

CRIMINAL LAW - MARCUS - 2021 OUTLINE

INTRODUCTION

- I. What Is A Crime? - Hart v. Devlin (2 sides of the spectrum)
 - A. **H.L.A. Hart** - We must look at *the harm to others*, not the views of the majority, to determine what is right or wrong.
 1. Largely predominant belief after *Lawrence v. Texas*
 - B. **Lord Devlin**: Majority moral beliefs reign= we should determine what is criminal by *what offends the moral majority*.
- II. **FOUR ELEMENTS OF A CRIME**
 - A. **Act**
 - B. **Mental State: intentionally/purposefully, knowingly, recklessly, negligently**
 - C. **Causation**
 - D. **Harm/Suffering (to society)**
- III. **American Law Institute and the Model Penal Code**
 - A. MPC created in 1962
 - B. Creates a guideline for statutes; however, it is not de facto law; just a template
- IV. Difference between US and Other Countries
 - A. Dissenting opinions
 - B. American Bystander Rule- No duty to intervene
- V. Common Issues on appeal
 - A. Law wrong in indictment, in conducting jury selection, etc.
 - B. Procedure wrong, such as closing argument
 - C. Judge improperly limiting evidence
 - D. Bad jury instruction
 - E. Insufficient evidence

CONSTITUTIONAL QUESTIONS

1ST Amendment: Freedom of Speech: Gov't can limit time/place/manner but not content.

4th Amendment: No illegally obtained evidence

5th & 14th Amendment : Due Process Clause: Proper Notice Needed, No vagueness in statutes (must be interpreted w/ certainty), Equal application, Statute must be constitutional.

8th Amendment: cruel and unusual punishment,

1st Amendment

- *Commonwealth v. Jones* - KY 1994
 - Woman called cop “Nazi pig motherfucker” - is arrested for disorderly conduct, making “unreasonable noise”
 - Δ makes 1st amendment argument instead of 14th (which she should have)
“unreasonable noise” is unduly vague + she hints at selective prosecution

5th/14th Amendment - Due Process

- *DP v. State* - FI Ct App 1997 **Do minors have fewer rights?**
 - Charged with being in possession of spray paint can
 - Δ argues infringement of due process (14th Amendment): state says its ok to afford less due process to minors (intent can be assumed from anecdotal evidence) bc they are protecting them.
 - Δ pleads **Inherently Innocent Items doctrine**: Can't be charged w/ possession of legal item: State says if its prohibited for that age, then you can assume intent.
- *Lawrence v. TX* - SCOTUS 2003 **Rejecting Devlin's Morality view**
 - Monumental Case- made anti-sodomy statutes unlawful
 - Overall Rule: Governing majority's views are not sufficient for upholding a law prohibiting an act which they find to be immoral (the law is unconstitutional)
 - Denying Devlin's opinion of the law
 - Overrules *Bowers*, which held that anti-sodomy statutes aren't unconstitutional

8th amendment

- *Jones v. City of Los Angeles* 9th Cir. 2006 **Cruel + Unusual to Punish Status?**
 - Several homeless ppl arrested for sleeping on street (LA statute)
 - Rule: It is **unconstitutional** to prohibit an involuntary act or condition if it is an unavoidable consequence of one's status or being
 - Uses 2 cases *Powell* and *Robinson*
 - *Robinson*: You cannot criminalize being an addict
 - *Powell*: You *can* criminalize public drunkenness (an act, not condition)
 - Limited holding: so long as more homeless > available beds: can't be illegal

THE ACT REQUIREMENT (*Actus reus*)

Voluntary act OR an omission where one has duty to act

Gov't must prove (1) Δ consciously aware of actions (2) Δ is voluntarily acting

(so unconsciousness and acting under compulsion of others = failure of proof)

Problems that come up w/ Act Req:

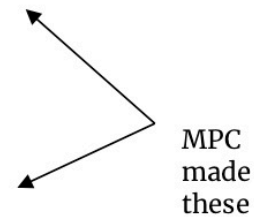
1. Did the Δ Act?
2. What kind of act?
3. Is there a failure to act?

Cases:

- ***State v. Hinkle - Unconsciousness***
 - Δ kills two others in a car crash; undiagnosed brain disorder; charged w/ manslaughter
 - Rule: When dealing with a claim of unconsciousness, state must prove that the actions were conscious and voluntary
 - Admission of evidence: evidence of alc consumption prejudicial (bc BAC=0)
 - Note: unconsciousness can be affirmative defense or F.O.P. (as it is here)
- ***Commonwealth v. Pestinakas - Act Req can be satisfied by OMISSION.***
 - Can person be prosecuted for murder for failure to perform a contract (with hospital staff) to provide food and medical care for another?
 - Yes- the omission of an act fulfills the voluntary act requirement so long as the mens rea is satisfied
 - Court found that it was, based on them withdrawing money from his acct

THE MENTAL STATE REQUIREMENT

1. Purposefully/Intentional
2. Knowingly
3. Recklessly
4. Negligently



PURPOSEFULLY (Subjective Standard)

- The person **knows doing X will create Y outcome**; and **they want Y outcome**
- Knowledge + a desire for the intended outcome (goal-oriented behavior)
- Highest state of culpability
- *State v. Smith* - NJ 1993 **Impossibility a defense?**
 - HIV infected inmate biting guard charged with attempted murder
 - **Issue:** Does it matter whether Δ 's actions could not, in fact, result in death?
 - **Rule:** For a charge of attempted murder, only need proof Δ acting intentionally (thought it could kill) regardless of impossibility
 - Established intent through prior words, actions

KNOWINGLY (Subjective Standard)

- Conscious act + awareness that the result is practically certain.
- Ex: Arson (knowingly burns down structure)
- *Fabritz v. Traurig* - 4th Cir. 1978 : **Knowledge requirement**
 - Child abuse case: did mom **know** she was risking the child's life by not seeking medical care? **Court determines NO.**
 - Holding: no evidentiary basis for proving the knowledge requirement
 - **Dissent:** knowledge can be inferred from her prior comments ("Tommy hits hard", saying she hadn't gone to dr. bc of bruises)

- **HABEAS CORPUS:** Civil action against the jailor/warden/governor; alleging unlawful detention or imprisonment
- *Flores-Figueroa v. US* - **What parts of statute does mental state adhere to?**
 - identify theft bc his fake SSN belonged to others (claims he didn't know)
 - **Issue:** Statute's language tricky = does knowingly apply just to having fake documents, or knowing the #s belonged to a real person
 - **Rule:** Yes, statute req's that "knowingly" apply to #s belonging to real person
- *Rehaif v. United States* -
 - Illegal immigrant possessing gun: mens rea of "knowingly" applies to what? the possession of the gun, the illegal status, or the law.
 - Rule: Knowledge applies to all elements of the crime: he had to KNOW that his status was illegal (which state didn't prove) (there is a scienter requirement)
 - SCIENTER: Knowledge of the wrongness/criminal nature of the offense.
- Compare to: *US v. International Minerals and Chemicals Corp.* : **Risky business**
 - Company illegally shipping corrosive materials: claimed unaware of crime; the Supreme Ct said only knowledge req only applied to the fact that they were shipping dangerous materials
 - **W/ high risk activities = no scienter requirement (they don't need to know its a crime, just have to know that they are doing it**

RECKLESSLY (Subjective and Objective Standard)

- Most difficult mens rea to establish
- Conscious disregard (S) of substantial and unjustifiable risk (O)
 - Hardest thing to prove is the subjective = that THEY knew
- Must be a gross deviation from normal standard of conduct
- *Commonwealth v. Welansky* - Mass. 1944

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| <ul style="list-style-type: none"> ○ Coconut Grove nightclub fire; several code violations, owner not present ○ Charged w/ IVMS (Involuntary Manslaughter): Can he be "reckless when not present?" <ul style="list-style-type: none"> ■ His control, not presence, makes him responsible | <p>Reckless behavior causing death ↓</p> <p>Consciously aware of the risk (Subjective) Its an unreasonable risk (Objective)</p> |
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- *Commonwealth v. Huggins* - PA 2003
 - Bus driver crashed after falling asleep at the wheel; convicted of IVMS: Guilty
 - speeding, driving tired w/ children, overloading van by 9 people

- **Rule:** conscious disregard for human life + acts differently from the standard of conduct that a normal person would exercise, then Δ G for IVMS.

