

I. Overview of the Criminal Justice System

A. Introduction

1. Architecture of the Criminal Justice System:

- a. Most criminal law is state law. Some states have adopted the MPC.
- b. Legislative branch makes criminal law, there is no such thing as a common law crime.
- c. Discretion- People involved (police, prosecutors, judges etc.) make decisions about how justice will best be served. Allows flexibility in dealing with cases. Sometimes discretion can be problematic, as when police don't get involved in DV cases (policy changed from "hands off" to requiring arrests).

Example- Problem of Catherine Sweeney:

Irish woman drove on wrong side of street, killed motorcyclist. Should prosecution charge her with misdemeanor or felony vehicular manslaughter, or not charge her at all?

2. Purposes and functions of Criminal law:

- a. To maintain social order
- b. To prohibit conduct that jeopardizes social order
- c. Mechanism for atonement

3. Civil v. Criminal law

a. Differences:

- i. Harm to individuals v. harm to society
- ii. Monetary recovery v. punishment/sanctions
- iii. Who brings action? State v. individual party
- iv. Differences in proceedings: Higher burden of proof in criminal law, constitutional protection
- v. Common law v. statutory law

b. Exceptions to differences:

- i. Can be fined for crimes
- ii. Civil law can prohibit actions through injunctions
- iii. State can bring civil actions
- iv. Some cases can be dealt with in either system
- v. Civil system does have "punitive" damages

c. What is distinctive about criminal law:

- i. Moral blameworthiness: We condemn criminals because they've violated our core social values, and their conduct is "immoral."

4. Constitutional Principles

a. Due Process and Fair Warning- The process we have to go through before we take away someone's liberty. This includes the concept of fair warning. This doctrine is stated in the 5th and 14th Amendments of the Constitution.

- i. Ex Post Facto- Legislatures are forbidden from criminalizing acts that

were innocent when done or increase the severity of the punishment for the crime after the crime has been committed. This ensures fair warning of what constitutes a crime and what its consequences are.

ii. Principle of Legality- forbids judicial crime creation. This also ensures fair warning.

Example- Keeler v. Superior Court

*Man beat up ex-wife when he found out she was pregnant in order to "get rid of" fetus. Fetus died. Man charged with murder. The court rejected the prosecution's argument that the statute should be read in terms of changing medical technology to allow "viable fetuses" to come into the definition of "human being." Instead, they interpreted "human being" to mean "person's born alive" as the legislature intended in 1850. **They said they couldn't expand the meaning of the statute because that would usurp the legislature's authority. Also, deciding after the fact that the man's conduct constituted murder would violate his due process, because it would retroactively increase the severity of his crime and its penalty.***

The CA legislature revised the definition of murder after this case to include a fetus.

iii. Void for Vagueness/Specificity- Penal statutes should be clear and understandable, not open to interpretation. Courts can strike down laws for being unconstitutionally vague. This ensures that individuals have fair warning of what the law is.

iv. Rule of Lenity- if there is any ambiguity in a law, it should be interpreted in a way that favors the defendant. This is not a constitutionally protected right, and the MPC did not adopt this rule. The court applied this rule in the Keeler case above.

b. Civil Commitment- due process only protects individuals charged with a crime. Sometimes a person can be committed without having engaged in a crime. They are charged in the civil courts as being so inherently dangerous to themselves or to others that they need to be committed.

Example- Kansas v. Hendricks

Man committed under Kansas' Sexually Violent Predator Act, which commits persons who, due to mental abnormality or personality disorder, are likely to engage in acts of sexual violence. P argued that the statute was a criminal law because its purpose is punishment. If it was criminal, it would be unconstitutional to charge him because of double jeopardy and ex post facto. The majority argued that it wasn't a criminal statute because it did not include the two main purposes of criminal punishment, deterrence and retribution. Instead, the purpose of the commitment was to protect the public and help him. This was a very narrow definition of punishment. Split court (5-4).

B. Punishment- Theories, purposes, limits

1. Retributive- those who choose to do wrong acts deserve punishment.

a. Retributivism

i. Culpability Retributivists- believe punishment should fit the culpability/moral blameworthiness of the crime.

ii. Harm Retributivists- believe punishment should fit the amount of harm done in certain crimes.

iii. Common Themes

- Punishment should fit the crime, eye for an eye, just desserts.
- Backward looking- purpose is to punish what a person has done in the past. Results of punishment are not thought about.
- Treats offenders in a uniform way. Punishment fits the crime, not

the criminal.

ii. Limits

- Requires proportionality- how much punishment is appropriate for a crime?
- Requires ordinality- ranking crimes according to their seriousness.

2. Utilitarian- forward looking. Punishment serves a particular purpose.

a. Deterrence

i. Specific Deterrence- purpose is to reduce frequency of the criminal behavior of an individual.

ii. General Deterrence- purpose is to make other people less likely to perform crimes because they don't want to be punished.

iii. Common Themes

- Notion that people are rational
- In order to work, negative consequences of the punishment have to outweigh positive benefits of the crime.
- Requires that people have notice of punishments.

iv. Limits

- Radically present oriented- some people are not future looking.
- In some groups, a person's status is raised by criminal behavior and prison time.
- Do people who commit crimes engage in rational thinking beforehand?
- Assumes that a person's livelihood is better outside of jail.
- Hard to determine how long of a punishment is necessary in order to deter.

b. Incapacitation

i. Selective Incapacitation- looks at various factors of an individual in deciding how long to lock him/her up. Assumes that we can accurately identify those who are most likely to reoffend and lock them up for a longer period of time.

ii. Elective Incapacitation- takes everyone that engages in a certain group of crimes and locks them up for a certain period of time. Punishes every person committing the same crime equally.

iii. Common Theme

- Lock 'em up, they won't be able to commit an offense

iv. Limits

- Success of these theories depends on our ability to make predictions accurately. How accurate is accurate enough? Should we rely on statistics? Judicial discretion?
- Assumes we are locking up the right people
- Assumes they won't commit crimes in prison
- In selecting who is going to reoffend or who is more dangerous, it is easy to be racist/classist.

c. Rehabilitation

i. Common Themes

- Offenders can be "changed" into non-offenders if given the proper

“treatment.”

- Is only used for first-time, non-violent drug offenders today, which has been found to be more effective than a prison sentence.

ii. Limits

- Need to have some sense of what to do in order to change people.
- Assumes that people can be changed.
- No evidence that it works, except for drug treatment.

d. Denunciation/Condemnation

i. Common Themes

- Sends a message to society and the offender about what conduct is okay, what isn't, and what our social values and norms are.
- Provides a “moral education” by condemning criminal conduct and by stigmatizing offenders and their behaviors.

e. Restorative Justice

i. Common Themes

- Promotes dealing with the offender by trying to restore offender to the community.
- focuses on the victim, also wants to restore victim.
- sometimes it requires that the offender make things right with the victim.

Example- A kid killed a man's wife and child by crashing into their car while drag racing. At first, the man wanted the kid to go to jail. But he changed his mind after talking to the kid. Now the kid and the man together talk to schools about the dangers of reckless driving.

d. Constitutional Concerns

i. The Eighth Amendment- Forbids cruel and unusual punishment, including sentences that are “grossly disproportionate” to the crime.

ii. CA Three Strikes Law-

- The US supreme court upheld the three strikes law as being constitutional in ***Ewing v. California***. The three strikes law is designed to increase prison terms of repeat felons. If a person has committed one or more felons and commits a new felony, that person will be subject to a greater sentence than a first time offender would be.
- The trial courts may avoid imposing a three strikes sentence by reducing certain felonies (wobblers) to misdemeanors, or by vacating allegations of prior felony convictions.

Ewing v. California- D was sentenced 25 years to life for stealing three golf clubs under the three strikes law. He had four felonies of robbery and burglary on his record. The majority used four principles to uphold the law: 1. Deference to legislature, 2. Courts should not try to impose a single theory of punishment, 3. Fed. Government should not tell states what to do, 4. Objective factors (not clear). Dissent applies ***Solem v. Helm*** test and compares his sentence to many different things: 1. Other jurisdictions, 2. Sentences in CA before the three strikes law, 3. Other more serious crimes that first-time offenders receive shorter sentences for. The dissent found that the three strikes law is grossly disproportionate to the crime.

