Criminal Law notes, Spring 2004. Professor Anderson.

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Intoxication

Involuntary intoxication

- Note that the substantive aspects of involuntary intoxication and insanity are the same—only the factual predicate (or threshhold—non-self-induced intoxication or mental disease or defect, respectively) are different.
- If you are II, § 2.08(2) does not apply to you. However, you still might have enough MR. In fact, the MR analysis—except for the special rules—stays the same for VI, II, and insanity.

MPC § 2.08(4)

- Hypo: Δ is involuntarily administered LSD; a person on the street appears to Δ to be a wild, raging beast.
  - § 2.08(4)(a): we're assuming non-self-induced here.
  - § 2.08(4)(b): this has two prongs (the same ones as in insanity):
    1. Cognitive prong: Δ must have no substantial capacity to appreciate the criminality (or wrongfulness) of his conduct; or
    2. Volitional prong: Δ must have no substantial capacity to conform his conduct to the law.

    (Note that some drug might cause seizures—in which case a voluntary act issue is implicated.)

  - If Δ tries but fails to commit some offense while involuntarily intoxicated, he already not guilty under § 5.01 (which requires P, K, or belief)—without the help of § 2.08(4).
- Hypo: Δ is involuntarily administered LSD; he believes someone is threatening him with deadly force.
  - To satisfy the self-defense requirements, Δ has to reasonably believe the threat—he's not reasonable here because of his intoxication. But Δ can use § 2.08(4)'s cognitive prong to escape conviction. (The volitional prong would work in certain other circumstances. See

Kingston.)

Insanity

We have a spectrum of possible formulations of the insanity defense, ranging from a big net to a small one.

- No insanity defense.
- One prong insanity defense (no volitional prong).
  - Narrowly tailored (like *M'Naghten*—actual knowledge).
  - Broadly tailored (like MPC—substantial capacity).
- Two prong insanity defense (cognitive and volitional prongs).
  - Narrowly tailored (*M'Naghten*).
  - Broadly tailored (MPC).

Furthermore, each of these can be tweaked by selecting the "criminal" or "wrongful" comparison variety.

Will we admit psychiatric testimony on MR?

- If we have no insanity defense, we have to in order to stay constitutional.
- If we do have an insanity defense, we can go either way. Some jurisdictions will hear it wrt. MR, some will only hear it wrt. the insanity defense.

Why would you sometimes rather be guilty than an insane acquitee? For one thing, because civil commitment is hugely subject to abuse. If you've committed no crime, the state, for constitutional reasons, faces high burdens for committing you; but if you're an insane acquitee, it is often much easier to commit you. (So, can we <u>make</u> you plead insanity??)

Hypo from prior exam: Δ who had a bear he thought was a person.

- Without a doubt, he's guilty of possessing the bear without a permit.
- What about when he shot the bear (while thinking it was a person)?
  - If there's no insanity defense, Δ can argue he lacked sufficient MR—and he'll win on this.
  - If there is an insanity defense, and phychiatric testimony will be heard only wrt. the insanity defense, Δ has to argue about his comprehension of either the wrongfulness or the criminaility of his conduct. His problem is that he didn't think he was doing the right thing—he thought he was doing a wrong thing (killing a person). (Note that this isn't a typical, or "straight" insanity problem.)

Another hypo from prior exam: Doug. Doug's problem occurs once he stops taking his medication.

- If there's no insanity defense, Δ can argue he didn't perceive his victim as human and thus lacks any subjective MR wrt. the "human being" AC.
- Could we get Doug for MR on his AR of stopping his meds? Well, stopping his meds is an omission and Doug has no duty to take his meds that would turn that omission into an AR (unless he's been ordered by the state to take them).

Monday, April 26

Intoxication

Intoxication

- In an analysis involving intoxication, first analyze the facts without the special rules on intoxication, then with them.
- Unfortunately, we've got the confusing general/specific intent thing in intoxication:
  - General intent—no intoxication defense.
  - Specific intent—intoxication defense.

  Often, it seems these are just used to pick whether, not why, we want a Δ to have an intoxication defense (!).

  And remember, saying an offense requires general or specific intent is sometimes nonsensical and confusing—an offense can have both "general" and "specific" offense elements.

Voluntary intoxication

MPC § 2.08(2)

- Hypo: Δ takes LSD voluntarily, then perceives a person on the street as a wild, raging beast charging him.
  - First, note the dual AR problem—if Δ had enough MR wrt. R at the time he took the LSD, taking the LSD can be his AR. (But even if he did, and it was, we have to make sure his intoxicated self didn't break the causal chain between AR and R.)
  - If Δ didn't have enough MR wrt. R when he took the LSD, we look to his MR later, when he was intoxicated.
    - Hypo A: Δ actually kills the person he perceives to be a raging beast.

- Without § 2.08(2), we can probably get Δ for negligent homicide, because he was acting unreasonable.
- With § 2.08(2), we can get manslaughter, because his awareness of the risk is immaterial.
- Can we get murder? To answer that, we have to know whether § 2.08(2), when it says it applies to "recklessness," applies to OR. It's ambiguous whether it does.

(Note the other two requrements for § 2.08(2) application—aware when sober, and self-induced—are present here by definition of the hypo.)

The net effect of § 2.08(2) is that we take away the awareness requirement for R for Δs who are voluntarily intoxicated. And since the awareness requirement is what distinguishes R from N, when a Δ is intoxicated, N will do for R on MR.

- Hypo B: Δ tries but fails to kill the person he perceives to be a raging beast. Regular § 5.01 won't work to get Δ on attempt, because Δ doesn't have the purpose or belief that he is killing a person. § 2.08(2) doesn't help because it doesn't apply—R is not an element of the attempt offense (P, K, or belief is required).
- Hypo C: the killing of an officer offense—R is required wrt. the "officer" AC.
  - If a sober Δ purposely kills someone without awareness of any risk that the victim was an officer, he's not guilty of the officer-homicide offense.
  - If a drunk Δ purposely kills someone without that awareness, but would have known if he was sober, he's guity of the officer-homicide offense because of § 2.08 (2).
  - If a drunk Δ shoots and misses, we <u>can</u> get him for the officer-homicide offense, by applying § 5.01(1)(b) (failed-attempt) and § 2.08(2): MR for AC of the completed

offense stays the same on attempt, and although Δ here is only N wrt. the "officer" AC, § 2.08(2) bumps that up to R, which is enough MR. (We can do the same thing with A&A, where MR for AC of the completed offense also stays the same.)

Involuntary intoxication

- What is "involuntary"? It's the opposite of "self-induced," which is defined at § 2.08(5)(b).
- If intoxication is not self induced, § 2.08(2) does not apply (i.e., it will not kick MR up to R). However, if you're involuntarily intoxicated and have lots of MR, you'll still be guilty unless you can satisfy § 2.08(4).

Friday, April 23

Necessity and Duress

Justification and excuse

Necessity and duress review

Hypos, p854 (note there is also a causation (contribution of the drunks) issue here):

- (a) Balance of harms is not strictly in your favor (2 to 2), so no necessity defense. And no necessity defense because natural circumstances.
  - But, because there's no brakes, you could make a "no act" argument (which would be an omission questions (which becomes a duty question)).
- (b) Duress? yes (assuming none of the limitations on the duress defense apply).

Duress: what will we take into account wrt. "reasonable firmness"? Well, we won't take timidity into account.

Causation review

X Y R

If Y is a bad buy, he might break the causal chain between X and R. If he does, X may still be liable for R, through either A&A or *Pinkerton*; or, X may be liable for attempt; and remember *Luparello* if X is only N wrt. R.

Wednesday, April 21

Justification and excuse

Justification and excuse

Necessity

Dudley and Stephens

- Why punish?
  - Incapacitation? Not here—no worries about repeat offenses.
  - Retribution or rehabilitation? No—they're fine people.
  - Deterrence? It wouldn't be effective—people in these situations are already worried about dying now.
- N.b., itc., the judges knew that the queen was going to commute the sentences no matter what, so these judges could condemn strictly in words.
- Applying MPC here:
  - § 3.02 (and § 2.09) can apply to intentional killings (but most jurisdictions won't allow it).
  - Balance of harms.