NEGLIGENTLY (Objective Standard)

- **When they didn't know, *but should have known***
- **Gross deviation from reasonable standard of care**
- **Objective standard bc its basically the reasonable person standard.**

MISTAKE OF FACT OR LAW

1. MISTAKE OF FACT

- If knowledge of that fact is element of the crime: then it is a **failure of proof**
 - Ex.: Larceny "Whoever intentionally takes property, knowing it belongs to someone else" : Δ NG if he thought he owned it
- If knowledge not an element: it's **affirmative defense**– special jury instruction needed
 - Ex: Arson: "Whoever knowingly burns structure and does so w/o permission"
 - If you burn something, but think you own it: all elements of the crime are met; **however**, you can raise the mistake of fact as a defense, so jury instructed
 - Policy reason? You made a reasonable mistake: as matter of public policy, no goal of criminal justice system satisfied by punishing you

Cases:

- California v. Russell - Cal Ct. Appeals 2006 **Mistake of Fact**
 - "Abandoned" Motorcycle taken by homeless man; undertook reasonable inquiry trying to find old owner
 - **Issue:** Could he still be found liable for receiving stolen property?
 - Court reverses conviction on grounds that he should have received a jury instruction on mistake of fact- PER MARCUS, this is WRONG
 - **Knowledge required by statute: thus, state failed to make its case, this is a failure of proof. No jury instruction was needed.**

2. MISTAKE OF LAW DOCTRINE

- Normally, "ignorance of the law is no defense"
- If knowledge of the law is required by the statute - mistake of law is a failure of proof

- If it isn't - mistake of law if an affirmative defense
 - Successful depending on if Δ acted with reliance upon an official statement of law given by a public officer (not his lawyers)
 - However, if it is a risky activity, no notice of the statute needed.

Cases:

- United States v. Mancuso - 2d Cir 1970 **Mistake of Law**
 - Statute: if narcotics offense = alert customs upon entering/leaving the country (wasn't posted in noticeable places, advertised) No req to know of statute
 - **Rule:** if people don't know about law; no useful end in punishing "violators"
 - Note: Court is rewriting the statute to have a scienter requirement (Knowledge of the existence of a law) : **COURTS AREN'T SUPPOSED TO DO THIS.**

PUNISHMENT & SENTENCING

“One man ought never to be dealt with merely as a means subservient to the purposes of another” - Kant

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| <p style="text-align: center;"><u>Goals of Criminal Law</u> (Sentencing and Punishment)</p> <p>1. Retribution - punitive element; you must be punished for your wrongs</p> <p>2. Incapacitation - keeping dangerous people out of civil society</p> <p>3. Deterrence - prevents others from committing the crime</p> <p style="padding-left: 40px;">a. Specific: so <i>this</i> Δ will not commit crime again</p> <p style="padding-left: 40px;">b. General: warning others of consequences</p> <p>4. Rehabilitation - redeems prisoners as members of society</p> | <p style="text-align: center;"><u>3 ways to sentence</u></p> <p>1. Judges: traditional system, historically they had max discretion. <u>WHY:</u> less shock from cases, able to weigh human factors case by case</p> <p>2. Juries: Only 5-6 states that involve them in sentencing. <u>WHY:</u> No outside influence/political interest; Morality being judged by societal standards/peers; One opinion shouldn't determine someone's fate; Makes juries confront the seriousness of their role</p> <p>3. Legislatures: through sentencing guidelines: <u>WHY?</u> Less discrimination, general deterrence for white collar crime, preserves ct resources, consistency</p> |
| <p><u>Mandatory Sentencing (became big 20-25y.a.)</u></p> | <p><u>4 kinds of incarceration:</u></p> |

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| <ul style="list-style-type: none"> • Judges used to have full discretion, now a lot have to defer to legislature • Gives a range for each crime • Typically has mandatory minimum • Include calculation of mitigating and aggravating factors • A lot of pushback: now they are more advisory than completely mandatory: however, they are still generally followed | <ul style="list-style-type: none"> • Waiting to be convicted (usually in county jail) • County jails - already sentenced, usually with misdemeanors • Prison: Can be state or federal (but overwhelming majority in state system) • Confinement: Paroles, probation, etc. |
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Notes

- Our prison population = 2.1 million
- **Cost of incarceration: 30k-70k per year**
- **Alternative Sentencing:** 6 types: Restitution/Fines, Community Service, Electronic monitoring, Drug/Alcohol treatment, Job-training/re-entry, suspended sentences
 - Big movement towards alternative courts (drug courts etc): are cheaper also
- **State v. Federal Sentencing**
 - Vast majority of criminal cases are state
 - **Federal cases:** crime crossing state lines, violations of federal statutes (Ex. white collar crimes), (Also, Conspiracy usually fed), using interstate means of communication (mail, phone, etc.)
- **Sentencing: Concurrent v. Consecutive**
 - Concurrent sentence= can be served at same time
 - Consecutive= must be served one after another

Cases

- **United States v. Bergman** - S.D.NY 1976 - **Lighter sentences for white collar crime**
 - Sentencing memorandum: Bergman was rabbi; guilty of fraud (state + fed)
 - Judge explaining why only 4 mo.: rehabilitation doesn't work, don't need to keep him off street, deterrence isn't a worry bc he won't do it again
 - But what about overall deterrence?
- **United States v. Jackson** : 7th Cir 1987 : **Hefty time w/ Sentencing Guidelines**
 - Another sentencing memorandum: Bank robber, released and robs bank 30 minutes later; up for life imprisonment

- Posner mentions doubt of efficacy of jailing Jackson for life: claims he prefers ~ 20y: but he must defer to the legislature that allows this.
- He does mention that Jackson can apply for clemency later
- Clemency ≠ pardon : Usually acknowledges guilt
 - Clemency can reduce a sentence; grant reprieve or commutation of sentence
 - Pardon will make the crime go away

PARTIES

Common Law : Rejected in modern times

- Principal in 1st degree: Person who committed the crime
- Principal in 2nd degree: person who assists and is at scene (lookout/getaway)
- Accessory before the fact: Not at scene, but can be the mastermind
- Accessory after the fact: NG of underlying crime; but AATF is a crime itself (still)

Modern Accomplice Liability: Unlike Conspiracy (doesn't req clear agreement)

- **Common Law : Rejected in modern times**
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- Focuses on Δ's state of mind + the assistance offered

Gov proves: (1) commission of offense by the principal (2) Δ shared principal's intent for crime to take place; (3) some action to further crime (even if just encouragement)

- **No crime of aiding and abetting:** once you are found party to the crime you are responsible for the principal crime
 - However, there is a crime of **accessory after the fact:** GOV PROVES (1) Knowledge of crime (2) Intent to assist (3) some act of assistance
- Note: accomplice can be guilty of higher offense if they are the brains (higher state of mind than what is needed for the muscle of the crime)

Federal Statute: 18 USC § 2: "Whoever directly commits any act constituting an offense defined in any law of the US, or aids, abets, counsels, commands, induces, or procures its commission, is a principal"

Can a principal be acquitted and a aider/abettor be found guilty?

- Courts answer this differently
- SCOTUS says: 2 different decisions is completely fine: see *Standefer*
 - In NC: acquittal of principal = acquittal of parties
 - In GA: acquittal of principal can be used as relevant evidence (usually walks)

Cases

- *Standefer v. United States* : SCOTUS 1980
 - Standard bribery case (usually tried together); bribed IRS agent w/ vacations; charged w/ A&A of taking bribes
 - Δ moves to get dropped the charges that the IRS agent was acquitted of
 - **Issue:** Can an aider/abettor still be convicted when the principal was acquitted?
 - **Rule:** Yes: the jury in present case can still find that that principal = G (even if in his own trial, he wasn't): collateral estoppel doesn't apply in criminal law: the issue can be relitigated in determining the A&A's guilt
 - "While symmetry in jury decisions is desirable, it is not necessary"
- *State v. Gladstone* - Wash. 1970 : State of Mind Req for Parties
 - State of mind case: undercover asks Δ where to buy MJ: he gives him name, draws map of how to get there
 - Convicted of A&A in sale of MJ: Issue is whether or not he had req'd mens rea

- Δ NG bc state can't prove he had any desire/intent for sale to take place
- "Dangerous precedent if mere communication that another might be willing to commit crime = aiding and abetting the commission of the crime"
- *United States v. Garguilo* - 2nd Cir. 1962 : Is Knowledge + Presence sufficient?
 - Δ convicted of counterfeiting \$\$, Q is about Macchia (the coΔ): is knowledge of crime + presence sufficient to establish guilt
 - Faulty jury instruction case: Judge told jury that that ^^ was sufficient
 - Rule: That was wrong: To prove an A&A case, you must prove some purposeful intent/ desire for the crime to come to fruition:
 - NOTE: Presence + Knowledge= sufficient if he did something to further crime
- *Commonwealth v. Feinberg* - Pa 1969 : The Sterno Case
 - Sold sterno (knowing alcoholics drank them) at corner store in Philly skid row; his order was filled w/ more potent form of sterno (claims he didn't know at first but giant skulls on them); he sold 400 cans but returned rest
 - 31 people died, he is charged w/ 31 counts of IVMS (died in prison)
 - Holding: Δ G bc he knew the products weren't being used as they should.
 - This shows reckless disregard for human life
 - **Marcus belief:** If you want to make sale of legal item illegal, then you need a statute about it/ imposing regulations.
- *United States v. Kelley* - 4th Cir. 1985 : Act requirement for A&A
 - Created org teaching individuals how to evade taxes; charged w/ aiding in false w4 claims;
 - Issue: If he never, pen in hand, helped in preparing the tax forms, can he be G
 - Holding- yes, he can
 - Rule: If knowledge of crime + intent for it to be carried out + action (he encouraged it) is sufficient
- *People v. Poplar* - Mich Ct App 1969: Accomplice Liability
 - Δ charged with b&e/assault w/ intent to commit murder as an accessory; someone was shot; he claims he can't be held accountable for that; court says, not true, Δ G bc accomplice liability