II. The Act Requirement

A. Voluntary Acts

1. Requirements of crimes
 - a. Voluntary Act (Actus Reus)
 - b. State of mind (Mens Rea)
 - c. Result (for some crimes)
 - d. Causation (only w/result crimes)
2. Act
 - a. Defined: a willed muscle contraction, external manifestation of will.
 - b. Not included in Actus Reus:
 - i. A reflex or convulsion
 - ii. A bodily movement during unconsciousness or sleep
 - iii. Conduct during or resulting from hypnotic suggestion
 - iv. A bodily movement not a product of the effort or determination of the actor.
 - c. Policy
 - i. Thoughts don't cause social harm
 - ii. Intent (mens rea) is usually determined through conduct
 - iii. Act must be voluntary- how can we deter people from things they have no control over?
 - d. Underlying Assumptions:
 - i. We have free will
 - ii. If people are engaging in acts, it is because that is what they want to do, they can control their actions.
 - e. What Act?
 - i. Sometimes the act does not have to be **directly** related to the harm. The act does not have to be when the harm occurs.

People v. Decina- Person has history of epileptic seizures. He had an epileptic attack while driving and killed four young girls. **The court moved back the time frame and held that his voluntary act was getting in a car to drive knowing that he was prone to seizures.** He was convicted for driving in a reckless or culpably negligent manner, whereby a human being is killed.

B. Omissions

1. Defined: An act is not an act, when there is an omission- in other words, **failure to act**, where a person has a **duty to act**.
2. A person has a duty where:
 - a. A duty is imposed by **statute**. Example: The CA Penal Code requires that sex offenders register with local law enforcement agencies. Failure to do so is a crime.
 - b. There is a **Special Relationship**. Example: Courts have held that parents have a duty to provide medical treatment for their children.
 - c. Where one assumed a **contractual** duty to care for another.
 - d. Where one has **voluntarily** assumed the care of another and **secluded** the helpless person so that others could not aid in care.
 - e. Special duties of a **landowner**.
 - f. A duty to **control** third parties, such as children or employees.
 - g. D **creates a situation of peril**. Example: a person causes someone to fall while rock climbing. That person has a duty to help the fallen person.
3. Good Samaritan Laws (Vermont)
 - a. Defined: a person has a duty to act when someone else is in trouble, if they

can help out without putting themselves in danger.

- b. Benefits: It disturbs us that people who know someone needs help and can help that person, but does not help. Example: case of David Cash who walked out of the bathroom in a casino as his friend sexually molested and killed a 7 year-old girl.
- c. Problems: How do we know what is required? Does it infringe on people's liberty? How can you make the laws less vague and more specific?

No Voluntary Act

Dorothy
Involuntarily
Kills Witch

Some Act (Open up time frame)

Newton
Boards plane
with loaded gun

Decina
Has hx of seizures
but decides to drive

C. Possession

1. Quasi-Act Defined:

- a. Person must knowingly procure/receive drugs. They have to know what it is. **or**
- b. Person becomes aware of his possession for a sufficient period of time to be able to get rid of it. In other words, a person has a legal duty to get rid of drugs within their control, failure to do so is a crime.
- c. Knowledge alone is not the equivalent of possession. A person must have some control over the possession. Example- ***People v. Ireland held that it was insufficient to convict D of possession simply because he resided in the location where the substance was being kept. The court determined that there must be some evidence tying D to the drugs.***

2. Constructive Possession

- a. Even if a person does not have physical possession of the drugs, if he is knowingly in a position or has a right to exercise some control over the drugs, then we can construe his conduct as possession.
- b. Courts have to draw a lot of inferences and use circumstantial evidence to convict someone of possession under this theory.
- c. Mere proximity is not enough, though it helps. There still has to be other circumstantial evidence that can be used to infer that someone has possession.

People v. Wheeler- Police broke into hotel room and found four women inside and heroin underneath a pillow. Only one woman was convicted of possession under the theory of constructive possession. The court drew inferences from the facts including: D lived in the room, D occupied the bed where the heroin was found, D failed to open door when police knocked, D was standing near a toilet that was being flushed as police entered, D gave a fake name to police. The totality of the circumstances satisfied the court to convict D of possession.

D. Status Crimes

1. Rule: Status crimes are cruel and unusual punishments in violation of the 8th and 14th amendments.
2. Concerns:
 - a. No act, instead it is a label we give to a person.
 - b. If you are something, you can be continuously and perpetually guilty.

3. Examples: Drug addicts, homeless persons, alcoholics

Robinson v. California- A CA statute made it a crime to be addicted to the use of narcotics. D was convicted under this statute. The evidence was scar tissue and needle marks observed on her arms by police. The Supreme Court held that this statute inflicted a cruel and unusual punishment in violation of the 14th Amendment.

III. The Mens Rea Requirement

A. Overview

1. Definition- State of mind (a "guilty mind"). We require an accompanying mental state for crime (along w/ act). We require Moral Blameworthiness.

2. MPC

- a. Sets up a hierarchy of culpable mental states. Example- Doing something purposely is either about the same or worse than doing something knowingly.
- b. Four mental states:
 - i. Purposely
 - ii. Knowingly
 - iii. Recklessly
 - iv. Negligently
- c. Under a retributive point of view, it matters which mental state is considered worse. That is how it is determined how a person should be punished.
- d. 30 states have adopted the MPC, other jurisdictions are influenced by it.
- e. MPC defines culpability for each element of a crime:
 - i. There are **three elements: Circumstance, result, conduct**
 - ii. Some crimes require results, but not all.
 - iii. Conduct falls more into the Actus Reus category rather than Mens Rea. The focus is more on the result and attendant circumstances

		MPC Chart <i>Culpability Definitions</i>		
		<i>Type of objective elements</i>		
		<i>Circumstance</i>	<i>Result</i>	<i>Conduct</i>
Purposely:	He is aware of such circumstances or hopes they exist.		It is his conscious object to cause such a result.	It is his conscious object to engage in conduct of that nature.
Knowingly:	He is aware that such circumstances exist.	He is aware that such circumstances exist.	He is aware that it is practically certain that his conduct will cause such a result.	He is aware that his conduct is of that nature.

Recklessly:	He consciously disregards a substantial and unjustifiable risk that the material element exists	He consciously disregards a substantial and unjustifiable risk that the material element might result from his conduct.
Negligently:	He should be aware of a substantial and unjustifiable risk that the material element exists.	He should be aware of a substantial and unjustifiable risk that the material element might result from his conduct

Example- if you want to kill a police officer, the attendant circumstances are that you must be aware that the person is a police officer or hope that the person is a police officer to be charged with purposely killing a police officer.

- f. Clarifications of terms:
- i. The difference between knowingly and recklessness is a difference in how sure a person is that certain results will happen.
 - ii. **Unjustifiable:** risk/benefit calculus- was the risk worth taking? Example- a person speeds because someone in car is having a heart attack and they are trying to get to a hospital. Maybe it is justifiable.
 - iii. **Negligence:** Culpability comes from one's failure to perceive risk. This failure must be a **gross deviation** from the standard of care a reasonable person would take in the same circumstances.
 - iv. **Recklessness:** How do you prove a conscious disregard of a risk a person is aware of? Courts and juries must infer from conduct. It is different from negligence- Not should have known, **must** have known of risks.
 - v. **Ostrich cases:** Some courts say a defendant acts **knowingly** when he was aware of a high probability that a certain fact existed but deliberately avoided finding out for sure to escape criminal liability. No defense unless the defendant actually believed that the fact did not exist.

3. Common Law

- a. General Intent
- i. General idea of moral blameworthiness.
 - ii. Used when there is no mental state defined in statute.
 - iii. Can **transfer intent**: if a person has a blameworthy state of mind, this state of mind can be transferred to consequences the person might not have intended from their acts.

Example of Transferred Intent: Person intends to steal rum stored in a ship. He lights a match to see, the rum catches fire, and the ship burns down. Under a general intent theory, he can be held guilty of arson, even though he intended to steal.

- b. Specific Intent
- i. Something more is required than the intent to do the act.

- ii. Usually, there is a mental state defined in the statute.
- iii. Cannot transfer intent.

Example of Specific Intent: *Breaking and entering is a general intent crime; breaking and entering with the intent to commit a felony inside (burglary) is a specific intent crime.*

State v. Peery: *Man accused of indecent exposure- walked in his house naked in plain view of people outside. Majority says it is specific intent crime. Knowing that he might be seen is not enough, he must have had the intent to cause a reaction. He was acquitted. Dissent says it is a general intent crime, and because he intended to do the act he is guilty.*

B. Defenses

1. Basic Principle- ignorance or mistake of fact or law is a defense if it negates the existence of a mental state essential to the crime charged.

2. Mistake of Fact

a. Common Law Jurisdictions

- i. **General intent crime-** D will not be held liable if the mistake of fact was **reasonable**. Unreasonable acts imply a blameworthy mental state.