Hypo: in a group, a grenade falls. A smothers it with B.

- Choices:
  - Omit—lawful, but everyone dies.
  - Smother himself.
  - Smother another.
  - Throw the grenade elsewhere.
- Do you need a necessity defense? No—the prosecutor can' prove causation, because A is not a but-for cause (i.e., B would have died anyhow).
  - N.b., if A throws the grenade elsewhere and people die, then A is a but-for cause—those people now died because of what A did (but A's only guilty if A was aware to a practical certainty of the people where he threw it; otherwise, A's just being reckless or negligent,

in which case the prosecutor would have to prove unjustifiability).

Note that some jurisdictions use the necessity balance of harms in duress—the only difference in those jurisdictions is that duress is applicable wrt. a person's threat and necessity is applicable wrt. a natural threat (i.e., there, duress is a type of necessity).

- But remember this is not how it's done in the MPC. In the MPC, you don't have to pass the necessity balance for duress.

Excuse

- N.b., a number of excuses are part of the prima facie criminal case (especially in the MR analysis there).
  - You could argue that these kinds of excuses are really justifications—we don't want to totally deter normal, everyday activities by only excusing them.
- Many excuses are "I just did what normal people do." The problem in these cases is defining what "normal" is (recall provocation, which is a partial excuse). I.e., how much like everyone else does Δ have to be (recall *Compton* provocation case; BWS; nearsightedness/wallet hypo).
- Other excuses are "I'm so different than everyone else that I shouldn't be held to the standards they're held to."

Duress

We could use a totally subjective standard, but, as in other contexts, we don't.

Toscano

- Generally, we want people to go to the police rather than commit a crime (recall imminence requirement in self-defense (especially wrt. BWS)).
- So, the question is whether we want going to the police to be a requirement or a factor (i.e., evidence of the extent or immediacy of the duress).
  - See MPC § 3.04 (basic self-defense): "immediately necessary" and "on the present occassion," which create the imminence requirement there.
  - In MPC § 2.09 there is no such language. But the prosecutor can argue imminence type arguments under the "person of reasonable firmness" requirement there.

Why don't we impose an imminence requirement

itc.?

- Maybe because we simply want a lenient imminence requirement for duress.
- Or, maybe, because Δ didn't do anything terrible.

Note that there is nothing in MPC § 2.09 about the balance of harms. But, like imminence, the balance of harms might be relevant to the "person of reasonable firmness" requirement.

Monday, April 19

Justification and excuse

Justification and excuse

Self-defense

Peterson

- When Peterson displays, he hasn't used deadly force yet. But, Keitt could honestly, reasonably believe that Peterson was about to use it, in which case it's deadly force to him. So then, the question, from Keitt's perspective, is whether Peterson is defending against unlawful force. But, if Peterson then uses the gun (against Keitt's lug wrench), he will have used deadly force against unlawful force—so his self-defense argument fails.
- Hypo: non-deadly attack on you, you escalate to deadly. If they shoot you, they have MPC self-defense.
  - N.b., common law will often reach the opposite conclusion, due to initial aggressor rule.
- N.b., *Allen* roommate note case. Under MPC, roommate is escalating, so opponent could go to deadly.
- Hypo: I assault, they defend nondeadly. I run away, they pursue.
  - Under MPC, we need no withdrawal rule; § 3.04(1) is all we need, because they are threatening unlawful, and so I have a self-defense argument (unless I escalate to deadly).

Self-defense in defending someone else

- MPC § 3.05

- The question is: do we analyze the availability of self-defense to the helper by looking at the situation from his eyes, or from the eyes of the potential victim's eyes.
    - The MPC looks from the helper's eyes.

Can you risk injury to others in self-defense?

- E.g., if you're armed with a machine gun only.
- This is an easy question when, as in the note case, you don't know the other people are ther.
- It's a harder question when you do. This goes to the justification/excuse distinction.

Necessity

Distinguish duress from necessity (although often you'll have both).

- Necessity: Δ picked the best option wrt. society as a whole—this is a justification.
- Duress: this is an excuse.

Unger

- MPC § 3.02 analysis itc.:
    - (1) "conduct" here is leaving. "Avoid harm" is yes, here (itc., harm to Δ).
        - (a) Continuing assault a worse harm than escape? (N.b., it must be strictly greater.)
        - (b) and (c): n.b., these solve the medical marijuana cases.

MPC § 3.02

- Does "believes" mean its a subjective standard?
    - Maybe, but there's nothing in (a) about what Δ believes. The balance must strike in Δ's favor.
    - (a): see *Schoon*: the question becomes:
        - Is it a harm? How could it be if congress has endorsed it?
        - Causally linked? A very weak link here, especially compared to stuff like a mountain cabin breakin for food.
    - (2) addresses whether there's a subjective or objective standard:
        - If you did believe it, but were negligent or reckless in developing that belief, then you can be guilty of an N or R offense.
- How do you strike the harms balance?
    - First, in N or R offenses, you don't need § 3.02—you just

argue a justifiability argument, because of the "substantial and unjustifiable risk" language in § 2.01.

Friday, April 16

Conspiracy
Justification and excuse

Conspiracy

Analysis:

1. Was there a conspiracy (run through the elements).
2. If so, what are the consequences.
    - If only one person actually completed, think about causation and A&A for the other people.

Plus, note all the variations on both.

Forseeability—where does it come up?

- Causation
- *Luparello*
- *Pinkerton*

All these involve forseeability tests.

- Negligence wrt. causing a particular result—here, forseeability is not the test, but it's a fact involved in the test.

Justification and excuse

- The law often does not put the burden on the Δ to prove defenses (instead, the burden is on the prosecutor to disprove the defense).
    - There is an exception, in many places, for insanity.
    - So, e.g., self-defense—Δ gets to effectively "try" the dead guy, to show why he deserved it (n.b., as in provocation manslaughter, too). Whereas, usually, badness of the victim is not an issue at all.
- Defenses related to self-defense:
    - In aid of law enforcement.
    - In defense of property.

Remember that self-defense can always be applicable—even when no killing is going on.

MPC § 3.04

- Hypo: what if Goetz had just pshed the other people back?
  - What act ("use of force")
    - There are always two aspects of this force:
      1. Δ's
      2. Victim's
    - Δ has several ARs (hypo: pushes; actual case: gunshots). Each AR is a "force," and so we must analyze each of them.
  - Goetz's biggest problem in the actual case is the last gunshot—even a problem, maybe, under the MPC's subjective standard ("believes" only).
    - N.b., "reasonably believes" in the NY statute.
- Reference to MPC § 3.09: N or R in adopting the "belief" in defense—you're guilty of the offense with that MR.
  - Most, if not all, states have not adopted this. Most, instead, shove in the "reasonable" requirement. (Remember *Cassassa*: wrt. povocation—"reasonable to me.") We'll at least take into account some personal characteristics (e.g., nearsightedness in the wallet/gun hypo). But we won't take all personal characteristics into account (e.g., paranoia). How do we differentiate these and draw the line??

Kelly

- N.b., why kidnapping in MPC self-defense?? Well, for one thing, it might be best not to go to crime scene #2, no matter what.
- Look at the definition of "deadly force" at MPC § 3.11(2).
- Δ itc. can say all kinds of bad things about the victim—in fact, it's the only evidence that's probative.
  - E.g., position of the victim's arms becomes relevant only under the other circumstances (e.g., BWS).
    - E.g., like a person who always keeps a gun in his left coat pocket (he's different from most other people wrt. reaching into his left coat pocket).
  - But what about expert testimony—we don't have much other, itc.
    1. Is expert testimony going to be probative?
    2. Is the expert going to be able to say anything relevant to this case?

    N.b., is this information "beyond the ken of the layperson"?

    These are easy questions under a subjective standard. But what about under an objective standard—this is much

harder.

Wednesday, April 14

Conspiracy

Conspiracy

Krulewitch

- Is the statement hearsay?
  - This is actually at the heart of the conspiracy problem—are we going to set aside the usual rules so we can catch conspirators in crime?
    - Catching them can be very important—collaboration is required for big crimes (e.g., 9/11).
    - Also, often when you catch one conspirator, they'll roll over (i.e., tell on) others.