- Rule: In Minn: Aider/abettor liable for any offense committed that was *reasonably foreseeable*
- Marcus says: they are applying a negligence standard to assault w/ intent to commit murder (basically the felony murder rule except for victim didn't die)
- **State v. Fornella** - Withdrawal as an accomplice
 - Boy was part of group, going to steal and math test; he left before completed (realized it was wrong and left)
 - He is charged w/ them
 - State says: for successful withdrawal, you must let the others know AND it must be effective (alert authorities)
- Note: WITHDRAWAL To establish withdrawal (assuming burden on Δ, he must prove (1) that he did withdraw, (2) communicated his intent to the other Δs and (3) that it is effective (alert authorities); and in modern times (4) that you were doing it in good faith

RAPE

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| <p style="text-align: center;"><u>TENN CODE ANN §39-13-503</u></p> <p>A rape = unlawful sexual penetration of a victim by a Δ or of the Δ by a victim accompanied by any of the following circumstances:</p> <p>(1) Force or coercion used to accomplish the act</p> <p>(2) The sexual penetration is accomplished w/o consent of victim and Δ knows that the victim didn't consent</p> | <p><u>MPC § 213.1 Rape and Related Offenses</u></p> <p>Rape. A male who has sexual intercourse w/ a female not his wife is guilty of rape if:</p> <p>(a) he compels her to submit by force/threat of death, serious injury, pain or kidnapping, to be inflicted on anyone; or</p> <p>(b) he has substantially impaired her power to appraise or control her conduct by drugging her, intoxicating her</p> <p>(c) the female is unconscious</p> <p>(d) female is less than 10 years old</p> <p>Note: this hasn't been adopted by states,</p> |
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| <p>(3) The Δ knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless</p> <p>(4) Or: sexual penetration is committed by fraud</p> | <p>was outdated even when created, reflected common law</p> |
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Common Law Definition (Largely the same as 1950's MPC definition)

- Intercourse (any kind of penetration) + by a man against a woman + by force or threat of force + with no consent
 - Part of "by a man against a woman has been taken out in modern statutes"
- Old definitions include "Carnal knowledge", "man against woman not his wife"
- Historically, woman had to prove she resisted to determine if it was sufficient force to establish rape.

Modern day elements (taken from TN statute): Rape is unlawful sexual penetration of a

victim by the Δ or of the Δ by a victim accompanied by any of the following circumstances

- Force/coercion
- Sexual penetration accomplished w/o consent of victim and Δ knows no consent
- Δ knows or has reason to know that victim is mentally incapacitated or physically helpless
- Sexual penetration committed by fraud

Note: in **VA**, took out "consent" : Δ must prove consent if they believe they had it (becomes an affirmative defense): but they left in "penetration by force or threat of force"

Reforms in Rape :

- Re-assessing the statute of limitations
- Statutes are less and less gender specific
- Marital exemption (20+ states still treat marital rape differently w/ penalties + needs to be reported sooner)
- Victims rights
- Name of the crime
- Degrees of crime- some states add these bc not one size fits all

- **Shield Statutes:** reputation evidence related to victims prior sexual conduct shall not be admitted in evidence in prosecution.

Cases:

- *State in Interest of M.T.S.* - NJ 1992
 - Judicial opinion explaining the changes in the law about rape
 - Burden of proof of non-consent used to be on women (resistance was used to establish this”
 - Women had to resist to the extent of her ability
 - Prompt complaint was necessary
 - Needed strong evidentiary support: testimony was not enough
- *People v. Iniguez* - Cal 1994
 - Woman raped while she feigned sleep by her aunt’s husband; victim panicked and froze; Δ admits she didn’t consent
 - **Issue:** Rape conviction possible w/ evidence that force or threat of force used?
 - **Holding:** Fear establishes this; fear is subjective and objective (she was afraid + it was reasonable to be afraid)
 - Also, fear of force satisfies the force requirement
- *Commonwealth v. Caracciola* - Mass 1991
 - Δ pretended to be police officer; picked up a woman, made her drive; threatened arrest; stopped at park and asked her to have sex with him
 - **Issue:** Δ argues there is no force or threat of force used
 - **Rule:** fraudulent inducement can satisfy force/threat requirement
 - **Dissent:** conviction unwarranted under the badly-drafted statute: rule of lenity tells us Δ should be acquitted; push legislature to change statute afterwards.

HOMICIDE

ELEMENTS OF MURDER:

1. ACT: Affirmative act or omission of act
2. MENS REA: Malice aforethought + 4 possible intents
 - a. **FIRST DEGREE**- Intent to kill + Premeditation/Deliberation
 - b. **SECOND DEGREE** [Common Law Murder]: Req's Malice (shown in 4 ways:)
 - i. Intent to kill
 - ii. Intent to inflict bodily harm
 - iii. Gross Recklessness (malignant heart)
 - iv. Felony Murder (sometimes elevated to 1st degree by statute)

Cases:

- *State v. Fierro* - AZ 1979 **What is Death**
 - Δ shot man, who didn't die until 4 days later, when life support turned off; Δ argues he can't be guilty of murder¹ bc removal from life support
 - Problem: AZ didn't have def of "death" should have deferred to common law, which they didn't (judge created new def.- can they do that? Not supposed to)
 - **Common law def was the circulation of blood**
 - Rule: Wounds don't need to be direct COD; sufficient that they cause death indirectly through chain of natural effects + causes unchanged by human action
 - Holding: Δ is G
 - **Note: used to be a year and day rule for homicide: victim had to die w/ the year**
- *Cruzan v. Missouri Dept of Health* SCOTUS 1990
 - Car accident ; victim was put in hospital; parents asked them to withdraw nutrition + hydration tubes; they refused; still had functioning brain stem (controls regulation of body) but no upper brain activity (everything else)
 - Issue: is it wrong for health dept to req evidence/proof of incompetent's wishes to be withdrawn from life support
 - Holding: State is entitled to a judicial proceeding to make a determination about the woman; constitution doesn't forbid it; health dept is allowed
 - **Note:** doesn't deal w/ broader issue: this decision is usurped by following 2

- *Washington v. Glucksberg* - SCOTUS 1997
 - Surrounding a Washington statute forbidding physician assisted suicide
 - Issue: Do we have the right to receive assistance to end our own life?
 - Rule: **It isn't a violation of constitutional rights to forbid assisted suicide, but Court says debate should continue**
 - Court said that for now, issue will be deferred to legislature's decision
- *Vacco v. Quill* - SCOTUS 1997
 - Same case as *Glucksberg* but w/ NY: Part of conjoined opinion
 - Court of Appeals said statute banning it was unconstitutional (violated equal protection clause of 14th amendment) Supreme court overrules this.
 - W/ Current "Death w/ Dignity" statutes:: requires person to be an adult, often with < 6 mo to live, needs written recommendation, they must self administer
- **What is Life** | *Keeler v. Superior Ct.*
 - Severely injured ex-wife and killed her unborn baby:
 - Issue: CA code calls for murder to be of a human being: do fetus's count?
 - **Rule of Leniency:** if not clear what legislative intent was, must be construed in favor of Δ
 - **Ex Post Facto laws:** retroactively applying laws to crimes that were committed before they were written: court says if they were to allow judicial enlargement of the statute, it would be ex post facto
 - Holding: The statute does not extend to the killing of an unborn fetus.
 - *Chavez* case: baby born alive, bled to death through umbilical chord
- **Intent to Kill** - *State v. Gary* - Conn 2005
 - Murder by transferred intent; court finds that all that is required is a general intent to commit murder (even if 3d person is murdered instead)
- **Intent to inflict GBH** | *State v. Thompson* - LA 1991 First Degree Murder- GBH
 - Robbed a church, beat the pastor and killed him: Δ argues he cannot be prosecuted for 1st deg murder bc they cannot prove he had intent to kill/ cause great bodily harm (they don't know if the metal pipe he had was used)
 - Rule: It isn't instrument used, but severity of injuries that establishes sufficient proof of specific intent to inflict great bodily harm.