Gordon v. State: *Gordon votes believing he is 21. Mistake was reasonable because his mother testified that he was 21, and a person receives knowledge of his age from his parents. Because illegal voting is a general intent crime, D cannot be guilty.*

- ii. **Specific intent crime-** D will not be held liable if the mistake of fact negates the mental state required for the crime. (But still might be held liable under another statute with a lower state of mind requirement.)
- iii. **Strict liability crimes-** A mistake of fact will not exculpate under any circumstances.

b. MPC Jurisdictions

- i. **Generally-** D will not be held liable if the mistake of fact negates the mental state required. (But D might be held liable under a different statute with a lower state of mind requirement.)

Example: *A woman who mistakenly kills a person while deer hunting cannot be guilty of murder which requires the purposeful or knowing killing of a human being. But she might be guilty of criminal negligence (she should have known that by shooting in that direction she might shoot someone) or recklessness (she did realize that by shooting in that direction she might shoot someone, but disregarded that risk.)*

- ii. **Strict liability crimes-** A mistake of fact will not exculpate under any circumstances.

3. Mistake of Law

a. Basic Principle

- i. Generally, "ignorance of the law is no excuse," but there are some exceptions to this rule that are applicable to all types of crimes (strict liability, general, and specific intent).

b. Reasoning for Rule

- i. If it were an excuse, it would be hard for prosecution to prove that D knew the law, so many might escape liability, and
- ii. It would take away incentive for people to learn the law, and
- iii. It would reward ignorance.

- iv. Every now and then there will be an unfairness to someone, but the utilitarian benefits to society due to this principle outweighs this concern.
- c. Common Law & MPC Jurisdiction Exceptions
 - i. **Due Process Exceptions**- The state failed to publish the law, or there was not sufficient notice to persons in D's situation as to what conduct is prohibited or required by the law.
 - ii. **Reasonable/Good Faith reliance**- D reasonable relied on an official interpretation of the law, later determined to be invalid or erroneous, such as (1) a statute; (2) a judicial decision or opinion; (3) an administrative order or grant of permission; (4) an official interpretation of the public officer or body charged by law with responsibility for the interpretation.
 - iii. **Mental State Exceptions**- Situations in which the word "knowingly" or "willfully" is strategically placed in the statutes to require understanding of the law as a condition of culpability.
 - iv. **Omission and Passive Act crimes**- Some courts say these crimes should require that the person knows the law to prosecute them. This can be accomplished by a notice requirement.

Lambert v. California: *D convicted of failing to register in LA as a previously convicted felon. Court held that D must have known of the law to be guilty, because the principle of due process requires notice which is important in situations where a passive person unaware of any wrongdoing is charged with a crime.*

- d. Reasoning for Exceptions
 - i. If someone makes a good faith effort to understand the law, we want to encourage this, not to punish a person that reasonably relies on any of the above.
 - ii. **Entrapment by estoppel**- stops officials from misleading people about the law and then prosecuting them for violating the law.

4. Voluntary Intoxication

- a. Common Law Jurisdictions
 - i. **General intent crimes**- Not a defense.
 - ii. **Specific intent crimes**- If the voluntary intoxication negates the specific intent required for the crime, than it is a defense. However, 20 states have abandoned this defense in specific intent crimes.

Example: *Burglary could be a situation where specific intent could be negated by intoxication, if a drunk person breaks into someone's house, thinking it is his own, to sleep.*

- iii. **Reason for abandoning the defense**- Helps *deter* people from intoxication which results in unlawful behavior, want to *incapacitate* people who can't control their behavior, fair to punish them for crimes other sober people would be liable for (*retributive*)
- b. MPC Jurisdictions
 - i. Not a defense unless it negates an element of the crime.
 - ii. However, if the actor due to voluntary intoxication is unaware of a risk that he would have been aware of if he was sober, and recklessness is an element of the crime, than voluntary intoxication is not a defense.

IV. Strict, Vicarious, & Corporate Liability

A. Generally

1. Purpose: There is no mens rea requirement in strict liability, vicarious liability, corporate liability, and public welfare crimes. Thus, the prosecution is relieved of the burden of proving mens rea.

2. Reasons for eliminating mens rea requirement:

- a. Public welfare is more important than individual interest in these crimes.
- b. The individuals involved in the crimes have taken on or are in a position of responsibility.
- c. This responsibility has heightened requirements for their conduct.
- d. This responsibility has to do with inherently risky endeavors that has a huge potential for harm to the public.

3. Policy: We hold individuals to a higher standard when they take on a responsibility by knowingly engaging in risky behaviors.

4. Excuse: Relies on prosecutorial discretion to weed out cases where D has done everything possible to prevent crime (as in vicarious liability where D attempts to prevent employees from committing crime).

B. Punishment

1. Generally: Most Strict Liability crimes do not involve incarceration as punishment (the major exception is statutory rape). Instead, the actor is usually fined.

2. Reasons:

- a. **Mala in se v. Mala Prohibitum**: Mala in se crimes are crimes that are bad in themselves, immoral acts. Mala Prohibitum crimes are bad because we say they are, we prohibit the act. Strict liability crimes are Mala Prohibitum.
- b. **MPC**: does not call these prohibited acts "crimes." Instead, calls them "violations."
- c. **NO Mens Rea Required**: Because actor is not culpable (most of the time), actor should not be incarcerated, because incarceration would violate due process.

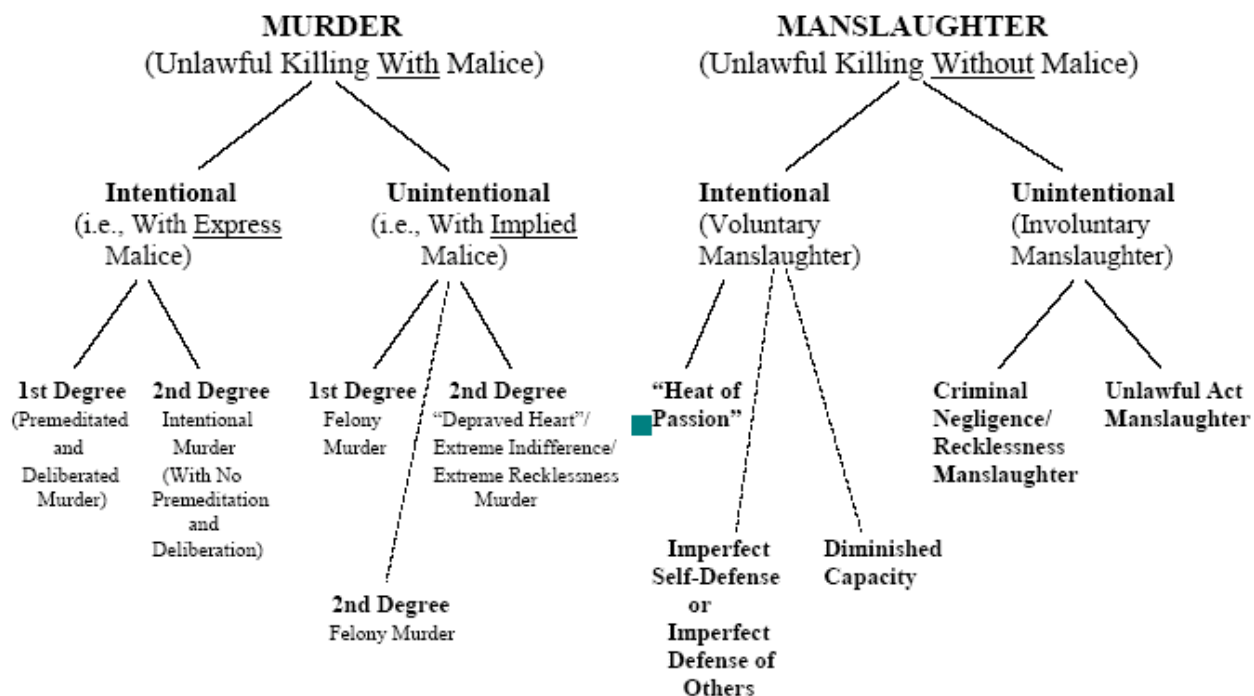
Commonwealth v. Koczvara- Owner of tavern charged with violating liquor code when employees sold beer to minors. Fined and sentenced to three months in jail. Court held that D is criminally liable for acts of employees (vicarious liability) but cannot be imprisoned because he lacks mens rea. His liberty should not be denied because an employee exercised poor judgement.

V. Homicide

A. Intentional Homicide (common law)

1. 1st Degree Intentional Murder:

Elements:



CRIMINAL LAW
(Weithorn)

* Not all categories are recognized in all common law jurisdictions, particularly where you see a broken line (- - -).