Hypo: cousin in cahoots with others to rob banks and blow up churches. He comes to you and offers to buy your gun. You sell it to him. Cousin then tells his coconspirators that you're with him (a lie) so that they don't worry. A coconspirator will recount your cousin's statement about you in court (and will be telling the truth).

- The conspiracy hearsay exception is circular: "we'll allow hearsay if you're a conspirator, and we hear the hearsay to decide if you're a conspirator."

Substantive side of conspiracy

- Is it a crime? (This is like attempt.)
- Does is mean complicity (*Pinkerton*)? (This is like A&A.)

Δ will argue for lots of little conspiracies. The state will argue for one big conspiracy.

Consequences of conspiracy

- MPC: just like attempt and solicitation—same punishment as for the completed offense. Except, we step a grade down one notch for heinous offenses.
- Other jurisdictions: conspiracy has its own punishment set in statute.
- Merger?
  - Some places say yes, some say no.
  - MPC: yes, if you've totally completed the planned offense.

Complicity aspect

- *Pinkerton*: could probably have used A&A itc., n.b.
  - *Alvarez* exception: "minor players" are not subject to the *Pinkerton* rule.
- Compare MPC A&A and *Luparello* A&A.
  - *Luparello* ≠ *Pinkerton*, but both have a forseeability inquiry.

pb3ap690

- Run the MPC A&A, *Luparello* A&A, and *Pinkerton* analyses.

A: MPC A&A on all offenses.

B&C as A&A'ors? Probably not.

- Didn't take to each other (though they did know of each other).
- C didn't even know of the car theft.

Everyone's guilty under *Pinkerton*, though.

Monday, April 12

Aiding and abetting
Justification and excuse

Aiding and abetting

Liability between parties

- Hypos on *Hayes*:

Actor 1 Actor 2 R

1. "I'll boost you throught the window to vandalize." Solicitation.
2. "Ok." Conspiracy.
3. In there stealing bacon. Booster is A&A.
   - Or, if booster is holding a gun to the enterer's head, booster causes (non-FIIHA, but forseeable).

Actor 1 (high MR wrt. R) Actor 2 (low MR wrt. R) R

E.g., "here's an unloaded gun—go pull the trigger while pointing it at this guy."

- Cause: is 2 an FIIHA? How informed, how independent do you have to be?
- A&A: has 1 A&A'd 2? Probably. But guilty only of negligent homicide.

Compare the Howard Beach case—ith., unlike there, 1 wants 2 to do what 2 did (i.e., purposeful promotion and facilitation). Also, ith., unlike in the Howard Beach case, we have a cause problem—unless we make an expansive reading of MPC § 2.06(4) (especially wrt. "accomplice in the conduct causing the result").

- MPC § 2.06(4) can be read to make 1 guilty of the offense he wants (murder) for A&A. Whether the MPC drafters meant for this, we don't know—but it might work anyhow.

What if 2 has a defense unrelated to MR wrt. result (e.g., law enforcement defense as in *Vaden*, or parent as in *Taylor*)?

Justification and excuse

- Justification: you did what society wants (e.g., executioner, self-defense).
- Excuse: you did a bad thing for an understandable reason (e.g., insanity, duress).

The easiest case is immunity—that's strictly personal.

Friday, April 9

Aiding and abetting

Aiding and abetting

Actus reus

- Sometimes, the aider is a but-for cause, but this is not at all required

(see *Wilcox*).

- Ways of promoting or facilitating:
    - By communicating (e.g., "do it!" ("do it!" also implicates solicitation and conspiracy)).
    - By not communicating (giving shooter the gun).
    - By doing both.
- N.b., although A&A'ors are often conspirators, and vice versa, they are not always—you could be just one of the two.
- N.b., solicitation is an attempt to conspire, basically.
    - You need at least two people for a conspiracy, but only one for solicitation.
        - E.g., police can intercept a soliciting letter.
            - If the killer does it anyway (i.e., without getting the letter), sender is A&A (MPC § 2.06(3)(a)(i)).
            - If the killer doesn't do it, solicitation.
            - If there was no interception, conspiracy.
- Hypos, n2pp630-632:
    - Actual *Tally* case—aiding, but not soliciting (because no communication).
        - N.b., the telegraph operator recipient could be A&A by omission (based on his contract duty to do his job), but only if he had the purpose to promote or facilitate.
    - *Hicks* hypo—attempt to A&A (MPC § 2.06(3)(a)(ii), or solicitation (MPC § 5.02(2)).
    - *Tally* hypos:
        - (a) attempt to aid.
        - (b) no offense even attempted, so the judge has nothing to have A&A—i.e., we're not in the § 2.06 world.
        - (c) we can't go to:
            - A&A
            - Attempt
            - Conspiracy
            - Solicitation

            So we have to go to § 5.01(3). Note that this solves the *Hayes* case (p633): boosting into the store is enough for guilt under § 5.01(3).

    - Note *Richards*, n1app642-643.

Wednesday, April 7

Aiding and abetting

Aiding and abetting

Mens rea

(AR E(ffect) (underlying offense))

E MR:

- MPC says P.
- Common law says K.
- *Luparello* says N.
  - This is sort of like the FMR—under the FMR, having intended to commit one offense, you might be guilty of another. Under *Luparello*, having intended to promote on offense, you might be guilty if another offense ends up getting committed.
  - But remember that *Luparello* is a different problem than *McVay*.

Xavier

- These are the same set of problems as in attempt:
  - In attempt, MPC § 5.01(1)(c) has mucked-up language.
  - Here, we don't have any language (i.e., the "otherwise required for the offense" language in § 5.01(1)(c)).
- *Xavier*-like hypo: shooting a federal officer (N MR) that the shooter thought might be an imposter.
  - What about the aider in the room shouting "do it!" Should we require more than N MR on AC? Anderson doesn't see why we should.
- Itc., what do we do with the aider, since the AC MR here is SL?
  - The problem's kind of easy itc., since there's a whole federal statute about what to do.
  - Itc., too, we have suspicious circumstances, but imagine a yard sale with a gun—seller is A&A! Even felon's attempt to buy the gun, where he doesn't pick it up or even touch it because he sees a cop across the street—seller is A&A the attempt! Especially if there's no renunciation defense to attempt!
  - Or what about statutory rape—the roommate says "go for it" to kid saying he's going to have consensual sex.

Should roommate be A&A??

- So, with SL MR for AC on A&A, we require more MR wrt. the underlying offense for the A&A'or. With N MR for AC, though, MR for AC stays the same for the A&A'or.

McVay

- Applying MPC § 2.06(4) itc.:
  - Result required? Yes.
  - Accomplice in the conduct? Yes—Δ promoted or faciliated the firing of the boiler.
  - Sufficient MR wrt. result? I.e., same MR wrt. result as is required in the underlying offense?
    - N.b., this is MR "if any," the MPC says, so SL stays SL (as in FMR).
- Note that we can end up with a *Hicks* problem here—especially in the drag racing cases—<u>as well</u>. Do you ahve to purposely promote or facilitate the <u>exact</u> bit of conduct??

<u>Monday, April 5</u>

Aiding and abetting

Aiding and abetting

Attempt: the underlying offense was not completed.
Aiding and abetting: the underlying offense was completed, but not by <u>this</u> Δ.

Note that you can have things like this:

(MR)	(MR)	(MR) (MR) (MR)
(AR	(AR	(AR + AC + R)))
A&A	attempt	underlying offense

And this can be recursive.

MPC § 2.06 and contemporary A&A statutes change lots of the older rules, but they do <u>not</u> change the accessory after the fact law.

<u>MPC § 2.06</u>: accomplice = aider.

- Sets up only two categories:
  - Principals

    - Aiders
- § 2.06(a): the non FIIHA (in the non-concurrent setting); this solves a causation problem.
- § 2.06(b): "accomplice" = principal by statute.
    - Note that under MPC, you're not guilty of A&A—you're guilty of the underlying offense because of A&A.