- Note: IN LA- intent to commit GBH is sufficient for 1st degree murder.
- **Intent to inflict GBH** | *People v. Geiger* - Mich Ct. App. 1968
 - Man beat his wife, drove around with her in back knowing she was very close to death/aspirating on vomit: makes a comment that he's facing a "murder rap"; waits 8 hours to get her to hospital
 - **Issue:** evidence that Δ had intent to cause GBH w/ attendant likelihood that death could result from the harm?
 - **Holding:** gap in time bt injuries and seeking help establishes he had intent to cause GBH
- **Depraved Heart - Gross Recklessness** | *People v. Knoller* - CA 2007
 - Dog bite case; they were told by vet that dogs were very dangerous
 - Appeals over jury instruction
 - Correct jury instruction: **did Δ acted with a "conscious disregard for human life"**
- **Depraved Heart-Gross Reckless** | *People v. Tseng* - Cal Ct. App. 2018
 - 3 cts of 2nd deg murder for gross recklessness; doctor who gave out opioids; overall 9 patients died;
 - Depraved-heart murder different from IVMS bc it requires that the Δ themself knew of the risk (instead of just a reasonable person should have known) and chose to act w/ a disregard towards human life
 - Prior actions/words/etc prove that she had **implied malice**

FELONY MURDER

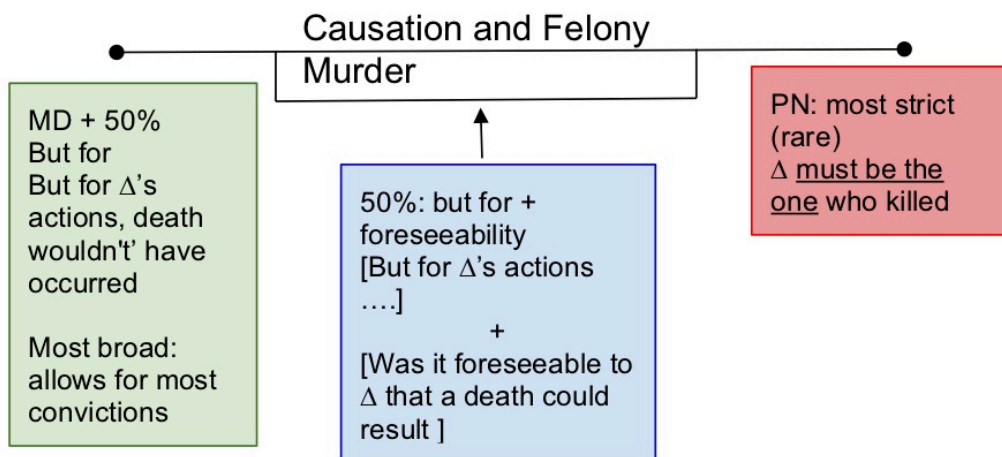
Notes:

- Felony murder = killing during the course of a felony
 - Some states define which felonies, others just say "dangerous/forcible" felonies
- Purpose of the rule
 - Easier to prosecute; holds those who recklessly kill liable for that killing; deters violent felonies that can result in death; morally driven (if you are committing a felony and something bad happens, you should be punished)
- Do we need it? Marcus says no (you could still convict bc of gross recklessness)
 - 10-12 states don't have it

- Evidence shows that it doesn't actually deter
- Note: You can't have attempted felony murder, but you can have felony murder attached to a crime of attempt (that was never completed)
- **When does a felony end?**
 - Marcus gives example of robbers that meet up a year later: says in that case, it ends when you divide the goods or decide to never meet again
 - *People v. Johnson* - Cal Ct. App. 1992 - "Place of Temporary Safety"
 - Fleeing robber; after crime, drove around and believed he reached safety; police found him and car chase led to accident killing another
 - Issue: Is a determination about a "temporary place of safety" S or O? - Court says objective. Δ G for murder
 - *State v. Maudlin* - Kan 1974 "Completion of sale"
 - Heroin sale; buyer ended up dying later on; trying to convict for felony murder.
 - Holding: Crime was completed and finished upon completion of sale

Which killings matter/ does it matter who does the killing?

- **Deals w/ causation/foreseeability**



Which FELONIES can be Felony Murder (Ex: mail fraud ≠ felony murder)

- **Abstract Approach : CA (before) + 50% of States**

- Looks at felony in the abstract: is this the type that leads to ppl dying on accident
 - *People v. Howard* - Cal 2005
 - High speed chase leads to civilian death; felony murder clause in CA; underlying felony = evading police
 - CA rule: Felony must be inherently dangerous in the abstract, not case-by-case
 - Evading police in abstract ≠ inherently dangerous felony
 - **Circumstantial Approach : MD + 50%**
 - Look at how the felony occurred *in that case*: jury decision
 - Did the circumstances render it dangerous to the point of
 - *Jackson v. State* - Md Ct. App. 1979
 - Hostage situation, police shoots hostage
 - But-for the robbers committing that felony, this wouldn't have happened
- *People v. Aaron* - Mich 1980
 - Issue: is the element of malice, required for murder, satisfied by intent to commit an underlying felony.
 - Issue of malice should be decided by jury
- *Rose v. State* - "Merger Rule" but not actually a merger rule
 - Ignore that name: think of it as independent felony rule
 - Someone beats another to death: they are not guilty of assault, attempted murder, and murder: bc there is no independent felony rule
 - However, w/ armed robbery that ends in a death
 - If Δ isn't charged w/ original felony, jury might be instructed to ensure all of the underlying elements of the felony are satisfied to use it to establish felony murder.

FIRST DEGREE MURDER

Intent to kill + premeditation/deliberation + act

Notes:

- 1st degree murder pretty uncommon (harder to get)
 - If they can't prove premeditation, they can go for 2nd degree

- In some states, certain *types* of murder are 1st degree (ex.: poisoning)
- Premeditation: if they planned any part of the murder before an affirmative act
- Must not be in heat of moment

Cases

- *Austin v. United States*- D.C. 1967 **Premeditation**
 - Δ murdered & mutilated woman, left her body near river where police found her, knife lodged in her skull; He is convicted of first degree murder
 - Δ argues that they cannot prove premeditation (jury instruction issue)
 - Holding: no sufficient evidence to support a jury instruction on premeditation: remanded with instructions to convict of 2nd degree murder.
 - Says Δ was correct to ask for an instruction that described premeditation as an “*appreciable*” amount of time; court denied this + added can be moments, minutes “even seconds”) - this court does NOT like this
 - Deliberation = decision reached in cool-headed state, wasn’t impulsive
 - Dissent:
 - the wounds indicate that the crime took some time + him taking the knife out in the first place shows deliberation + him moving her body, lying to officers
- Cardozo quote about allowing jury instructions that permit “only a moment” deliberation to equal premeditation
 - “I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words”
 - Basically saying okay to leave it up to juries to pick and choose level of culpability (in looking at difference between “impulsive” killing and “just seconds” premeditation)
- *People v. Scott* - Cal 1959 *Corpus delecti* (bring forth the body)
 - Man convicted of murdering his wife; no evidence of violence, no body
 - **Rule: circumstantial evidence can prove murder if it is only reasonable conc.**
 - Establish his motive bc he was pleased when she disappeared, he coveted her estate, forged checks afterwards, fled country, lied to authorities

MANSLAUGHTER

Voluntary Manslaughter: Intent to kill + Heat of Passion

- (1) Causing a death of another human being;
- (2) as a result of a sudden, violent, and irresistible passion
- (3) resulting from serious provocation
- (4) sufficient to excite such passion in a reasonable person.

Notes:

- **Heat of passion = must be (1) sudden and (2) great provocation**
- Very similar to 2nd degree murder + added element of heat of passion +NO MALICE
- Can serve as an **imperfect self defense for murder** (if they can prove they subjectively believed they needed SD + that amt of force, but objectively they didn't)
- **Test for adequate provocation is objective:** would reasonable man, confronted w/ these events, become so impassioned that his mind was incapable of cool reflection

Burden of proof w/ Voluntary Manslaughter:

- Voluntary manslaughter is treated similar to affirmative defense (for murder)
 - Δ has to raise the issue by prod. of evidence (by showing heat of passion)
 - SCOTUS SAYS: Then **burden of proof moved to gov't** to disprove "heat of passion" (BYD) + prove intentional killing to attain a murder conviction.

Cases:

- *People v. Najera* - Cal Ct. App. 2006
 - Δ was called "jota" meaning faggot by victim, who pushed him; went inside for 5-10 minutes, came out and stabbed him; jury found him guilty of 2d murder; Δ argues it should be reduced to MS bc of heat of passion
 - Issue: what level of provocation is sufficient?
 - Holding: **Name calling is insufficient** to cause an avg person to lose reason and judgement under an objective standard, and thus no basis for MS
 - Note: words almost always insufficient, but might be when something like "i killed your mother and i am going to kill your other family"
- *State v. Faulkner* - Ct App. MD 1984 - **imperfect self-defense**

- Δ killed brother in fight; believed he had a knife and took out a gun and shot him; requested instruction on imperfect self defense
- If subj belief that SD was required + subj belief that level of force was required (but obj neither was) = that is sufficient for imperfect self defense

Involuntary Manslaughter:

- (1) Reckless behavior (objective standard)
- (2) Resulting in death
- (3) Conscious awareness of risk (subjective)
- (4) Taking that risk results in death.