- a. Requires (express) malice aforethought
- b. Requires premeditation and deliberation

2. 2nd Degree Intentional Murder:

Elements:

- a. Requires (express) malice aforethought
- b. **No** premeditation and deliberation

Policy: The underlying policy idea is that premeditated killers are more culpable than spontaneous killers (this view has been highly criticized).

3. Voluntary Manslaughter (Heat of Passion):

Elements:

- a. Requires malice aforethought
- b. **No** premeditation and deliberation
- c. Requires extenuating circumstances:
 - i. Person experiences adequate provocation
 - ii. Provocation led to individual being in a particular emotional/mental state.
 - iii. In some states, passions must not have cooled by the time the act was committed (many states have dropped this requirement) .

- d. Two other elements that constitute voluntary manslaughter in *some* states:
 - i. Imperfect Self-Defense: Person acts with *unreasonable* and *mistaken* belief that they needed to defend themselves from harm.
 - ii. Diminished Capacity

Policy:

- a. Acts as a concession to our failings as human beings- assumes that we are unable to act reasonably in certain situations.
- b. While we may be sympathetic to this emotional state, we still don't condone it.
- c. Extenuating circumstances are such that we want to reduce liability, persons are less culpable than "ordinary" intentional killers.

4. Clarification of Terms:

Malice Aforethought-

- a. Definitions: (express malice) intention to cause death, or (implied malice) knowledge that the act will probably cause death.
- b. Elements:
 - i. Can be express or implied. Express malice is an intentional, preplanned, deliberate killing, motivated by ill will. Malice is implied when killings result from extremely reckless or wanton conduct.

Premeditation and deliberation-

- a. Definitions: Premeditation: formation of plan. Deliberation: thinking about plan, thinking about alternatives, letting it roll around in one's mind. (A more lax interpretation of deliberation is intentionality, i.e. she *deliberately* took the gun...)
- b. Elements:
 - i. Actor frames in his mind a scheme (plan) of murder.
 - ii. No set period of time fixed by the law as necessary to form plan (time frame can be very short).
 - iii. It is left up to the jury whether a plan could have been formed based on the facts of the case.
- c. *People v. Anderson - Used 3-prong test to find premeditation:*
 - i. Planning- facts about what D did prior to killing to point to some planning activity.
 - ii. Motive- Facts about D's prior conduct or relationship with victim that could infer a motive.
 - iii. Manner of killing- Facts about the nature of killing that would infer that it was so "exacting" as to have been based on a preconceived design.

Provocation-

- a. Usually has to be one very strong provocative event, some states (including CA) will consider a series of events (i.e. DV).
- b. Must be adequate/reasonable provocation. Traditionally, this was limited to certain situations (i.e. male finds wife committing adultery). Mere words are usually considered insufficient.
- c. Juries decide what constitutes reasonable provocations, based on a "reasonable person" standard. It is never completely a subjective standard, but sometimes not completely objective standard either: "ordinary 15-year old" or "ordinary battered woman."
- d. Feminist perspective: What should constitute adequate provocation is an act or series of acts already condemned by society (would eliminate

adultery as adequate, but would include DV cases).

B. Intentional Homicide (MPC)

1. Murder: Does not separate murder into degrees.
2. Voluntary Manslaughter: It is manslaughter if there is a reasonable explanation or excuse for extreme mental or emotional disturbance.
 - a. No specific mention of provocation; requires a reasonable provocation or excuse.
 - b. No requirement that insufficient time have passed for passions to cool.
 - c. Does not say that mere words are not adequate.
 - d. Reasonableness is determined from the “viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”
 - e. No restriction to single provoking event as opposed to a series of events.

C. Unintentional Homicide (Common Law)

1. 1st degree felony murder:

Elements:

- a. Requires (implied) malice aforethought. It is implied from the fact that the actor committed a felony.
- b. Requires a felony (other than murder). Usually the type of felony required is listed in the statute.
- c. Mens rea is required for the felony, but no mens rea is required for the killing. Thus, there is strict liability for *any death* that occurs in the commission or attempted commission of a felony.
- d. Each co-felon is responsible for the killing.

2. 2nd degree felony murder:

Elements:

- a. Requires (implied) malice aforethought. It is implied from the fact that the actor committed a felony.
- b. Requires an “inherently dangerous” felony (other than the ones listed in 1st degree felony murder rule).
- c. No mens rea for the killing required.
- d. Each co-felon is responsible for the killing.

Policy:

- a. The felony murder rules are the most criticized laws, but also the most resilient. They are usually criticized for making murder a strict liability crime.
- b. 2nd degree felony rule has been criticized in light of the “principle of legality” for being too vague. What is “inherently dangerous?” *People v. Hansen* court ruled that inherently dangerous felonies are those that carry a “high probability” of death. But statistics show low rates of homicides in the commission of felonies listed in 1st degree.
- c. Proponents say both felony rules might make a felon regulate his co-felons better.
- d. Some say they may make felons act more “carefully.”

The Merger Doctrine:

- a. Rule: the felony murder rule does not apply where the only underlying committed is assault or an integral part of the homicide.
- b. Reasoning: Most homicides are the result of assault. The application of felony murder rule to assault would relieve the prosecution in the great majority of homicide cases the burden of having to prove mens rea. It

would cause all manslaughters to be murders.

- c. Criticism:
- i. Holds someone who did not intend to hurt someone strictly liable for killing, while a person who did intend to hurt someone is not strictly liable.
 - ii. Difficult to distinguish what is and what is not an integral part of the homicide.
 - iii. “Inherently dangerous” felony rule and “merger doctrine” are contradictory.

People v. Hansen- decided that firing a gun at house with the intent to scare was not an integral part of the homicide. Thus, merger doctrine did not apply. The court determined it was an inherently dangerous felony, so D was convicted of 2nd degree felony murder.

The Agency Doctrine:

- a. Agency Doctrine (majority rule): felon(s) directly responsible for any deaths resulting from actions of any co-felon or himself.
 - i. This precludes the felon from felony murder rule if they or their co-felons were not directly responsible for the deaths.
 - ii. The felon(s) could still be liable under recklessness manslaughter or extreme recklessness murder.
- b. Proximate Cause theory (minority rule): felon(s) responsible for any death that occurs as a result of a chain of events that the felon set in motion.

3. 2nd degree “extreme reckless/depraved heart” murder:

Elements:

- a. Requires (implied) malice aforethought
 - i. CA law implies malice when the killing shows an “abandoned and malignant” heart.
 - ii. MPC implies malice when the murder takes place “under circumstances manifesting extreme indifference to the value of human life.”
 - iv. Juries have to take circumstantial evidence and use this to draw inferences of malice.
- b. Extreme recklessness standard

4. Involuntary Manslaughter:

- a. NO required malice
- b. Usually recklessness is the standard. In some states, gross negligence or even ordinary negligence can be applied.

5. Reckless Murder v. Involuntary Manslaughter:

Four factors used to determine which category the homicide falls under:

- a. The extent of the risk undertaken.
- b. The defendant’s degree of awareness of the risk.
- c. The degree of unworthiness of the motivating aim or lack of justification.
- d. The degree to which D took action to minimize the risk (not always considered).

Extreme recklessness v. recklessness:

The difference between the two turns on the dangerousness of Ds conduct.

6. Vehicular Manslaughter:

- a. CA is the only state that uses the ordinary negligence standard.
- b. Juries are reluctant to find involuntary manslaughter in such cases, so the legislature lowered the standard to condemn irresponsible driving.

- c. Light penalties compared to I.M.

7. Misdemeanor Manslaughter:

- a. CA rule- manslaughter if killing occurs from an unlawful act not amounting to a felony.
- b. The MPC rejects this rule and several jurisdictions have followed.

D. Unintentional Homicide (MPC)

1. Felony Murder (no degrees):

- a. An indifference to human life is presumed when the actor is committing certain felonies listed.
- b. Softer version, because it creates a *rebuttable presumption* rather than strict liability. It shifts the burden of proof to defendant. D must disprove mens rea of recklessness or extreme indifference.
- c. MPC wanted to get rid of rule, but knew states wouldn't adopt without it.
- c. Still, only one state has adopted the MPC's felony murder rule.

2. "Depraved Heart" Murder

- a. Must be committed under circumstances manifesting "extreme indifference to human life."

3. Manslaughter

- a. Killing is committed recklessly.

4. Negligent Homicide

- a. Killing is committed negligently.