Anderson's A&A trick

(MR)		(MR)	
(AR	→	R (wrt. effect)	(underlying offense))
of A&A		of A&A	

The problem will be when the MR for $AR_{A\&A}$ is high, but the MR for $R_{A\&A}$ is low.

Hicks

- Hicks "take your hat off . . ." could have encouraged Rowe; this could be Hicks's AR.
    - That AR was purposeful.
    - It caused the result.
    - But what MR is required for R?
        - Usually, there's a debate in the law between P and K (but see *Luparello*, which drops it to only N). The MPC says P (§ 2.06(3)).
        - Hypo: you take a friend to and home from the store. He committed armed robbery there, but you didn't know anything about that.
            - Your AR MR is high.
            - Your R MR is low.
        - Hypo: hostage negotiator says "get rid of those kids," and the hostage gets rid of them by shooting them dead.
            - Negotiator's AR MR is high.
            - Negotiator's R MR is low (maybe N, but no more).
        - But who's going to be P and not K here? Not many—the most significant category is people, like retailers, who supply instrumentalities.
        - Posner: if the underlying offense is heinous, K should be enough for A&A MR.
            - But note that under the MPC, a prosecutor can prove K and then, because of the heinousness of the offense, ask the jury to infer P (i.e., "no normal person would have done this unless P").

Distinguish these problems from the *McVay* type questions, where the problem is the MR wrt. the underlying result.

Luparello

- This is a *Hicks* problem, but you can change on fact to make it a *McVay* problem—instead of shooting, the actors beat the victim, who dies in the beating.
- MPC § 2.06(3) analysis:
  - Δ definitely has enough AR MR.
  - But Δ argues (correctly under MPC) that he doesn't have enough MR wrt. R—not P, not even K, or even R. The court rejects this, and says only N is required (!!).
    - Anderson suggests that you might, under itc., have to at least purposely encourage some unlawful act (that could forseeably lead to what actually happened).

Wednesday, March 31

Attempt: impossibility

Attempt

Impossibility

Dlugash: Anderson notes the we don't know from the muder conviction that Δ had enough MR for attempt (i.e., knowing); so, the court is wrong.

Berrigan

- The offense:

  transport letters + without consent of warden

  - If we arrest Δ before any smuggling, we can go for solicitation, but the MR evidence is iffy.
  - Assume away the informant for simplicity's sake. The warden's gives Δ consent in order to catch Δ.
    - Δ is not guilty of the completed offense.
    - Δ is guilty of attempt under MPC.

Lady Eldon

- The offense:

import + french

Δ is guilty of attempt under MPC § 5.01(1)(a).

- Second hypo: the duty list is changed and Δ didn't know.
  - Δ is not guilty of the completed offense (no such offense).
  - Δ is not guilty of attempt (no offense to attempt).

This is umbrella hypo #6.

Mitigation doctrine: Anderson think it's really ever going to apply—a voodoo doer has demonstrated willingness to do a proscribed thing. I.e., it's easy to pick up the shotgun when you realize voodoo doesn't work.

Monday, March 29

Attempt: solicitation
Attempt: impossibility

Attempt

Solicitation

Most solicitations turn into conspiracies.

- In these cases, however, there is no conspiracy because there is no such thing as a pretend conspiracy. (And no problem convicting these Δs because the MPC has the solicitation offense.) (Whereas, if you ask someone to be a hitman and they say yes and mean it—that's a conspiracy.)

Remember these realted ideas:

- Conspiracy
- Aiding and abetting
- Attempt
- Causation

Impossibility

In attempt-impossibility problems, AC is absent; the question is: can you attempt something you could not have completed?

Umbrella hypos

take + property of another
(K) (K)

Hypos 1-3: see classnotes, Feb. 4.

4. I pick up what I think is the "wrong one," but it's actually mine.
   - Not guilty of the offense.
   - Guilty of attempt under MPC.
5. This time, my uncle's revocation was effective under this law of property.
   - Not guilty of the offense.
   - Guilty of attempt under MPC.
   - N.b., if they catch you before you get there, you're also guilty under MPC (but not § 5.01(1)(a); you're guilty under § 5.01(1)(c)).
6. This time, there <u>is</u> an exception when it's raining.
   - Not guilty of offense (because there is no such offense to be guilty of).
   - Not guilty of attempt (you can't attempt something that's not an offense).

   This is because the criminal law itself is not an AC—you can't invent criminal law in your favor (umbrella hypo #3), nor can you invent it against you (umbrella hypo #6).

Applying the MPC approach to *Jaffe*

- Note that if Δ had done everything he wanted to, he wouldn't have completed an offense.
- Assume Δ gets and pays for the fabric. Under MPC § 5.01(1)(a) he's guilty of attempt.
- Assume Δ gets caught before paying. Under MPC § 5.01(1)(c) he's guilty of attempt.

Dlugash: what if the victim was actually already dead, for sure? Then not guilty for the completed offense, but guilty for attempt under MPC—either under § 5.01(1)(b) (completed) or § 5.01(1)(c) (caught before completing).

<u>Friday, March 26</u>

Attempt

Actus reus

- *Rizzo*: note that had the cops known Δs would get off, they would have waited longer before arresting them; but if they wait too long, they might not be able to prevent the harm.
- How does the MPC, by punishing attempt the same as the completed offense, not create a perverse incentive to complete the offense?
    - The abandonment affirmative defense—MPC § 5.01(4).
        - Abandonment must be complete and voluntary.
        - Under this approach, those who have attempted and would have desisted, but were caught before they did—they're guilty.
- *Jackson*: how long do we wait?
    - It's too dangerous to let them commit it.
    - We can't get much on them days in advance, though.
- Substantial steps: they must be "strongly corroborative" of criminal purpose.
    - Hypo: terrorist employed by an airline as a pilot. If he wants to crash an airliner into the terminal on descent—when does his AR strongly corroborate criminal purpose? Not until it's too late. (How do we solve this? Conspiracy—see *supra*).
- Multiparty aspect of attempt
    - Hiror-hitman: note the causation problem—the hitman is an FIIHA (solution? Use A&A and conspiracy).
    - Hiror-fake hitman:
        - Not an FIIHA, but no killing either.
        - From a policy perspective, the hiror is dangerous and will probably try again if given the chance.
        - But, if things had gone as the hiror planned, he wouldn't have comitted a crime!
            - So, the MPC creates the solicitation offense, which is punished as an attempt (i.e., solicitation is essential "attempt to conspire").

Wednesday, March 24

Attempt

Attempt

Mens rea

- You try but fail—MR wrt.:
  - Result—the requisite result MR for the underlying offense.
  - Attempt—the attempt MR.
- MPC
  - § 5.01(1)(b): you've done everything you have to do.
  - § 5.01(1)(c): you've still got some things left to do.
  - Result: belief is the minimum sufficient MR wrt. result (see *Thacker* n3p560).
  - Attendant circumstances:
    - Hypo: homicide of an officer. You thought the officer was a fraud.
      - If you kill him, you're negligent wrt. AC, and so guilty.
      - If you don't get that far (killing him): MPC § 5.01(1)(c): "as he believes them to be . . ." I.e., the MPC wants you to be guilty, Anderson says, but because of this clause maybe it doesn't make you guilty.
        - This language is there to solve the opposite problem—e.g. where you thought the guy was an officer, but he wasn't.

Actus reus

thought----------act---result

With attempt AR, we want to draw the line somewhere between thought and act. But where? I.e., when have you done enough?

* This is a hard and important question—consider terrorists and WMD havers. It's easier to stop them closer to "thought" but very hard or impossible to get them as they get close to "act" (e.g., after they've boarded the 9/11 airliner).

- One function of attempt AR is to convince us that:
  1. You've had the bad thought, and
  2. You're going to act on it.

Monday, March 22

Causation
Attempt

Causation review

The causation analysis:

1. Cause in fact (the "but for" test)
2. The "proximate cause" test (for lack of better term)

Concurrent cause?

- Yes
  - Substantial contribution?
    - Yes—causal.
    - No—not causal.
- No
  - Fully informed, independent human second actor?
    - Yes—not causal.
    - No
      - Forseeable?
        - No—not causal.
        - Yes
          - Responding 2d actor?
            - Yes—low level of forseeability is sufficient.
            - No—low level of forseeability is sufficient, but higher than if responding second actor.