ELEMENTS OF INVOLUNTARY MANSLAUGHTER-

- Mental state of recklessness and/or gross negligence
- Similar to Murder (gross recklessness) - minus the “gross”
 - Under IVMS is negligent homicide
- Note: Most don’t distinguish bt involuntary/voluntary, but distinction remains
- 3-7 avg sentence for both

Cases:

- *Commonwealth v. Welansky*
 - See above for description of events; gross departure from standard human behavior (Coconut Grove fire)
- *Commonwealth v. Konz* - PN 1982
 - Religious diabetic “putting health in god’s hands”; asked wife and friend to help; they withheld medicine; IVMS for the wife?
 - Holding: marital relations don’t create duty to spouse to summon medical aid; no recklessness bc no breach of duty (note: duty doesn’t usually come up in these cases)

CAUSATION

| | |
|--|---|
| <u>Actual Cause/ But-for Cause/ Cause in Fact</u> - But-for this act, the effect wouldn’t have occurred - Usually several but-for causes - Easiest to establish in crim law | <u>Proximate Cause/ Legal Cause</u> - Death is a natural/probable result of Δ’s act or omission - Establishes the culpability |
|--|---|

- **Defense:** I wasn't the actual cause = victim would have still died w/o my actions

- **Defense:** i wasn't the proximate cause, there were intervening facts that supersede my culpability

Cases:

- *Commonwealth v. Root* - PN Sup Ct. 1961 (Same court as Feinburg)
 - Two friends racing; the one that challenged tries to go around and is hit head-on; dies; friend charged with IVMS
 - Issue: is Δ 's reckless conduct a sufficiently direct cause of the death
 - **Rule: Δ 's reckless conduct not direct cause & the issue of proximate cause (which they tried to establish his culpability on) has no place in prosecution for criminal homicide**
 - **Dissent:** its the ppl of the commonwealth that are threatened by this behavior; we are not worried about the actions of the victim; if someones recklessness causes in any way another's death = felonious homicide
- *Commonwealth v. Barry* - MA Supreme Ct. 2019
 - Shooting outside nightclub; 2 Δ 's charged with a murder; both argue that prosecution lacks causation bc it can't say who shot the bullet that killed
 - Rule: **Conduct of 2 or more persons can both be proximate causes if it concurrently contributes to the death.**
 - Note: there is no "one dead, one killer" theory: 2 people can both separately (or jointly) be the cause of a death and can be convicted of such
 - Weren't prosecuted under joint venture theory (conspiracy)- could have been
- *Brackett v. Peters* - 7th Cir 1993
 - Δ raped and beat elderly man; she admitted to hospital, transferred to nursing home where she was fed and aspirated/died; Δ convicted of felony murder, files habeas corpus; Δ claims he is not the COD
 - Rule: eggshell rule applies here (although it doesn't with intentional murder, it does to felony murder)
 - But-for cause isn't enough to convict : ex. If the nursing home burnt down

- **However, proximate causes is satisfied here: judge says it was foreseeable**
(proximate = enhancement of likelihood (foreseeability))

CAPITAL PUNISHMENT

Notes

- Very few capital punishment cases in US now- generally moving away (<100)
 - Some through Supreme Ct decisions, others from gov't freezes or legislature
- Now- Only murder can be the basis
- Geographic disparities w/in states
- **Death-eligible jurors** : when picking jurors on potential capital cases, juror has to be able to say that depending on the facts of the case, they could sentence someone to deaths (and in other cases would not)
- **8th amendment challenges**
 - **1. Cruel and unusual punishment because of method of punishment**
 - **"Standards of decency" argument:** argues that bc society has changed our punishment of criminals should too
 - **2. Not proportionate to offense committed, nature of crime, or the Δ**

Standard statute:

- Focuses on Δ, victim, other crimes committed (at same time), manner committed
 - Certain other crimes very serious: arson, rape, terrorism
- Typically described in terms of remorse
- Certain victims increase likelihood: very young/old
- Certain jobs of victims: Police officers, prison guards (those most at risk)
- Especially awful crimes: Poisoning , torture, particularly heinous, abhorrent, cruel

Arguments for

- Deterrence (unclear if it actual deters)
 - 80% of police chiefs don't believe it does
- Retribution (punishing the worst of the worst)

Possible solutions

- Only allow attorneys to defend that have experience
- Forbid certain people to be eligible for it
- Continue legal education
- Proposed changes to statutes:
 - Include standards of what are aggravating/mitigating factors

- Include variations of the person of the Δ or victim
- “Worst of the worst”
- Exclusions- no children, intellectually disabled (and define it)
- Marcus’ favorite recommendation : No DP for anyone who suffered from mental disorder that impaired their capacity to appreciate the nature of their act

Cases:

- *Gregg v. Georgia* - Supreme Court 1976
 - Upheld GA statute that limited circumstances that could impose death penalty (so it is not imposed arbitrarily)
 - Why? It met the standards set out in *Furman* (no DP for some ppl and other sentences for others w/ same crime/circumstances (no arbitrary))
 - How did the statute pass this test: (1) Called for aggravating factors (2) auto appeal to state Sup Ct (3) Req’s state to cite similar cases w/ DP
 - Note: Issue of whether capital punishment in itself is cruel and unusual was brought up in *Furman* and not resolved: this court resolves the issue: it is not
 - Note: their statute called for **bifurcated proceeding**: first determines guilt, second, the option of the death penalty
- *Roper v. Simmons* - SCOTUS 2005
 - 17 yo committed murder (vile manner); was tried as an adult, sentenced to death
 - Holding: **Age of 18 is where they draw the line**; Δ sentence commuted to life
 - Why? Less culpability, more reckless and less responsible, susceptible to negative influence, character not as well formed
 - Dissent: Scalia: Ct’s moral views shouldn’t be imposed on the states; the meaning of constitution shouldn’t be determined by the “subjective views of 5 members of this ct and like-minded foreigners”
 - Dissent: O’Connor: we just decided that we can put to death <18; we need clearer showing our society is against this b4 deciding it for them; some under 18 year olds do have the requisite culpability (decide case by case)
 - Cites *Atkins* (decided after sentenced)
 - Unconstitutional to execute intellectually disabled ; however, up to states to decide definition of intellectual disability
 - Simmons argued reasoning of Adkins shows that <18 also prohib.
- *Miller v Alabama* - Banned mandatory life w/o parole for juvenile

- *Graham v. Florida* - state must give juvenile non-homicide Δ some opportunity to obtain release based on demonstrated rehabilitation (but not required to guarantee eventual freedom)
- *McClesky* : if you are going to argue **racial bias** of jurors; overall racial bias in that state doesn't count: you need to show that **in that case, prejudice existed.**

INCHOATE OFFENSES

| | | |
|--------------|---------|------------|
| Solicitation | Attempt | Conspiracy |
|--------------|---------|------------|

Notes:

* Referred to as "incomplete crimes" : not true; Actually, it is just the desired crime that is uncompleted.

SOLICITATION

ELEMENTS : Intent + some act

- (1) Intent that underlying offense be committed (high mens rea bc act req = low)
- (2) He or she commands, encourages, requests (just words sufficient) (any act to achieve goal)
- (3) Another to commit the offense.

Notes:

- Only applicable if the person solicited does NOT commit the crime.
- even if substantive crime has lower mens rea, you have to prove intent
- You sentence them after the act, but before the crime actually happens
- If the crime happens: they become a principal & guilty of the substantive crime (a&a)
 - Can merge with conspiracy/attempt as well (if it gets that far)
 - You can be charged w/ solicitation of attempted ___ but not attempted solicitation
- Oftentimes, the person being solicited isn't committing a crime (unless they agree)
- Solicitation by itself is NEVER a crime: Must be "Solicitation of [crime]"
- **Note: Place of charge= place where YOU spoke the words**

Concerns with solicitation

- What constitutes a serious solicitation?
- Who must come up to whom ?
- What about if the money never passes hands ?