VI. The Death Penalty

A. History

1. It used to be imposed automatically for certain crimes.
2. Later, judges and juries looked at a variety of factors to determine whether or not the death penalty should be imposed. This was open-ended discretion that had little predictability.
3. *Furman v. Georgia*- Supreme Court struck down statutes that allowed unguided open-ended discretion.
4. *Gregg v. Georgia*- Supreme Court upheld a guided discretion statute.
5. Supreme Court has said that what was considered constitutional may no longer be because of "evolving standards of decency."

B. Sentencing Process

1. Guilt Phase: Jury must find D guilty of 1st degree murder.
2. Special Circumstances finding: The jury considers whether there is at least one aggravating factor that will lead to the penalty phase. The aggravating factors are usually listed in the statute.
3. Penalty Phase:
 - a. In *Ring v. Arizona* (2002) the Supreme Court held that the defendant has a constitutional right to have a jury determine whether to impose a death sentence. This right can always be waived.
 - b. The jury considers a range of mitigating and aggravating factors. If the aggravating factors outweighs the mitigating factors, the jury imposes the death sentence. If the mitigating factors outweigh the aggravating factors,

- c. the sentence is life without parole. (CA law)
- c. Mitigating and aggravating factors aren't considered relevant in the guilt phase. They focus on the person rather than the crime.
- d. The jury must be "death qualified." That is, a person can be excluded from jury duty if opposed to the death penalty under all circumstances. Studies have shown that such juries are more likely to convict.

C. Death Penalty Application to Felony Murder

1. Rule: Death penalty can be imposed on a defendant who is found guilty of 1st degree felony murder, but there are limitations
2. Limitations:
 - a. *Edmund v. Florida*- held that the 8th Amendments ban on cruel and unusual punishment bars the imposition of the death penalty on a person convicted under felony murder rule who "did not kill, attempt to kill, or intend that the killing take place or that lethal force would be employed."
 - b. *Tison v. Arizona*- Held that felons who exhibited a "reckless indifference to human life" during a felony could be sentenced to death even though they did not kill or intend to kill.

D. Persons with Mental Disabilities or Disorders

1. Mental Disorder:
 - a. Insanity defense- success is rare.
 - b. Mitigating Circumstance- If not acquitted for reason of insanity, the mental disorder can be considered as a mitigating circumstance.
 - c. Time of Execution- Supreme court decided that it is a cruel and unusual punishment to execute someone who, because of a mental disorder, is not "competent" to be executed (D doesn't understand that he will be executed and why). Once D regains competency, can be executed.
2. Mental Deficiency (mentally challenged/retardation):
 - a. *Atkins v. Virginia* (2002)- Supreme Court held that it is unconstitutional to impose the death penalty on an individual who is mentally deficient.

E. Minors

1. Age: The Supreme Court has determined that states cannot constitutionally execute a minor younger than 16 (*Thompson v. Oklahoma*) but it can execute those who are 16 years and older (*Stanford v. Kentucky*).
2. Mitigating Circumstances: The jury can consider D's youth as a mitigating factor.

F. Race

1. Many have argued that the death penalty is unconstitutional because of racial disparities found in the application of the death penalty. This argument has not been successful.

VII. Rape

A. Common-Law

1. Common-Law Definition: Carnal knowledge (sexual intercourse) forcibly and against a woman's will.
2. Resistance Requirement: The victim must have "resisted to the utmost" for the court to find that it was against her will.

3. Traditional View of Harm: Harm to the property of the father or husband.

B. Modern Views

1. Definition: Sexual intercourse by means of force against the will of a woman and without her consent.

2. Required Elements:

- a. Proof of force
 - i. CA statute requires force substantially different or substantially greater than that which is necessary to accomplish the rape itself.
- b. Proof of non consent
- c. Sometimes proof of woman's resistance is required to prove the above two elements.
 - i. Resistance is not required in any other crime.
 - ii. Why woman might not resist: fear (paralyzing), may put her in more danger.
- d. Usually no mens rea term is stated in statute (it is a general intent crime).
 - i. Some courts say once you've proved the actus reus the mens rea naturally follows.
 - ii. Others say the mens rea is negligence (majority) or recklessness (minority).

3. Debated Elements:

- a. What is sexual intercourse?
- b. What is consent?
- c. How much force is necessary?
- d. Are force and consent interrelated or are they different?

4. Modern View of Harm: Harm to the victim- psychological, emotional, physical and harm to women in general- women change behaviors due to fear of rape.

5. Mistake of Fact:

- a. *Director v. Morgan*- Because rape is the intention to have sex with a non consenting woman, if the man honestly believed, even *unreasonably*, that the woman was consenting, then he is not guilty.
 - i. Recklessness standard. He must actually be aware of the risk that victim may not be consenting.
- b. Ds belief of victim's consent has to be both honest and *reasonable*.
 - i. Negligence standard. If he should have known that victim was not consenting, he is guilty.

6. Variations in rape law

- a. Some say force or non consent needs to be proved, acknowledging that the two are difficult to differentiate.
- b. New Jersey- Removes the burden of proving non consent from the victim. D must ascertain consent. Makes the law similar to definition and requirements of battery.
- c. Fraud- only some recognize this as rape.
- d. Duress/coercion- More and more jurisdictions recognize this as rape.

State v. Rusk- V gives D ride home from bar. D takes V's keys, asks her to come up. V says she doesn't want to but eventually does. He lightly chokes her. She asks "If I do what you want will you let me go w/o killing me?" He was convicted, but appellate court overturned stating no resistance and force is evidenced by resistance or that she didn't resist because of fear of imminent bodily harm or death. However, the jurors were looking at mental state of victim and found a reasonable woman under the circumstances would find force- that he wasn't going to let her go unless she complied. Supreme Court reversed Appellate's decision.

People v. Iniguez- V raped by family friend. He (200 lbs) got on top of her (100lbs) while she was sleeping. Jury found guilty of rape. Appellate court reversed and reduced to battery, saying that while it was non consensual, there was no proof of force.

C. Marital Rape

1. Traditional Rule: Man cannot rape his own wife.
2. History:
 - a. 1984- 40 states had marital rape exemption.
 - b. 1990- No state has absolute marital rape exemption, but many treat it differently from other rapes.
 - c. 24 states have eliminated all distinctions.

D. Statutory Rape

1. Generally: Strict liability crime. If an adult has sexual intercourse with a minor, that adult will be criminally liable.
 - a. No mens rea required.
 - b. No requirement that it be forced.
 - c. Does not matter if female consented.
2. Definitions: Statutes have very different definitions as to what constitutes statutory rape.
3. Policy Considerations:
 - a. **Common Law**- Concern about harm to property because it harmed a female's chastity making her value less, she is harder to marry off.
 - b. **Modern Law**-Concern about female ability to consent based on studies about female adolescence.
4. Gender Neutrality:
 - a. **Common Law**- was gender specific: adult male and minor female.
 - b. *Michael M. v. Superior Court*- Not constitutionally required to have gender neutral statutes.
 - c. **Modern Law**- Most states have enacted gender neutral statutes.
5. Application:
 - a. Some jurisdictions use it to curtail teenage sexuality and punish both "victim" and "perpetrator." Think they are preventing teenage pregnancies this way.
 - b. Others use it to prevent adults from engaging in sex acts with minors.
 - c. Discretion is used in deciding whether to punish "victim" as well.
6. Mistake of Fact:
 - a. If it is truly a strict liability crime, then there can be no defense of mistake of fact.. But
 - b. *People v. Hernandez*- held that mistake of fact can be a defense in some circumstances.
 - i. Court talks about the "reasonableness of mistake" very similar to general intent crimes.
 - ii. Court distinguishes this crime from other strict liability crimes because of the harsher penalties involved.
 - iii. Most states have not followed this view.

E. MPC Rape Law

1. Elements:

- a. Generally, not gender neutral
- b. Lowers the resistance requirement
- c. Marital rape exemption
- d. Not first degree if a voluntary social companion and the victim has permitted him sexual liberties before
- e. No mens rea stated, the default mens rea of the MPC is recklessness.

VIII. Justification & Excuse

A. Generally

1. General Rule: Even though a person may satisfy all the elements of a crime, we don't want to convict them.

2. Justification: Society permits a person's actions under certain circumstances. They are at a minimum, condoned. They may even be viewed as appropriate or correct.

- a. Justification defenses:
 - i. Self-defense
 - ii. Defense of others
 - iii. Necessity

3. Excuse: Society does not condone the Defendant's actions. But because of certain extenuating circumstances, society determines that D is not a proper object for blame and condemnation, and is not held to be criminally responsible.

- a. Excuse defenses:
 - i. Insanity
 - ii. Duress

B. Self-Defense/Defense of Others

1. Self-defense: Defendant must have a *reasonable* belief that the use of physical force is *necessary* to defend herself against an act of *imminent* or *immediate* unlawful force by that other person.