Attempt

- Has its own AR. E.g., pointing the gun??, buying the gun??, thinking about the gun??
- MR might be different than what's sufficient for the underlying offense.
- Gradation:
  - General rule: attempts are punished less than the completed offense.
  - MPC rule: attempts are punished at the same grade as the completed offense.

- Why punish attempt? Because the actor has made a bad choice:
  - That we want to punish from a retributive perspective.
  - That we want to deter.

  Buy why punish less (under the general rule)? We don't want you to try again—we want to give you an incentive to stop. Note multiple attempt counts can solve this problem, to some extent, without punishing less.

Smallwood

- N.b., even if the victims here had consented, the attemp analysis would be the same.
- What if Δ was tried and convicted for attempt, and then the victim actually dies?? Do we try him for homicide??
- MPC § 5.01: "with the kind of culpability otherwise required for the offense."
  - We could have:
    - Low probability with purpose—sufficient.
    - High probability without purpose—insufficient.
  - Is knowledge going to be enough?
    - Hypo (n6bp562): blow up plane to collect insurance.
      - MPC § 5.01(1)(b): Δ's purpose ith. was not to kill the pilot—but "or with belief it will cause the result without further conduct" gets him.
      - What if Δ is caught before he gets the bomb to the plane?
        - MPC § 5.01(1)(b) doesn't apply—further conduct is still required.
        - MPC § 5.01(1)(c) applies—a substantial step planned to culminate in the crime.

Friday, March 12

Causation

Causation

N.b., re: attempt, conspiracy, and aiding and abetting:

- Make sure to identify the underlying offense.
- Each will have its own AR.
- MR might be different than for the underlying offense.

Stephenson

- Causes:
  - Bite wound (Δ)
  - Trama incident to attempted rape (Δ)
  - Delay in treatment (Δ)
  - Taking poison (victim)
- What if the poison killed her instantaneously? Then we are not in CC. We ask if victim was a FIIHA.
  - The prosecutor will argue that victim was subject to Δ's control.
  - Δ will argue that victim went out and bought a hat, then came back (but prosecutor will respond that victim was always accompanied by Δ's minion).

  So, probably victim was <u>not</u> a FIIHA. The question becomes one of forseeability.

What happens when subsequent actors are only <u>negligent</u>? (Remember that in CC, this doesn't matter.)

- Consider a russian roulette case where the victim is not a player, but an innocent passerby. Does the identity of the victim matter?? The drag-racing cases kind of suggest that it does.

Root

- What do we do with the 2d actor??
- But-for cause? Sure—the race wouldn't have happened but for Δ
- Victim a FIIHA? Did he <u>decide</u> to take a chance? What about *McFadden*, where there's another (innocent) victim?
  - In both cases, it's N → N → result.
  - What if we have P → N → N → result. This is *Kern*:
    - The victim:
      - Not an FIIHA.
      - Was forseeable that he'd do what he did.
    - Driver: FIIHA?
      - If he'd decided to kill the victim, then sure.
      - But the driver was actually only negligent. So, when is negligence relevant and when isn't it?? See *Root*. Anderson hypothesizes that a kind of "comparative" fault is at play—the chasers are guilty because they were purposeful whereas the driver was only negligent.

<u>Wednesday, March 10</u>

Causation

Causation

N.b., omissions can be causes. Also, remember the transferred intent possibility.

Causation redux

1. Operating together?
2. Forseeable?
3. FIIHA?

Remember, because we don't really know the policy behind all this, we don't know how or where to draw the lines between these categories.

Campbell

- MR? Not knowledge, but more than negligent. Maybe reckless or OR. What about purpose? Yes!
- Causation? Hope is enough for purpose but not enough for causation.
    - We're not in CC, but the result was forseeable. But, to get to forseeability we have to go through FIIHA. Was the victim a FIIHA?
        - Will drunkenness take the victim out of FIIHA??
    - N.b., the further breakdown of the forseeability category:
        - Responding intervenor (e.g., an executioner): low forseeability standard.
        - Not a responding intervenor (e.g., the driver in *Kibbe*): slightly higher forseeability standard.

        But is this really an artificial distinction, or is it just that responding intervenors are more forseeable?

Kevorkian: If Δ can get the analysis to FIIHA, he'll argue that the victims were FIIHAs. But are we in CC?

- E.g., poision within reach (not CC)? Or,
- E.g., holding the rifle up (CC)?

Monday, March 8

Causation

Causation

Causation problems we run into

Act 1 → Act 2 → Result
(high MR) (low MR)

E.g.:

- A1 (victim is nearly killed, but the killers thought she was dead)
- A2 (killers dump the victim in a river)
- R (where she dies)

Act 1 → Act 2 → Result
(actor 1) (actor 2)

- Actor 1 may still be guilty of attempt, no matter what.
- Consider actors 1 and 2:
  - Conspiracy?
  - Aiding and abetting?

Remember that the "result" could actually be an act (e.g., Δ holds a gun to someone's head and orders them to attempt to kill someone—the "result" of Δ's act, for causation purposes, is just causing the hostage to attempt a killing. It doesn't matter it the hostage succeeds or not.)

With causation, unlike other aspects of criminal law, we don't know what the underlying policy is. So, it's a bit unsatisfying. How do we figure out how to draw the lines? Well, all we've got is an intuitive sense that causation analysis matters. (Note that it's unclear if we're saying "the chain broke, therefore Δ isn't guilty" or "Δ isn't guilty, therefore the chain broke.")

Causation variables

- Forseeability
- Two or more things operating together (concurrent cause situation)
- Decision by a human to do a bad thing

Analysis

1. Is cause-in-fact present?
2. If so, are two or more things operating together?
3. If not, was actor 2 a fully-informed independent human actor (FIIHA)? If so, the chain is broken (actor 1 isn't guilty).
4. If not, was the result forseeable? If so, actor 1 is guilty.

Acosta

- FIIHA? Helicopter pilot was negligent. Does that break the chain of causation? This is a very hard question, says Anderson (the author doesn't think this is an issue, but Anderson does).
- Concurrent cause? No—Δ idn't operating on the helicopters at all.
- Forseeability?
    - How much do we need??
    - Objective or subjective standard?? See ¶1p520, the "not highlyextraordinary" standard, which is an objective standard (need only be forseeable, not forseen). This is a very low forseeability standard, maybe even lower than negligent, Anderson thinks.
    - N.b., we don't usually get to forseeability—usually we're in concurrent cause, and needn't go further.
        - If not concurrent (e.g., *Acosta*, hiror-hitman):
            - FIIHA? E.g., a grizzly bear or a convenience store clerk with a gun in his face are not FIIHA.
            - If not FIIHA, forseeable? E.g., the helicopter pilot in *Acosta*.

We have a causation standard because we want to sort out but-for cuases into the punishment-worthy and the otherwise.

Warner-Lambert: the court is just wrong here, Anderson says. We are in concurrent cause, and don't have to go any further.

Kibbe: no concurrent cause, no FIIHA, so forseeability is the question here.

<u>Friday, March 5</u>

Felony murder
Causation

Felony murder

<u>Limitations</u>:

- Danger
    - In the abstract approach
    - As committed approach
- Merger
    - SIFP approach

        - Ad hoc approach
    - Killer
    - Victim
        - Any victim
        - Innocent victims only (i.e., not a co-felon)
    - Time-frame (roughly the same in MPC and CL)
    - In furtherance (vs. in course of) (possible limitation)
        - E.g., co-felon robbing a bank sees his enemy and shoots and kills him—this killing is not in furtherance of the felony.

Killer/victim limitations

- N.b., the FM analysis here might not be the same as for non-FM situations.
- N.b., also, in these cases, it may be possible to find MR without FM (e.g., the shield cases). But, where you can find MR without FM, there's going to be a causation problem.
- Non-co-felon shooter: should we hold the felons liable for the killing?
    - Proximate cause rule: encourages felons to choose helpless victims, therefore lowering the need for and thus the likelihood of deadly force.
    - Agency rule (proximate cause + agency): encourages felons to pick co-felons who are unlikely to kill.