Solicitation: Potential Penalties

1. Same as completed offense (very rare)
2. Fraction of completed offense
3. Fixed penalty (usually a misdemeanor)

Withdrawal from solicitation :

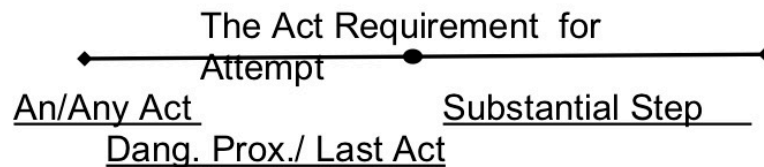
- Common law- you cannot withdraw (in many states, this is still the rule)
- Modern view (in some states): You can withdraw if (1) you make it clear you want out (2) you do it w/ a good heart (not for self-serving reasons; and (3) its effective: u alert potential victim or police

Cases:

- *People v. Rubin*- Cal Ct. App. 1979
 - Dir. of JDL said (in public speech he would pay anyone who killed/maimed Nazi; "im not joking, this is serious"; argued free speech
 - Issue: (1) can they prove intent for crime to take place (2) freedom of speech?
 - **Rule: *Brandenburg* rule (SCOTUS): w/ F.o.S/solicitation, must consider 1. How imminent incitement is and 2. Likelihood of producing that result**
 - Holding: even though it is in 5 weeks, still imminent bc national news; also, bc it was broadcasted, risk was greater of it happened.
 - Note: Court ignored the intent argument, left to jury
 - Dissent: This is F.O.S. issue; he just wanted attn
- *People v. Gordan* - Cal Ct App. 1975
 - Atty charged with solicitation of a bribe; she asked officer to help her plant drugs on an enemy
 - They talked about pricing but afterwards she withdrew.
 - Rule : In CA: **No withdrawal from solicitation: once the words are spoken, the crime has taken place.**
- **Conrads Law**
 - **Makes it a crime to know someone has suicidal ideation and (1) has a level of control over other (2) encourages/coerces suicide (3) person does**

ATTEMPT

ELEMENTS = (1) Specific intent to commit underlying crime + (2) Overt Act towards commission that falls short of completing crime



Notes:

$\frac{1}{4}$ States 6-7 states $\frac{2}{3}$ of states | MPC | Fed Cts

- Key with attempt issues
 - What is the standard of proof?
 - How do you prove these elements?
 - What should the penalty be?
 - Impossibility problem ?
- Attempt to commit IVMS (cases w/ neg/reckless mens rea) not possible
- Attempt and conspiracy do not merge: You will have to serve time for both

Sentencing

- Mess: some say $\frac{1}{2}$ of completed crime, some say same, some say depends on degree
 - How to fix: Attempt by degree (based on where act falls on the spectrum): Dang prox = same as completed, substantial step = half, any act= misdemeanor

Abandonment:

- Some states allow you to abandon completely
- Others allow it to act as a mitigating factor to decrease sentence
- Once a substantial step is completed, can you abandon the crime?
 - *Staples* says no; 6th Cir. says no; MPC says YES

Cases:

- **Mental State** | *State v. Casey* - Utah 2003
 - Δ shot at girlfriend's head; misfired; and he shot at it again
 - Rule: an intent of "knowingly" is not enough for attempted murder in Utah (even though it is sufficient for murder)
 - Note: Knowingly allowed in MPC definition; Also, in most states you can get attempt w/ way less of an act; this was a "final step" requirement
 - Holding: found that he equally could be convicted of intent so upheld conviction

- **Act Requirement** | *State v. Lee* - 11th Cir. 2010 (Substantial Step)
 - Internet chatroom case w/ fake mother offering up daughters; att entice-minor
 - This is federal case, so it requires the act to be a substantial step
 - Issue: Intent is very strong, but the act is pretty weak (never made plans to go)
 - Holding: his actions meet sub step req. for enticement
- *People v. Mahboubian* - NY Ct of Appeals 1989 (Dangerous Proximity)
 - Ins fraud case; antiquities; organized a theft; theft was caught in the process; convicted of conspiracy p easily (low act req); issue is act req for attempt
 - NY statute reads like an *any act* req “conduct which tends to effectuate crime”
 - Actually it is a dangerously close standard: dissent focuses on this
 - Δ focuses on what was *left* to be done, prosecution focuses on what was done
 - Holding: Δ G bc of actions | Dissent: Δ NG bc no dangerous proximity (a lot left)
- *People v. Brown*- IL Ct App 1979 | The Act Req is CONFUSING
 - Pop bottles; just looked in the bin, asked if they wanted to jump in and grab em
 - Substantial step req'd by statute; court says Δ NG bc state can't prove dangerous proximity (Idiot)
 - Shows how the language confuses everyone in regards to the act req
- **Abandonment** | *People v. Staples* - Cali Ct. App.
 - Rented office space above bank, slowly sawing through ground; started to doubt self, didn't complete job + was discovered by landlord
 - Rule: In CA, there is no abandonment after the act req is satisfied; in this case it was

Impossibility and Attempt

Model Penal Code: No impossibility defense allowed : however, easy to twist and read differently)

Modern statutes:

- Have adopted MPC definition of getting rid of impossibility
- Focuses on the dangerousness of the offender (Marcus believes appropriate)
- Currently, convictions based on fake stash rooms and underage agents are standing

Cases:

- *Commonwealth v. Henley* - PA 1984
 - Jewelry store owner bought 5 “stolen” chains; convicted of attempted theft

- Issue: does impossibility serve as a defense where there is a legal impossibility to the crime (bought “stolen” jewelry that wasn’t in fact stolen”
- **Rule:** If one intends to commit the substantive crime + completes acts necessary to commit the crime, but it is shown that the crime is impossible, Δ = guilty.
Impossibility is no longer a defense.
- Note: Easier would be to change the statute to: **It is a crime to receive goods that you believe are stolen.**
- *People v. Dlugash* NY Ct App 1977- what matters is state of mind
 - Δ charged w/ murder, fired gun at person (he claims he thought he was already dead, was acting under coercion)
 - Issue: can Δ be held guilty for murder if first person had succeeded at killing the victim?
 - Rule: **person can be convicted of attempted murder even if their actions did not constitute the crime in actuality (bc he was already dead)**
- *United States v. Oviedo* - what matters is the substantive actions taken (crimes?)
 - Attempted distribution of heroin (but it ended up not being heroin); he claimed he knew product was fake
 - Rule: **To convict of the attempt, you must prove that his acts (not considering his guilty mens rea) were criminal - WRONG**
 - **Solution:** Whoever sells what they *believe* to be illegal drugs is guilty of attempt to sell

Where does it come up?

1. White Collar Crimes w/ Undercovers
2. Drug Cases (Stash house cases) (side note: issue of entrapment here)
3. Chatroom cases w/ undercover “underage” users

| <u>Legal Impossibility</u> | <u>Factual Impossibility</u> |
|---|--|
| - What the Δ is trying to do, even if completed, wouldn't amount to a crime - Sometimes defense to an attempt crime (not MPC) Ex: Lady Eldon's lace | - Conduct that is a crime, but an unknown circumstances makes it to where it is impossible - Never a defense to an attempt crime Ex: Pickpocketing an empty pocket |

CONSPIRACY

Mens Rea: (1) Intent to commit crime + (2) Intent to make agreement

Actus Reus: Any overt act

Why conspiracy?

Why Not? [Krulewitch v. US]

| | |
|--|---|
| <ul style="list-style-type: none">- Inchoate function: stops crime b4 it is committed (everyone agrees w/ this purpose)- Group crime more dangerous (not everyone agrees) : Less likely to withdraw, increases likelihood of crime being completed : Bigger risk of other crimes being committed- Allows for more prosecutions/one trial/witnesses called once (especially for complex crimes): spillover culpability (more evidence against A strengthens case against B)- Incentivizes plea deals- Way to deal w/ organized crime (however, that isn't what mainly used for) | <ul style="list-style-type: none">- crime of conspiracy "stretched beyond reason" and too vague- issue w/ Pinkerton for sustaining conviction of crime Δ had no knowledge/participation w/-problem w/ vagrant nature of crime: (6th amendment issue: jury where crime committed)Evidence may lead to accused being confronted in ct w/ facts/actions/statements he never knew ab-CoΔs may accuse/contradict each other; in a sense, convicting each other |
|--|---|

Notes:

- **Does not merge (conspiracy to commit X + crime of X)**
- More common in federal ct (better at dealing w/ it + usually across state lines)
- Venue: can be where ANY part of the crime took place
- Judges have discretion whether or not to convict together
 - **If severing:** can do so by locality, common witnesses, timeline, big fish/lil fish, strength of evidence
- **Co-conspirator accountability:** if ANYONE in conspiracy commits another crime while connected to that conspiracy: all players can be found culpable (it was foreseeable)
 - Hearsay exception: Co-conspirator hearsay (if someone on the chain says something incriminating, it can be applied to EVERYONE)
 - Difference between accomplices + co-conspirators:
 - Co-conspirators need an agreement (implied or explicit) - A&A doesn't
 - Act requirement lower for co-conspirators (ANY overt act)
- Statute of limitations goes towards the last act by anyone (even if someone quit 15ya)

2 kinds of conspiracy

- I. **Wheel** - players all relate to one person in the middle (hub) but not know each other (spokes)
 - A. Plays liable for crimes of others bc even if they don't know each other, they're each beneficiary of the other's agreement
 - B. Harder to prove (each claims only interacted with key player)
 - C. liable for others actions if it can be proven they knew of existence of others
- II. **Chain:**
 - A. Standard conspiracy : community of interdependence of interests
 - B. Oftentimes, people lower on chain try to sever themselves (many take pleas)
 - C. Link from end to end

Withdrawal and conspiracy - 6 takeaways

1. If person withdraws before overt act- then failure of proof on gov't (no act req)
2. Person can raise withdrawal of affirmative defense after over act happens (option available in about 1/2 of states)
3. If she withdrew after over act- conspiracy complete (G) but NG of substantive crimes (that haven't happened)
4. Withdrawal important w/ statute of limitations (clock stops at withdrawal)
5. Being incarcerated ≠ withdrawing from conspiracy (must take affirmative act)
6. Has to be timely and effective (in good faith and alert law enforcement)

