must also know that these co-conspirators have agreed to promote the commission of the same offense  $\Delta$  has agreed to promote.
    - ii.  $\Delta$  must have purpose to promote** the criminal acts of each co-conspirator.
  - c. *US v. Bruno 1939*- hybrid conspiracy-** group of smugglers, middlemen and two sets of retailers convicted of conspiracy to smuggle/distribute narcotics. Court held there was only one conspiracy; although the retailers had not met the smugglers, they knew they existed and had to have wanted them to succeed. This was analyzed as a chain. Decision later criticized, should have been seen as a chain linked to a wheel, it is doubtful the two retailers wanted each other to succeed.
- 3. criminal procedure**
  - a. exception to hearsay rule:** statements of alleged co-conspirators can be admissible.
  - b. venue:** all alleged co-conspirators can be tried together in the same venue, in any place where any of the overt acts occurred.
  - c. Pinkerton doctrine: (minority rule, followed by feds)** conspirator is liable for all foreseeable crimes committed in furtherance of the conspiracy so long as he was a member of the conspiracy when the crimes were committed.
    - i. *Pinkerton v. US 1946*-** two brothers were bootlegging. One went to jail, the other continued to commit offenses, then caught, then both were convicted of conspiracy. Both were convicted of all the target offenses the second brother committed while the other was in jail. The one who committed the offenses became the agent of the imprisoned brother by agreeing to commit the crimes in the beginning. He authorized him to commit the crimes in his name.
    - ii. in jurisdictions rejecting Pinkerton,** prosecutors can achieve similar results if the agreement itself is considered sufficient encouragement to suffice as the actus reus for complicity.
  - d. statute of limitations:** does not begin to run until the conspiracy ends.

4. **withdrawal:** withdrawing party remains liable for conspiracy itself.
  - a. **effects:**
    - i. statute of limitations for the conspiracy begins to run,
    - ii. no Pinkerton liability for offenses committed thereafter,
    - iii. hearsay statements made after withdrawal inadmissible.
  - b. **CA approach:** conspirator must inform every co-conspirator of withdrawal.
  - c. **Fed. approach:** conspirator can withdraw by acting inconsistently with conspiracy's objectives, in a manner that should come to the attention of co-conspirators. Conspiracy does not have to be thwarted, but withdrawing conspirator must do something inconsistent with achieving the goals of the conspiracy.
5. **renunciation:** complete defense to conspiracy prosecution.
  - a. **majority rule:** conspirator may renounce by giving police timely notification or by making substantial attempt to thwart target offense.

**XIII. JUSTIFICATION:** things that are not socially undesirable; speaks to the act.

**A. Introduction:** self defense, use of defensive force to protect one's home or property, and necessity.

**B. Self-defense:** a person is justified in using deadly force against an aggressor if he or she reasonably believes such force is necessary to fend off imminent, unlawful and deadly force by the aggressor.

1. **proportionality:** actor must reasonably believe that the defensive action is proportional to the threat.

a. **People v. Goetz 1986-** Goetz shot 4 young black men on the subway who he thought were about to rob him. A grand juror asked for a definition of "reasonable belief," the prosecutor responded that it was an objective test, measured from the perspective of a reasonable person in that situation. Appellate court says that's wrong, it must be reasonable to him. Reversed. NY Court of Appeals says that is not right. By definition, anything you believe is reasonable to you. The word reasonable must connote objectivity. NY does not adopt a subjective approach.

2. **necessity:** actor must reasonably believe that the defensive action is the least drastic way to ward off the attack.

a. **retreat:**

i. **majority rule:** one need not retreat before using defensive force, even if one can do so in complete safety.

ii. **minority rule:** one must retreat before using deadly defensive force, if one knows they can do so in complete safety.

(1) **castle exception:** one is not required to retreat from one's own home; exception is if you are being attacked by a co-occupant, you do have to retreat.

(2) **People v. Tomlins 1914-** father shot and killed his son. Trial court instructed that he had to retreat if he could do so, court of appeals reversed based on recognizing the castle exception.

3. **imminence:** actor must reasonably believe that the attack is just about to occur.

a. **BWS:** not a legal defense, but a condition to support claims of self defense.

i. **elements**

(1) **learned helplessness:** unwillingness or inability to seek help, even when made available.