Causation

There will be a causation inquiry sometimes when the result is not homicide. In fact, there will be a causation inquiry sometimes when there is no result element at all.

When there are two actors, always consider:

- Straight causation
- Aiding and abetting
- Conspiracy

Acosta: the court is wrong, Anderson says, in applying MR in the context of what actually happened.

Wednesday, March 3

Felony murder
Felony murder: merger

Felony murder

- MPC "felony murder": under MPC definitions, the term "presumed" in § 210.2(b) means "rebuttable." I.e., it simply shifts the burden to Δ (which is not absolute liability for felony-murder, as in the common law).
- Common law felony murder: if there is (a) a felony and (b) the FM limitations are satisfied, then the killing is automatically murder; there is no rebuttal.

Felony muder time frame limitation: per the MPC, at least, the killing must have occurred either during the:

- Commission of,
- Attempt of, or
- Flight from

a felony. However, either the Δ or an accomplice could have done the killing within that time frame.

Remember, when you've got enough MR otherwise, you don't need FM. It's only where MR is only negligent or regular recklessness that you need FM. Ask: what's the killing in the first place? Is it purposely or knowingly?

Phillips

- Why did Δ have to be retried? If Δ is already guilty of criminal theft by fraud, why isn't that already outrageous recklessness?
  - Δ might have believed the other, traditional treatment wasn't going to work either. For outrageous recklessness, we've got to show that, subjectively, Δ knew his treatment would probably lead to the victim dying sooner. So, Δ could be guilty of theft by fraud but not have the OR required for murder.
- Why won't the court convict Δ of FM here, considering we're talking about a dangerous felony? Because there are so many safe ways of committing theft by fraud—the court will not put fraud inside FM. (But, again, remember that Δ could commit fraud in a way sufficiently dangerous for murder without FM).

Felony murder: merger

Smith: if the only limitation on FM was the "danger" limitation, every manslaughter could be the underlying felony for FM (even the attempt and aggravated assault preceding a manslaughter could be the underlying felony).

Wilson

- N.b., why do we need FM? These are purposeful killings!!
- Since the killings occurred inside, there is another felony besides the manslaughter (and aggravated assault)—burglary.

- Assuming all the felonies here are sufficiently dangerous, should any of them be sufficient for FM?
    - By excluding them from FM, we are excluding the <u>most</u> dangerous people from FM application.
    - But by including them, there would be no provocation manslaughter anymore, because all of them would be FMs—then FM <u>would</u> apply to the less dangerous people.
    - But all this doesn't matter—this limitation (the sufficiently independent felonious purpose limitation) isn't about danger. It's about preserving the manslaughter category.

Why do we have FM?

- Make felons more careful.
    - The SIFP limitation works toward this goal (although some purposeful killings won't be discouraged no matter what). So, the SIFP limitation makes sense in light of this rationale.
- Deter commission of felonies.

<u>Monday, March 1</u>

Inadvertant killing
Felony murder

Inadvertant killing

Fleming (drunk speeder and weaver)

- How to place a killing in the muder/manslaughter table (below): look at the facets of the risk:
    - Substantiality
    - Justifiability
    - Perception
- Itc., what if Δ was drunk like he was but there was <u>not</u> a voluntary intoxication rule?
    - MPC negligent homicide? Yes—gross negligence.
    - CL Involuntary manslaughter? Yes—gross negligence.
    - MPC manslaughter? Maybe not—maybe no "conscious disregard" because Δ was very drunk.
    - MPC § 210.2(1)(b) murder? No—no recklessness, and especially no "outrageous" recklessness.
        - Was Δ's act even "voluntary" under the MPC? See § 2.01(b) (not itc.) and § 2.01(d) (not itc.).
    - CL voluntary manslaughter? No—no provocation involved.

- CL murder? Requires "malice aforethought."
  - Purpose (not here)
  - Knowledge (not here)
  - Outrageous recklessness (not here)
  - Super gross negligence (maybe)
  - Intending to do great bodily harm (not here)
  - Felony-murder (not here)
- This is a dual actus reus situation:
  1. Getting drunk in the first place (maybe enough MR).
  2. "Deciding" to drive after drunk (maybe not enough MR).

  Did (2) break the causal chain begun at (1)?
  - Especially considering the statistics, it's hard to say that deciding to drive drunk shows reckless indifference to human life.
  - What we really do is go backwards in time to find an AR with the requisite MR.
- Voluntary intoxication—MPC § 2.08(2). Application itc.:
  - Does § 2.08(2) recklessness establish an element here?
    - Manslaughter? Yes.
    - Murder? Some types of recklessness do—is that enough to satisfy § 2.08(2)? n3p444 says <u>yes</u>.
  - Self-induced intoxication? Yes.
  - Unaware of what he would be if sober? Yes.

  "Unawareness is immaterial": with this artificial "awareness" we couple the actor's conduct. Therefore, we make an artificial "conscious disregard."

<u>Common law murder: special cases</u>

- Super gross negligence. E.g., the four knives and a hatchet guy.
  - Under the MPC, you're stuck with negligenct homicide in an SGN case.
  - At common law, SGN is a controversial way to get to murder.
- Great bodily harm. E.g., master kills his apprentice when he hits him with an iron bar, intending only to do GBH.
  - You can get MPC negligent homicide or CL manslaughter <u>without</u> this rule.
  - You can probably even get murder without this rule.
  - So, the GBH rule only helps when there's GBH done by someone who's not even grossly negligent (e.g., a skilled surgeon severs his enemies arm, not intending to kill him, and the enemy then dies from infection of the arm.)

Felony murder

Serne: how far can we get without the rule? Murder? Isn't there outrageous recklessness? It looks like it, Anderson says.

Phillips: outrageous recklessness even without the rule? Sure.

Stewart: murder, even without the rule? Yes—we can go back to the beginning of the binge for an AR with requisite MR, or we can apply MPC § 2.08(2) (voluntary intoxication).

So, the felony-murder rule makes a difference only when Δ can't be put under murder otherwise.

Friday, February 27

Inadvertant killing

Inadvertant killing

Can someone be negligent but not reckless if they could have been more careful?

- N.b., distinguish between two types of negligence:
  - Incapable of more care
  - Capable of more care but chose not to

  If someone chooses not to be careful, are they necessarily reckless? No—to be reckless you have to be focused on a particular material element.

  If we can't sort these categories out in practice, we may have to punish the whole lot. This would mean some innocent people will get punished, so we try very hard to sort these two categories out.
- So, we've got a difference between:
  - Choosing to be negligent
  - Being reckless

Williams

- N.b., itc. the court analyzes on ordinary negligence, but today gross negligence would be required.
- N.b., also, as a practical matter you could not represent both parents—if you were representing the father, you would want to argue that the baby's death was totally the mother's fault.
- What duty? And when?

        - There may have been something Δs could have done to extend the baby's life a little (despite the facts found here—remember that death isn't a question of if, but a question of when).
        - The baby could have been sick for only 10 days. This means there were possibly only 3 days during which the baby could have been saved. Δ could seek in cross or with its own pathologist to shrink that 3 day period. Get it down to a single day, and Δ could focus on what happened that day: how much time did parents spend with the baby? Were there any other odors in the house that day (e.g., bacon)? Etc. This is getting real close to a reasonable doubt.
    - Substantiality and unjustifiability of the risk:
        - Justifiability: Δs argue that they feared the welfare department might take their baby away without just cause. The court rejects this argument.
        - Perception of risk: do we use a homogenized American's perception or a tribal member's? I.e., can Δs argue that they did the right thing under the circumstances (semi-subjectively) they were in.

Manslaughter breakdown:

- MPC
    - Manslaughter
        - EED
        - Reckless
    - Negligent homicide
        - Gross negligence
- Common law
    - Voluntary manslaughter
        - Provocation
    - Involuntary manslaughter
        - Reckless
        - Gross negligence

Now, can an inadvertant killing be a murder?