Cases

- **Mental State** | *People v. McChristian* IL Ct App. 1974
 - Gang rivals and shoot out (of 5 men in car) ; say to the other "we'll get you next time"; prosecutes several for conspiracy to commit murder+ attempted murder (which jury drops)
 - Rule: **to prove it is a conspiracy, state must prove specific intent/common design to murder EACH of the five men.**
 - Holding: reversed: no evidence to prove common design/shared intent
- *US v. Bruno* - 2d Cir. 1939
 - Typically drug rink distribution conspiracy case. Peru -> NY then to LA and TX; smaller Δ's arguing they can't be liable bc they didn't know the big guy
 - Note: Charged as one conspiracy: actually 3 (Peru/NY, NY/LA, NY/TX)

- Holding: They can all be charged together bc success of one depended on success as whole; even if smugglers and retailers (LA/TX) didn't communicate, they knew of each other's existence
- **The Agreement** | *Direct Sales Co. v. US* - SCOTUS 1943 **Implied agreement**
 - VERY famous case; legal acts of drug distributor (knew that client was selling illegally and continued); Is Δ G of conspiracy to violate fed drug act
 - *Falcone* Rule: One doesn't become a party to conspiracy by A&A through legal sales UNLESS he knows of the conspiracy (and inference can't be drawn from knowledge buyer using goods illegally) - weren't restricted commodities
 - Holding: Direct Sales knew of the conspiracy + harmful articles = lower burden
 - **Some argue this is exact same as Falcone case: did they get it wrong?**
 - **Rule: No explicit agreement needed to make conspiracy**
- *State v. St. Christopher* - Minn 1975 : **Unilateral v. Bilateral**
 - Δ asked cousin to kill Δ's mom; cousin didn't intend to, worked with police
 - Issue: Does conspiracy need 2 people to agree/share intent?
 - Holding: **Allows for unilateral approach according to MPC**
- **Object of the Agreement** | *Commonwealth v. Donoghue* - KY Ct. App 1933
 - Loanshark charging usurious rates, took advantage of poor; charged w/ conspiracy
 - Rule: You cannot charge a conspiracy w/o an actual crime
 - The "Crime" was charging usurious rates
- **Completed Offense** | *Albernaz v. US* - SCOTUS 1981
 - 4 charges: consp. to import mj + consp. Distribute + underlying crimes
 - Rule: **when same act/transaction violates 2 dif conspiracy statutes; its okay if each requires a proof of fact that the other does not**
- **The FAMOUS Case** | *Pinkerton v. US* - SCOTUS 1946 **Complicity Doctrine**
 - Rule: **Co-conspirator liability**: you can held liable for any of your co-conspirators crimes if you haven't EFFECTIVELY withdrawn (he was just in prison, wasn't a withdrawal)
 - As long as all the crimes are FORESEEABLE
 - Criticism: "Dragnet" allows gov. to convict ppl 4 crimes they didn't know ab

- **Pinkerton instruction:** if jury finds 1) conspiracy existed 2) Δ was member, then Δ can be liable for crimes committed by co-conspirators in furtherance of consp.

| <u>Unilateral Approach</u> | <u>Bi-lateral approach</u> |
|--|--|
| <ul style="list-style-type: none"> ● MPC requirement: only one party needs to agree ● establishes liability individually ● If agreement being feigned by one side- can still convict ● <u>Marcus says: this is just solicitation.</u> | <ul style="list-style-type: none"> ● Common law req+ Federal Law ● Says conspiracy must be 2+ ppl agree ● Issue: Under this approach: If X + Y charged with conspiracy to commit murder, and Y found NG, then traditionally, X NG ● ct gets around this by saying conspiracy bt X + <u>unknown others</u> |

DEFENSES

Burden of Proof: (except insanity)

1. All states - Δ must raise issue w/ production of evidence
2. Then ½ states: Δ must prove defense w/ preponderance of evidence
3. OR ½ BOP of gov't to disprove defense beyond reasonable doubt

DEFENSE OF SELF/ OTHERS

Defense of Self

Majority approach:

1. Imminent danger- Subj.
2. Imminent Danger- Obj
3. Amt of Force was needed- Subj.
4. Amt of force was needed - obj
 - You don't have to be right, just reasonable (mistakes allowed)

Common Law Approach

1. Subjective reasonable person standard
- * No state has adopted

- ***People v. Goetz*** - NY Ct App 1986 ***Reasonable person or reasonable Δ***
 - 4 youths approach Δ, ask for money; he shoots them; paralyzes one; Δ charged w/ attempted murder; issue of past robbery (PTSD)
 - Issue: is SD subjective or objective belief force is needed

- Holding: In NY, it is the objective standard (but jury can use surrounding circumstances of Δ to determine if it is reasonable given those facts)
 - Hmm... is that not imposing a bit of a subjective standard?
- **State v. Rupp** - Iowa 1979 - **No duty to retreat if it is life-threatening**
 - Fight at bar, victim charges at Δ, shoots him and flees; history of bad blood and threats bt two
 - Issue: did trial ct err in not including that Δ doesn't have duty to retreat if it involves a risk to his life? Court says YES. Δ allowed to stand ground if risk
- **Commonwealth v. Shaffer** - MA Sup. Ct. 1975 - **Duty to Retreat**
 - Fiancé shot by wife (Δ); he threatened her and the kids; she shot when he came down stairs
 - Issue: she wants MA to apply stand your ground rule: if not, she says she retreated to the wall (but she could have called 911, left thru basement door, he had no weapon, she was experienced w/ it)
 - No castle doctrine in this case bc cohabitants
 - Note: opinion notes location increasingly imp. 2 determine reasonability
 - Rule: **sticks by no SD until availed self of all alternative ways to avoid**
- **State v. Pride** - MO Ct. App. 1978
 - Victim robbed at truck stop; hands gun to man; he shoots at fleeing felons who shoot back (Δ)
 - Δ claims SD bc he was being shot at; court rejects this
- **Battered Woman Syndrome** | **Bechtel v. State** - OK 1992
 - Issue: should testimony of battered women's syndrome be allowed
 - **Reasonability and BWS**: changes the standard bc she knows of the danger better than others (can see signs it's coming); what is not normally overt show of violence can be to her; learned helplessness/psychological paralysis
 - **What can an expert testify/not testify to?**

- She can testify that it is a real diagnosis; explain cycle of abuse; how it affects perception
 - What she cannot testify to: if the Δ acted reasonably or not
- **Rule:** court reverses decision, remands to be heard w/ testimony (and changes the reasonable person standard to add language relevant subjective to BWS- but doesn't change anything)
- **Dissent:** there doesn't need to be any BWS testimony in this case bc this is typical self-defense; no change to language was needed for this case; if we are going to add that, the legislature should do it.
- Prevailing view: no new defense w/ this case; just reemphasizes SD
- Q: W/ BWS: does it apply against all ppl or just her abuser? Who else could get this treatment (PTSD/Holocaust syndrome?) Same case as Goetz?
- **Self-Defense w/ Wrongful Arrest | *People v. Cherry* - NY Ct. App 1954**
 - Right to self-defend against wrongful arrest: this court says YES.
 - Rule: if you believe it is an illegal arrest (even by uniformed officer) you can resist
 - At time, this was common law - but you had to be RIGHT ab the wrongful arrest
 - **Now:** Almost all courts say NO. Increases risk; if wrongful arrest, deal w/ it in court
 - **Rule now:** If reasonable person would believe if it is a police officer, you have no right to resist, even if it is an unreasonable arrest
 - **EXCEPT: if excessive force- u can use force (ex=Floyd)**
- ***State v. Fair* - NJ 1965 - *Defense of Others***
 - Guy friend intervened; stabbed abusive bf; all were drunk
 - Issue: Did trial ct fail in failing to instruct on defense of others? **"Yes."**

Two rules w/ who has the power to intervene

1. Alter ego: Δ steps into shoes of the defended party
 - a. 3d party has right if the assumed victim would have right
2. Objective test: intervening party is bound only to own intent (MPC)
 - a. One who intervenes under a reasonable belief he is protecting another who he believes is being unlawfully assaulted is to be exonerated
 - b. Encourages bystanders to intervene w/o threat of conviction
 - c. Same subjective/objective test as SD but w/ 3d person instead of self

Common Law: Retreat to the wall

- Do everything you can before deadly force
- However, if escape is perilous, you can use deadly force

Castle Doctrine: One who, through no fault of his own, is attacked in his own home has no duty to retreat

- Can only be invoked by one w/ no fault (can't be bc of a fight)
- Privilege of non-retreat from own property (exception to duty to retreat)
- Oftentimes extends past 4 corners of home (some states, your yard, others - porch)
- Intersection between defense of habitation and SD
- Not usually a thing when other person is cohabitant
- The felony doesn't need to be forceful or atrocious (as it does typically w/ SD)