- a. As long as D satisfies all the elements of the defense, he will be exculpated even if he was mistaken. D just has to have a reasonable belief that force was necessary, even if that belief is mistaken.

2. Elements:

- a. **Reasonable belief**
 - i. Generally this is an objective test, but it is qualified by the situation or circumstances of D at the time of the offense.
 - ii. Subjective elements sometimes come into play, such as Ds past history. How subjective the test is depends on the jurisdiction.
 - iii. A minority of jurisdictions require only an honest belief.
- b. **Necessary force**
 - i. There must be no other reasonable alternatives.
 - ii. Duty to retreat- a minority of jurisdictions require that the individual retreat rather than using physical force, when retreat is possible.
 - iii. Castle doctrine- There is an exception to the duty of retreat if a person is within her own home. This doctrine does not apply if the attacker is a co-occupant of the home.
 - iv. Proportionality- Necessary force has to be proportional. If D uses deadly force, he must reasonably believe the other person is going to use deadly force.
- c. **Imminent or immediate threat**
 - i. Not clear how long of a period of time imminent or immediate are.
 - ii. See Battered Women's Syndrome below, expands notion of

imminence.

- d. **Unlawful force of other person**- the force that the other person is using or threatening must not be justified or authorized by law.
- e. **D must not be aggressor**- many states do not permit a self-defense claim if D was the initial aggressor.

People v. Goetz- D was riding subway, teenagers approached him asking for money, he shot all the teens, even when they were not threatening him. D had a history of being mugged. He was found not guilty on all counts except weapons possession. The civil courts, however, rejected Goetz's self-defense claim.

3. MPC:

- a. **3.04**- D must believe that his actions are necessary (does not state he must reasonably believe).
- b. **3.09**- Defense not allowed if D negligently or recklessly believes force is necessary, in crimes where the required mens rea is negligence or recklessness.
 - i. Example- D can be liable for negligent homicide if D was negligent in having the beliefs required to establish self-defense.
 - ii. Under this rule, if D was reckless or negligent in his beliefs, the defense is still available for crimes requiring the higher mental states of knowledge and purpose.

4. Imperfect Self Defense: If D is mistaken and his actions were unreasonable some jurisdictions will recognize this as imperfect self-defense. This defense will not exculpate D, but will mitigate his sentence to involuntary manslaughter.

5. Defense of Others:

- a. Generally, the requirements for defense of others is the same as defense of self.
- b. Minority "alter ego" approach- a minority of jurisdictions view D as "stepping into the shoes" of the person he is defending. If, unknown to D, the person he is protecting is a law breaker and the people he is rescuing them from are undercover police officers, D has no right to use force and will not be exculpated.

C. Necessity

1. Principle: If circumstances compel a choice between various evils, D will not be punished if he chooses the least harmful option.

- a. The necessity defense is most successful where the gap between the evils is large and the lesser evil is minor and not permanent.

2. Elements:

- a. **Reasonable belief**- D must have a reasonable belief as to the *balance of evils* (which is the greater and which is the lesser evil) and as to the *necessity* of taking the action in order to avoid the greater evil.
- b. **Imminence**- Sometimes there is a requirement of proof that the greater evil was imminent.
- c. **Lack of reasonable alternatives**
- d. **Causal connection**- Some jurisdictions require a causal connection between the act committed and the evil or injustice avoided. That is, that the action taken could reasonably be expected to eliminate the danger.
- e. **Legislative intent**- There must be a sense that the legislature would have supported the action, or at least that it doesn't contradict legislative intent.
- f. **Without Blame**- some require that the actor did not bring about the situation.

- g. Some require that the greater harm must be public disaster, imminent death, or great bodily harm.
3. Homicide and Necessity Defense: Some jurisdictions exempt intentional homicide from the acceptable lesser evils, or only use it to mitigate the grade of homicide the actor is charged with.
- i. Kantian approach- An absolute principle that one should not harm another.

Regina v. Dudley and Stevens- *cannibalism while lost at sea case. Ds claimed they choose the lesser of two evils- one person dying versus four people dying. Court says there is no necessity to preserve one's life by sacrificing another: because, who will be the judge of when it is necessary? By what measure are comparative lives to be measured? The court sentenced them to death, but the sentence was commuted to 6 months in prison. This preserved the principle that murder is wrong, but the circumstances allowed a mitigation of the punishment.*

4. MPC 3.02:

- a. Does not require imminence, but treats it as one of a range of considerations to take into account.
- b. Does not exempt homicide, but states each life has equal value.
- c. Defense is not available when the actor's beliefs are recklessly or negligently formed if the mental state required is recklessness or negligence.
- d. Most states have not adopted the MPC definition of necessity.

State v. Reese- *D escaped from prison. Claimed necessity based on fear of imminent danger from an inmate who raped him and threatened to kill him. D did not succeed in defense because D did not turn himself in as soon as he was away from danger. CA necessity defense in prison escape cases narrowly defined by "Lovercamp rules."*

5. Civil Disobedience: It is easier to win on the necessity defense for acts of civil disobedience, if the law D is violating is the one he is protesting. Courts differentiate between "indirect" v. "direct" civil disobedience.

US v. Kabat- *Priests engaged in "civil disobedience" property damage at nuclear weapons site. Claimed necessity as a defense. Defense failed because (1) the court took a narrow view of imminence (2) no causal connection- Ds couldn't reasonably believe that the destruction of property would harm the missiles, so it wouldn't prevent the "greater harm" claimed (3) Ds had other legal options.*

D. Duress

1. Principle: Ds actions may be excused if he was acting in response to coercion by another person.
2. Elements:
 - a. **Coercion**- D takes an illegal action in response to the coercion or command of another
 - b. **Directs**- who directs him to take that action
 - c. **Threatens**- by threatening to kill or seriously injure the actor or a third party
 - d. **Reasonable belief**- D reasonably believes the threat to be genuine
 - e. **Imminence**- the threat is present and imminent at the time D engages in the criminal act
 - f. **Not able to retreat**- there is no reasonable escape from the threat other than compliance with the demands
 - g. **No fault in creating situation**- D is not at fault in bringing about the situation which exposed him to the threat
 - h. **Not able to resist**- A person of "ordinary firmness" could not have resisted the threat.

E. Insanity

1. Principle: The insanity defense excuses those persons whose severe mental disorders render them unable to “reason” or to “control” their conduct, so that they cannot be morally blameworthy.

2. Elements:

- a. **Time**- D must have the severe mental disorder at the time of the offense.
- b. **Standards used**-
 - i. M’Naghten Rules (1843):
 1. Because of Ds mental defect,
 2. D did not the nature and quality of the act he was doing
 3. or he did not know that what he was doing was wrong.
 4. This is a cognitive standard.
 - ii. ALI/MPC 4.01 (50s and 60s):
 1. Because of Ds mental defect,
 2. He lacks substantial capacity to
 3. Appreciate the criminality/wrongfulness of his conduct
 4. Or to conform his conduct to the requirements of the law.
 5. This is either a cognitive or a volition standard.
 - iii. Irresistible Impulse *Commonwealth v. Chester* (1958)
 1. Because of Ds mental defect,
 2. D acted from an irresistible and uncontrollable impulse.
 3. This is a volition standard. It has to do with reason and self-control; a belief that the person couldn’t control himself.
 - iv. Product test *Durham v. U.S.* (1954) (most liberal)
 1. The unlawful act was a “product” of Ds mental defect.
 2. Only one state has adopted this standard (NH).
- c. **Consequences**-
 - i. Most jurisdictions- committed immediately and automatically.
 - ii. Some jurisdictions- Evaluation and judicial discretion.
 - iii. Many Ds are committed for a similar or longer term than they would have served in jail.

4. Objective v. Subjective:

- a. Some use objective standard. If the insane person’s justification for the crime was true (i.e. person kills aunt because he believes aunt is Satan and will destroy the world) would reasonable people have wanted him to commit the crime?
- b. Others use a subjective standard. The person must subjectively believe that his actions were right.

5. Morally or Legally Wrong:

- a. Jurisdictions are split.
- b. Objective or subjective test used for morality.
- c. Yates called police right away because she knew conduct was legally wrong. Texas used a legally wrong standard and convicted her. But did she know that her conduct was morally wrong?

6. History:

- a. Great optimism in the 50s and 60s about what mental health professions could offer the criminal justice system.
- b. By the 80s and 90s, there was great disillusionment.
- c. The standards of insanity reflect changing societal views.
- d. The Henkley decision (Reagan shooter) caused a lot of societal upheaval; many states eliminated volitional prongs and re-introduced the M’Naghten

- test.
- e. Most jurisdictions have reverted back to the M'Naghten standard.