Malone

- Do we count each trigger pull as a separate, independent AR? That is, if Δ spun the cyllinder and it fired on the first pull—running only a 20% chance of killing—is that murder? That is, is that "outrageous recklessness"?
    1. Must be reckless
    2. Must demonstrate "extreme indifference to human life." (N.b., the common law uses language like "abandoned and malignant

heart.")

Wednesday, February 25

Intentional killing
Unintentional killing

Intentional killing

Provocation: locating the (fuzzy) line between murder and manslaughter:

- Categorical approach (*Girouard*).
- Matter of degree (*Maher*).
- MPC: a matter of degree approach but with "extreme mental or emotional disturbance" (EMED, or EED).
    - What were tests in the common law matter of degree approach are factors in the MPC approach.
    - EED often becomes a jury control question: how do you restrain the jury when you've got such an open-ended approach?? N.b., though, that there is at least a little objectivity in the MPC approach. See *Casassa*.

Unintentional killing

Here, we will actually be talking (sometimes) about the difference between lawful and unlawful killing (as opposed to the gradation questions we've been looking at so far).

Welansky

- Dual actus reus situation: is the AR Δ's omission (as the court seems to think)?? What about his acts: inspecting the premises and configuring the club the way he configured it (with locking exits)?? You could get Δ if you could find sufficient MR accompanying those acts.
- Note that there is also a significant causation problem itc., since the boy, not Δ, lit the match. (Also, the court didn't know about this, but later research indicated there may have been a flammable gas leak caused by refrigerator repairmen. That introduces yet another complication in the causation issue).
- What is the MR standard, according to the court itc.?
    - "Stupid and heedless" → not aware → not reckless. (But note that you still might be negligent under the MPC.) But, itc., the court holds Δ liable even if "stupid and heedless," meaning

negligence is the requisite MR.

- Then the appellate court says negligence is <u>not</u> enough.
- What about the fact that Δ was at the club <u>every day</u>? Wasn't he running the same risk—that he couldn't get out—, proving that he didn't perceive the risk (or he'd have done something about it)? Anderson says this argument isn't very persuasive because Δ knew where the exits were (whereas most patrons wouldn't).

<u>Should</u> we punish nelgigent, even grossly negligent, people at all? Or should we hold out for recklessness? What arguments are there for punishing negligent people?

- First, consider tort: we decide in tort to put the burden on the <u>not</u> standard-abiding person rather than the standard-abiding person.
- Does that work for criminal punishment?? Are those people making a choice that we want to deter??

<u>Monday, February 23</u>

Provocation

Provocation

	Murder			**Manslaughter**		
Common law	1st degree	2d degree		Voluntary	Involuntary	
		"no time too short"	"you have to think about it"		Reckless	Negligence
MPC						Negligent homicide

Table 1: murder/manslaughter

Maher

- Would Δ itc. be entitled to a manslaughter instruction under *Girouard*?
  - The problem is that Δ didn't <u>see</u> the adultery. See ¶7pp405-406. The dissent is very troubled by this—Δ could have wrongly inferred; its worried about the wrong person getting killed. This bumps against the line between <u>justification</u> and <u>excuse</u>.
    - Justification: doing the right thing.
    - Excuse: doing the wrong thing for an understandable reason.

Provocation could be either a partial justification, a partial excuse, or both. The dissent itc. treats it as a partial justification. Or, that is, a partial apportionment of fault. (N.b., the MPC takes what's clearly a partial excuse approach—or, at least, its apporach is not limited to partial justification.)

- *Girouard* vs. *Maher*:
  - *Girouard*: categorical approach (which therefore can be limited to justification).
  - *Maher*: matter of degree approach (which therefore can not be limited to justification—provocation is at least somewhat an excuse).

- Analyzing provocation:
  1. Was Δ provoked?
  2. Was Δ reasonable?
     - How do we frame this question to a jury? I.e., reasonableness of <u>what</u>?
       - Δ's actions??
       - Δ being provoked?? (Which is a more lenient standard than "Δ's actions.")
       - Or should we just give no standard?
         - Traditionally, we are uncomfortable with this.
         - Also, we don't want the jury considering illegitimate factors.
  3. Did Δ cool off?
     - Do things really get <u>better</u> over time?? Or do they actually fester and get worse??
     - Rekindling: e.g., a provocative reminder of something you already knew about.
  4. Would a reasonable person have cooled off?

  N.b., Δ has to win on both the subjective <u>and</u> objective sides of both provocation <u>and</u> cooling off.
     - Assessing the objective side—you can't take <u>all</u> of Δ's characteristics into account (because then you're being subjective). See *Camplin* (n2ap421, n3cp423).
       - But Δ's characteristics can affect the nature of the provocation (e.g., racial epithets that provoke).
       - So, you might have to take into account at least all characteristics that have to do with the provocation itself.
       - But what about hot-temperedness, e.g.??

Casassa

- Δ clearly loses under a categorical provocation approach (e.g., *Girouard*).
- Δ's even probably a murderer still under a matter of degree approach.
- So, Δ's arguing for a purely subjective test. That's clearly a loser because of the term "reasonable" in the statute.

Wednesday, February 18

Mens rea and rape
Homicide

Mens rea and rape

The offense:

I	+	**AC**	|	+	**(F OR T)**
(K)		**(N** (American)**)**			
		(R (English)**)**			

Usually, we require recklessness for criminal offenses, but sometimes—as here—we drop it down to negligence.

Recklessness: note that we instruct that reasonablenss/unreasonableness is irrelevant. But the prosecutor will try to prove reasonableness anyhow—because a reasonable person would have perceived a "substantial and unjustifiable risk"; and so that's evidence that Δ, being reasonable, is guilty. Mackinnon argues that it doesn't matter whether we require recklessness or negligence as long as there is an underlying gender-differentiated dispute re: what's reasonable. Also, see in *Williams* (cited in *Fischer* at ¶7p355), where if there is a force or threat of force, then mens rea w/r/t absence of consent is irrelevant, and no jury instruction is given re: mes rea.

N.b., the drunk is the classic unreasonable person.

Homicide

We'll consider two different bodies of homicide law:

1. MPC homicide
2. Common-law-derivative statutory homicide

There are two possible approaches to studying homicide law:

1. Doctrinal (not us): study, in turn, murder, manslaughter, involuntary manslaughter, etc.
2. Factual (us): study, in turn, inentiona, then unintentional cases.

As to each case, determine what line the court must draw (e.g., between 1st and 2d degree murder).

Carroll: here the court must decide between 1st and 2d degree murder.

- Δ argues his conduct was not "willful, deliberate, and permeditated"; he argues that each term is needed, and he is arguing specifically against premeditation.

  Consider: does premeditation mean the murderer is really worse?? Isn't the person who kills without even really thinking about it a real bad person?? Contrast mercy killings. This, though, is a question for the legislature.

- This court says intent to kill alone is enough for 1st degree murder. How did the court get from "premeditation" (¶2p398) to "specific intent" (¶3p398)? The court dropped "deliberate" and "premeditated" and says these really mean "willful."

Guthrie: this court, unlike that in *Carroll*, says you have to think about it for a while if it's going to be 1st degree murder.

What would the *Guthrie* Δ argue under the *Carroll* rule?

- "I wasn't trying to kill him—I was just trying to get him to stop." I.e., "I didn't intentionally kill him—I'm a murderer, but not in the 1st degree."

How would *Carroll* go under the *Guthrie* analysis?

- See n1p403, evidence of permeditation: here we have a prior relationship (wife was beating the kids), and planning (that is, Δ could be lying about why we put the gun on the windowsill).

Friday, February 13

Rape
Mens rea and rape

Rape

Analogizing rape and theft

Historically, theft developed from robbery. What were once only civil wrongs are now crimes. Are we doing the same thing with rape? That is, where once force was required, now only absence of consent need by shown?

Consider: faked resistance and/or reasonable belief of such.

If we want to, how do we get rid of the force requirement? Consider the N.J. statute (n1p340). Just use the introductory clause and add "without consent" (and something about negligence if you want the *Sherry* outcome). So, if the legislature really meant for the *MTS* outcome, why did they use "physical force" with the meaning it drags along with it from traditional rape law??

Consider: theft by lying.