(2) **Walker "cycle theory":** sense of helplessness reinforced by a cycle of violence consisting of a tension building phase, explosion of violence- acute battering phase, and loving contrition phase.

ii. **imminence requirement:** cycle theory attempts to show that during the explosion phase, the battered woman reasonably perceives the entire phase as one prolonged attack.

iii. **proportionality requirement:** cycle theory attempts to show that because violence takes place along an escalating curve, the woman reasonably perceives that the next attack will be deadly.

iv. **State v. Norman 1989-** wife had been battered for 25 years, forced her to be a prostitute. He went to jail for a DUI, and beat her severely. She killed him; convicted of voluntary manslaughter on an imperfect self defense theory. Appellate court reversed,

holding she should get perfect self defense instruction, SC reversed that saying the attack was not imminent. All the evidence tended to show she had ample time to prevent further abuse.

**v. *People v. Aris***- battered wife was beaten all night and husband told her he wasn't going to let her live till the morning. She got a gun and killed him while sleeping. Convicted of 2<sup>nd</sup> degree murder, no imminence because he could have changed his mind about letting her live.

**4. reasonable perception:** self-defense is concerned with reasonable perception, not objective reality, of the person employing the defense. Reasonable perception of proportionality, necessity, or imminence, to the person using the defense.

**a. imperfect self defense:** in some jurisdictions, including CA, an **unreasonable but honest** perception of proportionality, necessity, or imminence qualifies the actor for imperfect self-defense (voluntary manslaughter). Genuine, sincere, but unreasonable belief in any of the three, it is imperfect. The unreasonableness is judged objectively.

**b. perfect self defense:** a case in which the Δ can show that he or she reasonably perceived the three factors above- proportionality, necessity or imminence. The result is an acquittal.

### C. Other uses of defensive force

#### 1. defense of property

**a. majority rule:** one may not use deadly defensive force solely to protect personal property.

**i.** some jurisdictions permit deadly defensive force to prevent forcible property crimes, i.e. robbery is committed with force or threat of force.

**ii.** LA allows deadly force to be used in carjackings.

#### 2. defense of home: conflict of authority.

**a. common law approach:** home dweller may use deadly force if he reasonably believes it is necessary to prevent imminent and unlawful entry.

**b. middle approach:** deadly force authorized based on a reasonable belief that the intruder intends to commit a felony.

**c. narrow approach:** deadly force authorized based on a reasonable belief that the intruder intends to commit a forcible felony, or otherwise poses a risk of death or bodily harm.

#### 3. use of spring guns or mechanical devices

**a. common law rule:** one has a defense to homicide by spring gun if he would have been privileged to use deadly force had he been present.

**b. MPC/modern trend:** one is never privileged to protect one's habitation by spring guns or other devices.

**i. *Bishop v. State 1987***- Δ set up a spring gun because there had been many break ins to his trailer. An acquaintance tried to open the front door and was killed. Δ tried to say that the deceased was trying to break in so he would have been able to shoot him had he been there, court said no use of spring guns ever because they are without mercy or discretion.

**D. Necessity:** lesser evils defense; person made the best of a bad situation.

#### 1. majority rule: actor must reasonably believe:

a. committing criminal act is necessary to prevent imminent harm;

b. the harm prevented is greater than the harm caused by the criminal act; and

c. that actor is not at fault for creating the emergency.

#### 2. weighing of harms: done from society's perspective, not actor's.

**3. *Regina v. Dudley & Stephens 1884***- 4 sailors on a lifeboat with no food; youngest one started drinking seawater. The others cut his throat and ate him to survive. They were found guilty and sentenced to death but sentences were later commuted to 6 months.

#### 4. defense to escape from prison:

##### a. Lovercamp requirements, in CA, must have all 5:

**i.** prisoner faced with death or forcible sexual attack;

**ii.** no time for a complaint, or history of futile complaints;

**iii.** no opportunity to go to the courts;

**iv.** no evidence of force or violence used towards guards or other innocents;

v. prisoner immediately reports to the proper authorities when he is safe.

b. *State v. Reese 1978*- Δ was raped, and threatened with further assault. He notified his counselor and the authorities. He was found 3 days after his escape and told police he was going to contact a lawyer but hadn't had a chance. He was convicted because he hadn't gone to the authorities when he was safe.

c. **sliding scale approach:** the 5 factors go to the credibility of the witness, but if one factor is weak, it can be strengthened by another strong factor.

**XIV. EXCUSE:** while not socially desirable, understandable in certain situations; focuses on the actor.

#### A. Duress

1. **majority rule:** a person will be acquitted of any offense except murder if the act was committed under the following circumstances:

- i. actor reasonably apprehends unlawful threat of imminent death or serious bodily injury to him or member of his immediate family;
- ii. there is no reasonable means of escape; and
- iii. the actor is not at fault for being in the coercive situation.