7. Other issues:

- a. **Competence to waive Miranda Rights-** Whether D understood what his rights were and had the capacity to waive those rights at the time of his arrest.
- i. If it is determined that D was incompetent at the time of his arrest, the testimony he may have given is inadmissible.
- b. **Competence to stand trial-** Whether D has sufficient present ability to communicate and cooperate with his lawyer.
- i. If D is not competent, he will be referred for treatment to try and restore competence.
- ii. Sometimes treatment is not successful. The Supreme Court has said it is unconstitutional to detain someone for more than a reasonable period of time to ascertain competency.
- iii. If the person is dangerous, the person may be committed under a civil commitment standard.
- c. **Competence to be executed-** Whether D understands that he is going to be executed and why at the time of his execution.
- i. If not, D will be referred for treatment to try and restore competence so that he can be executed.
- d. **Diminished Capacity-** D doesn't have the mens rea to commit the crime at the time of the offense due to a mental disorder.
- i. Allows defense to introduce evidence of D's mental abnormality, to try to negate or mitigate criminal responsibility.
- ii. Negation of capacity to form intent- Defense tries to prove with mental health testimony that D could not form the intent or mens rea required.
- iii. Because of possibility of acquittal, diminished capacity defense is not popular and not adopted by many jurisdictions.
- iv. 40% of states do not allow mental abnormality evidence except in insanity claims. 20% of states follow MPC- can bring in mental health testimony as long as it is relevant to mens rea.
- v. CA (and a few other states) take a middle position- They do not allow testimony to show that D doesn't have the capacity to form intent, only testimony showing that he actually didn't form intent.

People v. Wetmore- D had hx of 10 hospitalizations. He was discovered in someone else's apartment believing it was his own. D was charged with burglary- breaking into the home of another with intent to commit a felony. But, he thought it was his apartment, and he had no specific intent to commit a felony inside. Mental health testimony would have exculpated him, but lower court did not allow it in. Appealed on the ground that prosecution failed to prove mens rea, so D should be acquitted.

IX. Domestic Violence

A. Generally

1. History:

- a. "Rule of Thumb" in common-law.
- b. Moved to formal criminalization of DV, but not enforced for nearly a century.
- c. Criminal Law responded to grassroots feminist activity in the 70s that raised consciousness about DV.

B. Battered Women's Syndrome (Lorraine Walker)

1. Principle: Women have a type of psychological disturbance due to a history of abuse that should excuse them from criminal liability. BWS is raised during self-defense claims.

- a. **Learned Helplessness**- Battered women learn not to bother to change situation, because it seems that there is no way out.
- b. **Cycle Theory**- Pattern to abusive relationships with three stages.
 - i. Tension building stage- minor battering incidents and verbal abuse.
 - ii. Acute battering incident- triggering event develops into more serious violence.
 - iii. Batterer becomes apologetic and loving.

2. Elements:

- a. **Reasonable Battered Woman Standard**- Courts that have accepted BWS tend to take a more subjective approach to the reasonable belief standard.
- b. **Expanded Notion of Imminence**- Abuse is seen as perpetually imminent, fear is constant.
- c. **Duty to Retreat** (element of self-defense)- this element can be a problem because of the exception to the "castle doctrine" when the attacker is a co-occupant.

3. Criticism:

- a. Non-scientific study; methodological problems with data.
 - i. However, there is a lot of truth in her work that she brought to the forefront. She got people talking more about victims of DV.
- b. Feminists argue that we don't need to prove women's psychosis. Women should be excused or their acts should be justified on other grounds.
- c. Explains why women don't leave through the idea of "conditioned passivity." But research shows that women do try to leave, and that they are threatened or harmed even more once they leave.
- d. Research has also shown that not all abusive relationships fit into the cycle pattern.

State v. Norman- After 20 yrs of abuse, wife kills abusive husband while he is sleeping. The abuse had been recently escalating, wife tried to leave but was unable, police wouldn't help. D argued self-defense but denied because harm was not imminent at time of killing, not justified in using deadly force, and duty to retreat. Dissent argued Ds belief that harm was imminent and deadly force necessary was reasonable under the circumstances.

Brooks v. State- Wife goes into friend's house with abusive husband in pursuit. She gets a gun and comes out. Husband keeps approaching her with hands up. Wife says "stay back or I'll shoot." Husband keeps approaching and she shoots and kills him. Trial court said BWS could not be grounds for provocation under "heat of passion" voluntary manslaughter. Appellate court says it can, but Ds lawyer didn't object to trial court's answer so D cannot pursue VM route.

X. Inchoate Crimes (Incomplete Crimes)

A. Attempt

1. Rule: People can be punished for failed efforts at attempting a crime.

2. Types of Attempt:

- a. **Imperfect**- D completely performs actus reus, but the result doesn't occur.
- b. **Incomplete**- Actor wasn't able to finish or perform all of the actus reus.
 - i. Presents the Q of how much the actor must act for him to be held liable.
 - ii. Want to wait till actor is close to completing the crime so that we are sure of his liability, but don't want to wait too long.

- c. **Impossible**- The social harm that the actor is attempting to cause cannot occur because of a mistaken belief on the part of the actor. If the circumstances were what the actor believed them to be, then the act would be a crime.

5. Legal v. Factual Impossibility:

- a. **Common law**- This distinction was important.
 - i. Factual: When the consequences sought by D are forbidden by law, it is no defense that D could not succeed because of circumstances unknown to him.
 - Example- A pickpocket attempts to pick an empty pocket. No defense that the pocket was empty.
 - ii. Legal: If D attempts to do something which is legal, he is not liable for a criminal attempt.
 - Example- A person who attempts to procure stolen property would not be liable if property wasn't actually stolen.
- b. **MPC/Modern Law**
 - i. Eliminates distinction.
 - ii. Legal impossibility is no longer a defense in most circumstances.
 - iii. Exception MPC _ 5.05(2)- If it is so inherently unlikely to result in a crime that neither the conduct nor the actor presents a public danger, the court can enter judgement and impose a sentence of a lower grade or, in extreme cases, may dismiss the case.

People v. Dlugash- D shoots man, there was a Q of whether man was already dead. Court found that D can still be held liable for attempted murder if D did not know that man was already dead. Focuses on Ds intent and culpability, rather than factual or legal impossibility of crime due to attendant circumstances.

4. Punishment:

- a. **Reasoning**
 - i. The person has some culpable state of mind/moral blameworthiness.
 - ii. Person is dangerous if he is culpable.
 - iii. Deters people from attempting to commit crimes.
- b. **Attempts v. Completed Crimes**
 - i. MPC- Punish equally except certain capital offenses.
 - ii. CA- Cuts sentences for attempts in half. Most jurisdictions do this.

5. Actus Reus: With Impossible and Imperfect attempts, the actor has performed the actus reus. With Incomplete attempts, the focus is on how much action is enough.

- a. **Preparation v. Attempt**
 - i. Distinction between mere preparation for a crime (no liability) and an attempted crime (liability).
 - i. Many tests have been used to distinguish the two.
- b. **Substantial Step Test**
 - i. Actor must have taken a substantial step towards the commission of a crime that is strongly corroborative of the actor's mens rea.
 - ii. MPC test that has been influential in many jurisdictions.
 - iii. The MPC lists a number of things that could be a "substantial step"
- c. **Physical Proximity Test**- "last step" doctrine. Act must be proximate to the completed crime.
- d. **Indispensable Element Test**- If the actor doesn't have an element needed for the crime, he can't be liable for an attempt.
- e. **Unequivicality Test**- Person's conduct unequivocally (w/o a doubt) manifests his intent.

6. **Mens Rea:** One must have the specific intent to commit act or cause the result that constitutes a crime.

- a. **MPC-** The actor must have purpose of committing or omitting act. High level of culpability. The mens rea of the actual crime still applies as well.
 - i. For example, Statutory Rape is still a strict liability crime, but in attempting person must have purpose of having sex. Does not have to have purpose of having sex with a minor.

7. **Abandonment:**

- a. **MPC-** If a person does abandon an attempt to commit a crime, it is an affirmative defense if the abandonment was a complete and voluntary renunciation of his criminal purpose.
 - i. Criticism- The distinction between voluntary and involuntary abandonment is hard to determine.
- b. **CA-** Rejects MPC view because it is messy and a lot of people could bring it up as a defense. CA says once an actor has crossed over a certain line there is no going back.
- c. **Other Jurisdictions-**
 - i. There is variability in whether jurisdictions allow abandonment as a defense.
 - ii. If they do, there is usually a distinction between voluntary and involuntary abandonment.