Stand your ground: No duty to retreat

- Aba has decided these laws increase homicides/don't deter violent crimes
- Huge racial impact
- States are urged to repeal them (they don't except when cops say to)
- Only against the offender (sill L if a bystander dies)

Defense of Property (subcategory of SD)

Cases:

- ***People v. Cebellos*** - Cal. 1974 - ***Trap Guns***
 - Trap gun kills 16 yo burglar
 - Rule: **only justified if they would have been justified to use SD if present**

Prevention of Crime

Note: you can use Deadly force on some kinds of underlying crimes : kidnapping, rape, murder, arson, armed robbery, highjacking

Cases:

- ***TN v. Garner*** - TN 1985 ***Cops have less power against fleeing felons***
 - Police officer shot at fleeing burglar after B&E
 - **Rule:** Only allowed if officer has probable cause that Δ is dangerous
 - "Balancing of interests"= interest to effectuate arrest/interest to live
 - Holding: Civil case against officer confirmed; this was unreasonable force

- **Dissent:** O'Connor: Says burglaries are dangerous crime; in the balancing of interests, she sees the test as coming out in favor of the officer. Burden should be on π to show that the officer knew that the victim wasn't dangerous

DURESS AND NECESSITY

NOTE: DURESS CANNOT BE USED AS A DEFENSE FOR A PURPOSEFUL KILLING.

- Traditionally separate defenses (though now largely interchangeable)
 - Duress caused by another person
 - Necessity caused by events

Duress and Necessity:

- So long as the defendant's **perception (of fear) is reasonable**, he should be allowed to argue the defense
- If there is a **reasonable alternative** to committing a crime, it should be taken
- There is an **element of imminence**: when the claimed duress loses its coercive force, the Δ must cease committing the alleged offense
- **Duress is no defense for killing another person**: if your life is threatened and you have the option to be saved by killing an innocent person, you ought to die before doing so.
 - Issue of a seaman throwing others overboard to save himself following a disaster at sea
- The **defense cannot be invoked** if they are put in that situation **by their own reckless decision**: ex: joining a gang
- Even if evidence is insufficient to establish defense: can b used to mitigate sent.
- **Necessity**: Moreso about physical conditions that lead to the commission of a crime, whereas **duress** more so about threat of force from a person
- While common law typically distinguished between the two defenses, modern courts minimize the difference between them.
- Financial necessity is not an allowed defense: Sorry Jean val Jean
- BUT: some courts allow for medical necessity in MJ cases

Cases:

- *State v. Metcalf* - OH Ct. App. 1977
 - Issue: can be defense of duress for non-homicidal crimes be predicated on the fear of safety for OTHERS? (Δ claimed scared for family bc undercover threatening)
 - Rule: Used law of necessity for analysis (which does allow it): Defense can be invoked when Δ fears for others (especially family)

- *US v. Bailey* - SCOTUS 1980
 - Four prisoners escaped bc bad conditions at jail; necessity/duress?
 - If duress/necessity invoked to escape; stops being in force the second they are in safety = should have turned themselves in
 - Dissent: it never lost coercive force, they would have been sent back.
- *State v. Warshow*
 - Demonstrators against nuclear plant; argued necessity
 - Rule: impending harm for necessity must be imminent + reasonable certain to occur
 - Concurrence: can't be necessity if it is a state-sanctioned activity
 - Dissent: it wasn't ab overall environmental risk but turning the plant back on (inside knowledge it might blow)

ENTRAPMENT

Notes:

- US only country in world to have this as a true defense; didn't come from common law
- Comes from Justice Brandize: gov't overreach on prohibition issues
- ½ states follow Supreme Ct rule on it, others follow own rules (only ½ have codified)

| | |
|---|---|
| <p>Subjective Test - SCOTUS + 30 states</p> <ul style="list-style-type: none"> ● Focusing on Δ- were they predisposed to commit the crime ● Focus on moment before inducement ● Jury decides ● Problem: includes proof of priors + associations | <p>Objective Test - MPC view (20 bigger states)</p> <ul style="list-style-type: none"> ● Did the gov't go to far ● Did the gov't engage in conduct to encourage an individual to commit crime ● Judge decides ● Problem: ppl say it disregards culpability of Δ |
|---|---|

Notes:

- There is also a combo option: Judge decides as matter of law if entrapment (with obj) standard, then if he says no, it goes to jury to decide (with sub. standard)
- Inducement = merely "offering an opportunity" not sufficient; must be repeated offerings, money, sexy, using pity, force, threat
- In some states, (AZ) you must admit to crime to use entrapment (Uncons. Per Marcus)
- There are cases where entrapment so bad, it violates due process (doesn't matter what their pre-dispo was) : Sup Ct never heard one, only a dozen nationwide

Cases

- *Sherman v. United States* - Scotus 1958

- Narcotic addict persuaded to sell to another he met at clinic; other was an informant; got Δ back on drugs as well
- Rule: entrapment when criminal conduct is creation of law enforcement and Δ would not have otherwise done the act
- Entrapment here absolutely
- Concurring opinions: argue for objective test (but agree in result)
- *United States v. Russell* - SCOTUS 1973
 - Manufacturing speed; undercover provided him w/ nec ingredient one of the times; Δ plead entrapment
 - Rule: only when gov't deception implants the criminal design= entrapment
 - Here, not entrapment: he did it before, and did it after
 - Dissent: by supplying ingredient, gov't became party to crime (this is BAD)
 - Other dissent: focus on objective rule
- *Jacobson v. United States* - SCOTUS 1992
 - Last time SCOTUS has heard case on entrapment
 - Rule: accused must be predisposed to commit crime; state didn't prove that here

INTOXICATION

| <u>Involuntary Toxication</u> | <u>Voluntary Toxication</u> |
|--|--|
| <ul style="list-style-type: none"> - True Defense - Yes, I committed those crimes, but someone drugged me - NO Jury instruction | <ul style="list-style-type: none"> - Not a true defense - Δ only proving gov't failure to meet mental req (FOP) - Juries hate it as a defense |

Notes

- 1/3 1/3 1/3 split on evidence of intoxication (admitted or not)
 - Some say admitted only if necessary
 - Others say never
 - Some say evidence in some cases
- Forget ab general/specific intent
- States are split about intoxication: prevailing view is there should be restrictions, but it is a mixed bag

Cases:

- *Heideman v. United States* - DC Cir. 1958
 - Δ and friend rob and assault cab driver; claims intoxic
 - Court rules it should have been admitted to jury (wrong) bc reasonable person could question if he had the intent necessary
 - Dissent: Burger says it shouldn't have (right!) but its for wrong reasons
- *State v. Stasio* - NJ 1979
 - Says purpose and knowledge can be negated by voluntary intoxication, but recklessness and negligence cannot (bc they don't need specific intent)
 - Refer to it as a defense, which it isn't, but whatever

INSANITY

Notes:

- Very serious circumstances compared to those sentenced normally
- Only ¼ of the 1% of defenses raised are successful
- Comes up at three times
 - Competency to stand trial - very low standard (do they have general idea of what is going on?)
 - Insanity at time of crime- what we focus on
 - Death penalty
- Almost none go free
- Deals with culpability: belief is if insane= diminished culpability

Procedure

- Trial is bifurcated proceeding
 - 1st: Did they do it
 - 2nd: are they insane
- In some states, they are automatically transferred to state facility
- Others, it is determined by a judge, prosecutor, family members
- If in facility- no sentence cap: just until no longer threat to society

M'Naghten's Case

- Rule: Did the accused, at the time, know the difference between right and wrong
- Was moved away from until Reagan's attempted assassination
- Still leading majority rule (30 states + Feds)
- Criticism

- All or nothing
- Focus is on cognition (right and wrong) and not volition

Irresistible Impulse Test:

- In response to criticism: creation of this test
- Released from liability if they couldn't control themselves

MPC - tried to fix this

- "Substantial capacity" over all or nothing (M'Naughten) test
- Focus on volition + Cognition

Insanity Defense Reform Act

1. Threw out MPC definition
2. Burden of proof goes to Δ , clear and convincing evidence
3. And Experts cannot testify as to the issue of Δ 's insanity
4. Back to M'Naughten

Insanity as a Failure of Proof?

- Can be FoP: Δ doesn't want to raise the issue of insanity as a defense, but says that diminished capacity means gov't can't prove intent
 - In some states, allowed: if it works, they walk
 - If not, they go to regular jail (big issue)
- Other states: if you are raising the issue: needs to be Insanity Defense: they can be found NG, but they will still be put away.

Experts

1. First must establish credentials
2. What can that expert testify to: What is X mental disorder; Was this person suffering delusions; they can educate jury about condition
3. They cannot: diagnose person (depending on judge); say that that person was unable to decide right/wrong (jury issue)

Burden of Proof: Usually on Δ to prove insanity (by preponderance or clear and convincing