2. **Requirements for the defense:**

- i. the threat must emanate from a human being.
- ii. deadly force must be threatened.
- iii. the deadly force must be present, imminent, and impending- threat of future harm is insufficient.
- iv. person may not claim the defense if the threat is directed at a person unrelated to the actor.

3. *State v. Scott 1992*- victim was being inducted into a gang; was beaten and tortured on two separate occasions. Δ tried to raise a duress defense, that he was scared of retribution from the leader of the gang if he did not participate in the torture of the victim. Court ruled the coercion was not present and imminent, or continuous, and there was evidence he had a reasonable opportunity to escape. Also, he knowingly associated himself with a criminal gang.

4. **Duress as a defense to homicide**

- i. most states do not allow duress as a defense to an intentional killing.
- ii. felony murder- split, some states allow this as a defense, others disallow it in every case, regardless of the Δ's mens rea.

5. **MPC approach:** requires a threat of physical injury, but does not limit the defense to cases involving an imminent threat of death or serious bodily harm.

**B. Entrapment:** The defense of entrapment exists where a law enforcement official, or someone cooperating with him, has induced D to commit the crime.

1. **Two tests** used to determine if the defense is valid:

i. **subjective (predisposition): the majority test**, and the one used in the federal system- **Was the Δ predisposed to commit the type of offense with which he is charged?** Entrapment exists where:

- (1) the government originates the crime and induces its commission; and
- (2) Δ is an innocent person, i.e., one who is not predisposed to committing this sort of crime.

ii. **objective (police conduct): minority rule; easier for Δ to meet. Was the offense induced by methods creating a substantial risk that such an offense would be committed by persons other than those who are ready to commit it?** Under this rule, entrapment exists where the

- (1) government agents originate the crime, and
- (2) their participation is such as is likely to induce un-predisposed persons to commit the crime, regardless of whether D himself is predisposed.

2. **Cases**

i. *US v. Russell 1973*- Δ charged with manufacture/sale of methamphetamines. He argued he had been entrapped when a fed offered to supply a necessary chemical in return for ½ the drugs produced. Court upheld his conviction due to his predisposition to commit the crime; "the drug manufacturing enterprise began before the agent appeared and continued after the agent left the scene." Applied the subjective test.

ii. *Jacobson v. US 1992*- Δ convicted for receiving through the mail child pornography. SC reversed, finding the govt. overstepped the line between setting a trap for the “unwary innocent” and the “unwary criminal,” and did not establish that the Δ was predisposed to commit the crime. Rule is, predisposition is measured as of the time of the first contact with the Δ and the govt., not at the time the Δ commits the crime. Majority says that at the time the last catalog was sent he was predisposed to commit the crime- at the beginning, he was only predisposed to view the materials, but this was not the crime he was charged with.

C. **Insanity:** complete defense. If you are found insane, you will be acquitted.

1. **M’Naghten rule: majority rule**, actor suffered from such a mental disease or defect that he did not know that his act was wrong.

a. mental impairment must result from a disease; doesn’t include voluntary intoxication.

b. impairment must be total, Δ can’t be able to tell right from wrong in any aspect of his life.

2. **MPC rule § 4.01:** as a result of mental disease or defect, actor lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

a. *US v. Freeman 1966*- Δ prosecuted for selling drugs. His defense was that as an addict he had organic and structural damage to his brain. He had awareness of what he was doing but no understanding of what this meant. He was found to be sane- court remanded under instructions to re-try under MPC standard.

3. **comparing M’Naghten and MPC:**

a. **degree of impairment required:** M’Naghten requires total, MPC requires substantial.

b. **depth of cognition sufficient to defeat defense:** M’Naghten requires knows; MPC requires appreciates, regarding the difference between right and wrong.

c. **volitional impairment a defense?** M’Naghten no- if he knows the nature and quality of his act, it doesn’t matter if he couldn’t control himself. No defense. MPC yes- if he lacks the substantial capacity to conform his conduct to the requirements of law, it can be a defense.

4. *US v. Lyons 1984*- Δ prosecuted for knowingly obtaining narcotics; he claimed his brain damage prevented him from controlling his behavior, but did not prevent him from seeing the world as it was. Trial court disallowed insanity defense on the grounds that his mental defect was his own fault due to drug use. On retrial, court went back to M’Naghten, said volitional prong should be dropped because it can’t be measured.

5. **stress and personality disorders**

a. **pathological gambling**

b. **post traumatic stress disorder**

c. **post-partum psychosis**