People v. Staples- D rented office space above bank. Began to drill hole in floor in preparation of robbing bank. D claimed he abandoned idea of robbing bank and that all actions taken were merely preparatory. The Court questioned whether Ds abandonment was voluntary or due to evidence that landlord discovered plan. Court focused on drilling constituting direct movement towards crime, which is enough to hold D liable for attempted crime.

7. **MPC Statute:** The MPC has been very influential in the area of attempt. See handout for statute.

B. Solicitation

1. **Rule:** It is a crime to ask or tell another person to engage in criminal conduct.

2. **Elements:**

- a. **No result necessary-** If there is a result, D will most likely be liable for the crime under accomplice liability.
- b. **Mens Rea-** Must show that D had the purpose that the crime be committed.
- c. **Actus Reus-** communication
 - i. MPC approach- does not matter whether the communication was actually received or not.
 - ii. Common law- looks more at whether the crime might be committed. If solicitation was not received, D is not liable.

3. **Punishment:**

- a. The grade of the offense is correlated with the offense D is trying to get the other to commit.
- b. MPC punishes the same as the crime being solicited. (Huge emphasis on culpability and little emphasis on harm)

XI. Accomplice Liability

A. Generally

1. **Rule:** If you are an accomplice to a crime, you are guilty of the target crime.

- a. Unlike attempt, accomplice liability is not a separate crime.

2. Actus Reus Requirements:

- a. An accomplice must aid or abet a principal in order to be held liable for the crime committed by the principle.
- b. **Aid-** means to aid, assist, or help someone to commit a crime.
- c. **Abet-** means to encourage someone to commit a crime (kind of like solicitation- but with the result occurring)
 - i. Generally, mere presence at the scene of the crime is not sufficient to be liable as an accomplice.
 - ii. If the prosecution can prove that the principal and accomplice had a prior agreement that he would be present to lend support, than the accomplice need not do anything else at the scene to be liable.

3. Causation:

Majority View-

- a. The burden is very low for showing that the acts of the accomplice actually contributed to the result sought.
- b. Not a “but for” test, it is okay if the crime would have resulted w/o the help of the accomplice.
- c. Generally, there must be some possibility that the acts could have helped further the crime.

Minority View #1-

- a. Limits accomplice liability to situations where the crime could not have been accomplished w/o it.

Minority View #2 (MPC _ 206(3))-

- a. Does away with causation requirement completely by holding a person liable for even attempting to aid a principal.

4. Dual Mens Rea:

- a. **Two components to Mens Rea requirement:**
 - i. The accomplice must engage in conduct with the intent of aiding or abetting the principle.
 - ii. The accomplice must share the principal’s intent to commit the offense.
- b. Usually, these two elements are congruent with one another and may even be indistinguishable. The second is typically inferred from the first.
- c. Sometimes the two elements are not congruent. For example, when an arms dealer intentionally sells a gun to someone, but does not share the purpose that the gun be used in a bank robbery.
- d. **Majority rule-** MPC _ 2.06(3) the actor must have purpose regarding the commission of the offense.
- e. **Minority rule-** In some jurisdictions, knowledge of the principal’s criminal purpose will satisfy the mens rea requirement.
 - i. In such a jurisdiction, the gun dealer would be liable if he knew the gun would be used in a robbery.
- f. **Facilitation-** In those jurisdictions that require purpose, a person with knowledge can be held accountable for the lesser crime of facilitation.

5. Accomplice Liability in Unintentional Crimes:

- a. **Rule-** Generally, an accomplice is not liable when he intentionally aids or abets a principal, but the crime the principal commits is an unintentional crime such as negligent homicide.
- b. **Two Common Exceptions-**
 - i. Result Crimes: When a crime has a result element, the accomplice

need only share the principal's culpable mental state otherwise required by the crime.

1. *Abbott* case- D engaged in drag racing with Moon. When Moon negligently hit another car and killed someone, D was also held liable for negligent homicide as an accomplice because (1) he intended to assist in the drag racing (2) he demonstrated the required mental state.
 2. However, the minority view still requires that the second mens rea be purpose. In *Marshall*, D loaned his car to a friend knowing he was intoxicated. The friend negligently hit and killed someone, he was charged w/ VM. The court viewed purpose to commit a unintentional crime to be logically impossible, so D was not liable.
- ii. Felony-Murder Rule: No showing needs to be made as to the second mens rea with respect to the resulting homicide. But the dual mens rea must be proven with respect to the felony that triggers felony murder liability.
- c. **Less Common Exception-**
- i. Natural and Probable Consequences: An accomplice who intentionally assists the principle, and shares the principal's criminal purpose for a target crime, can also be held liable for any and all crimes that are the "natural and probable consequences" of the assistance provided.
 - ii. Many courts will not apply this doctrine and the MPC does not endorse it.

US v. Buttroff- Court concluded that Ds had intended to provide assistance to the tax filers through the recommendations and advice given at various public and private meetings and through assistance in completing tax forms, and that it can be inferred through these actions that Ds intended to make the crime of filing fraudulent or false tax returns succeed.

Wilcox v. Jeffery- Court found that journalist's "participation" in illegal concert- attending it, applauding, and writing about it- was enough to hold him liable for aiding and abetting the jazz musician Hawkins who was not allowed to work while in the country.

State v. Gladstone- D told undercover narc a person (Kent) from whom he could purchase marijuana. Court found that although D had knowledge, he did not have the purpose of promoting or facilitating the offense of Kent selling the marijuana.

XII. Theft

A. Larceny

1. Rule: A trespassory (wrongful) taking and carrying away of the personal property of another person with the intent to deprive the owner of the property permanently.

2. Elements:

- a. **Taking**- The perpetrator must secure dominion (i.e. control) over the property.
- b. **Trespassory**- The term requires that the property be taking wrongfully, that is, w/o the consent of the victim.
- c. **Carrying away**- This element initially required that the perpetrator physically move the property. Modern codes and the MPC eliminate this requirement, because much property today is not tangible.
- d. **Personal Property**- At common law, larceny was limited to misappropriation of tangible personal property. Modern law has expanded the categories of personal property to various forms of intangible property.
 - i. *Lund v. Commonwealth (1977)* Court held that computer time and

services did not satisfy the definition of personal property under the VA code at the time. Now VA has explicitly expanded the definition of larceny to include computer services as property.

- e. **Of Another**- The property in question must be owned by another.
 - i. Mistake of Fact defense- Larceny is a specific intent crime. Therefore, if D is mistaken about whether or not the property is owned by another, he is not guilty of larceny because the mistake negated the specific intent of the crime. There need not be any showing of the reasonableness of the mistake.
- f. **Specific Intent to Steal**- Although this is usually defined as the intent to deprive the owner of the property permanently, it also includes an intent to deprive the owner of the use of the property for an unreasonable length of time, or to intend to use it in such a way that the owner will probably be thus deprived of his property.
 - i. *People v. Kunkin*- A mail clerk removed a roster of undercover narc agents from the Attorney General's office and brought it to a newspaper to be published. While he did indicate that he wanted the list back, once he turned over the list he left that employment inferring that he intended to deprive the owner of the list permanently.

3. Receipt of Stolen Property Elements:

- a. The property was received, concealed, or withheld by the accused.
- b. Such property had been stolen
- c. The accused *knew* the property had been stolen.
 - i. *In Kunkin, the newspaper office was not liable because the prosecution had failed to prove that they knew the property was stolen- that the mail clerk intended to deprive the rightful owner permanently.*

4. Permanent Deprivation includes:

- a. depriving the owner of the property for the property's useful life.
- b. exposing the property to such risk that its return could be impossible.
- c. placing an unacceptable condition upon the property's return.

5. Defense of Borrowing: In most jurisdictions, a person cannot be guilty of larceny if he takes property with the intention of borrowing it and returning it within a reasonable period of time.

- a. Many states, however, have passed statutes that make the taking of another's property temporarily a crime, particularly with respect to certain types of property, such as cars.

6. Changing Intent:

- a. If an individual takes property intending only to borrow it, but then changes his mind and keeps it, he is guilty of larceny at that latter point.
- b. If an individual takes property with the intention of keeping it, but later changes his mind and returns it, he is still guilty of larceny because the crime was complete.

7. Taking goods for sale w/ intention to pay: If a person takes fungible goods that are offered for sale by merchants, intending to give an equal or greater payment for the goods, he is not guilty of larceny.

8. MPC Statute: See handout.

- a. Consistent with modern common law.