Evans: minus the lying itc., could we find rape? Yes. "You are mine" and "I could kill you" might be evidence of threat of force. What mens rea would be required? See ¶3p348—it's his state of mind that's controlling.

Lying to get consent to sex: traditional proscriptions (a very narrow set):

- Fraud in factum (what's happening) (but not fraud in inducement (why it's happening))
- Impersonating a spouse
- Fraudulent marriage ceremony

All other fraud was not proscribed w/r/t rape, whereas nearly all fraud has been proscribed w/r/t theft.

Mens rea and rape

Sherry: Δ requested a knowledge MR jury instruction (meaming Δ would have to have been aware to a practical certainty there was no consent)—that's clearly erroneous so Δ's lawyer should have known he had no chance of getting it. So, on appeal, the court doesn't have to pick between negligence and recklessness, whereas it would have had to if Δ had asked for a recklessness isntruction.

Under *Sherry*, the law wants you to stop if you're even as much as 25% uncertain of consent.

Fischer: majority American view—neligent MR required w/r/t "no

consent" (in England, recklessness is required).

Wednesday, February 11

Rape

Rape

The offense:

intercourse + no consent + (force OR threat of (force OR great bodily harm))

Force: must there be evidence of resistance? Or it force equivalent with intercourse? That is, should the offense be simply:

intercourse + no consent

If so, how would *Rusk* change? Must the state still bring up the light choke? Of course—this is probative of consent. From an evidentiary perspective, the trial wouldn't look a whole lot different, until the jury is instructed.

What are the benefits and detriments of removing the "force or threat" element??

N.b., text's author's pondering re: threats.

- Withholding support.
- Promises to give support.
- Illegitimate threats.
- Threat to tell a true secret.

Hypo: "have sex with me or I'll tell your husband you had an abortion" (which is true). Should we criminalize that? The real question is: what choices will we allow people to force others into? Note that analogy to property offenses—theft by exortion, for instance. We protect a hearer's money, why not their decision to have sex?

Monday, February 9

Mistake of law
Rape

Mistake of law

Taxonomy

- Mistake about the law other than the law that defines the offense (e.g., property law mistake in a theft offense). Mistake of law can be a defense here:
  - Knowing MR: mistake of law is a defense.
  - Negligent MR: negligent mistake of law is a defense.
  - Strict liability: mistake of law is not a defense.
- Tax law exception (mistake of law w/r/t statutory tax law. See *Cheek*.).
- Mistake about the law that defines the defense (*Albertini* type). MPC § 2.04(3) is a defense (used after a prima facie case has been made).

Cobra hypo: Indian calls U.S. customs office, which tells him he can bring cobras to the U.S. (which, let's say, is not true—it's unlawful to possess cobras). The offense:

possession	**+**	**cobras**
(knowing)		**(reckless)**

So, a prima facie case can be made. Δ will defend on MPC § 2.04(3)(b). The defense:

(reasonable + reliance) + official stmt. + later found (invalid OR erroneous) + ((i) OR (ii) OR (iii) OR (iv))

This hypo hinges on (iv) (n.b., *Albertini* hinged on (ii)). Had Δ relied on a low-level official, it would put the "reasonable" requirement into question. N.b., "reasonable" is probably not a requirement when § 2.04(3) is applied to *malum in se* offenses.

What if Δ thought he was talking to an official, but really wasn't?

- See § 2.02(1) and § 1.13(9)(c). Having the right person is a non-material element, and so § 2.02(1) says negligence is required.
- Anderson notes that the offense in this hypo was probably meant to require that you get the right person, period. But, once you follow the MPC around, it seems that you can get an imposter as long as you don't know it.

Rape

- In a typical stranger rape case, Δ will claim "It wasn't me!" (mistaken identity).
- In a typical acquaintance rape case, Δ will claim "She consented!" (i.e., the "no consent" element was absent).

Rusk: the offense:

intercourse + no consent + (force OR threat of force)

Here, its the "force OR threat of force" element that's in question. But:

- Threat of what?
- Must the victim's fear be reasonable?
- Light choking: force? Or threat of force?

Δ's bad facts:

- Light choking.
- "If I do what you want, will you not kill me?"

Friday, February 6

Mistake of law

Mistake of law

N.b., often congress doesn't want to deal with things, so they aren't specific.

Liparota, p266 (food stamps): the offense:

knowingly + violate + regulation

where **regulation = purchase + food + higher rate**

If congress passes an offense all together, we're like *Marerro*. If congress passed it in parts, it's a reference to a regulatory agency's rule—we're like *Liparota*.

Why do we assume people know the law? To a *Marerro*-type Δ, we say, "If you're not sure, leave the gun at home." That is, if there's a sure way to not commit the offense, don't do the actus reus.

Analysis: do we conceptualize knowledge of the law as part of the offense of as some other collateral law?

Cheek (tax violator): jury gets instructed about reasonableness, which means negligent MR applies. But the statute says "willfully." Why doesn't SCOTUS require reasonableness w/r/t tax law? Because the tax code is so complex and confusing (Anderson says: it's no more confusing than when "any" doesn't mean any (in *Marerro*)). But SCOTUS distinguishes between knowledge about the tax code and knowledge about the constitution. So the question is: what law defines the offense itc.??

Albertini (protestor): Δ has a belief about the constitutionality of his actions (like Δ in *Cheek*). So, Δ could:

- Do it, and take a chance of being guilty.
- Seek a declaratory judgment.

See MPC § 2.04(3)(b): Δ acted in reasonable reliance on an official statement later determined to be erroneous in a judicial opinion.

What's the big deal about the cert. grant? After cert., Δ's reliance might not be reasonable—with cert., there's then a substantial possibility that the 9th Circuit decision will be overruled. N.b., in *Marerro*, the dispute between the majority and the dissent re: what the NY legislature left out in adopting MPC § 2.04.

Wednesday, February 4

Strict liability
Mistake of law

Strict liability

Morissette: a distinction between good-old-fashioned offenses and (newer) regulatory offenses.

Staples: another distinction. Congress, if it wanted to impose strict liability for a regulatory offense, would either:

1. Do so expressly, or
2. Only impose s/l where there is some warning that you're entering a highly regulated environment (e.g., pharaceuticals).

The offense:

possession + full auto + without permit

- What if Δ didn't even know he possessed it? See MPC § 2.01 (4): knowledge is required (even if it's an expressly strict liability offense).
- W/r/t the permit, we don't care if you don't know you need a permit or if you don't have one. But, "I thought I had one" might be a defense (but it isn't—see *Marerro*).

Baker (cruise control): Δ argues his act was involuntary. The court says this argument would have worked if the throttle had broken, if Δ was a passenger in a trespassing car, or if the brakes failed. But not here (Anderson says this holding is wrong, just wrong). Note that this case involves mens rea, voluntariness, chain of causation—it's all wrapped up together.

Mistake of law

Smith (David), np261: Δ destroys his own home improvements in a rental. The offense:

destruction + property of another
(knowing) (knowing)

Umbrella hypos: Consider an offense that requires a taking the property of another, with knowing MR as to both elements.

1. Two umbrellas in a stand. I pick up the wrong one.
   taking + property of another
   (knowing) (~~knowing~~)

2. One umbrella in a stand. It's my uncle's. He gives it to me, verbally, but then revokes the gift before I pick it up. I'm confused about the law of property w/r/t gifts.

   taking + property of another
   (knowing) (~~knowing~~)

3. One umbrella in a stand. I know it's not mine, but in my jurisdiction, I can take an umbrella if it's raining. However, in this jurisdiction there is no such law.

   taking + property of another
   (knowing) (knowing)

Marerro

The offense:

possession + firearm + concealed + without permit + not a peace officer

Assume knowing MR. Did Δ have the required MR w/r/t "not a peace officer"? Yes. This is because we have to break down that element—it really means:

> **not a (DPS officer OR state corrections officer OR local corrections officer)**

and Δ knows he's not any of those.

> Hypo: Δ works at a state facility that has just been federalized (and Δ doesn't know it yet). Then it's umbreally hypo (1), mistake of fact.

So, Δ must argue that he thought "any" meant any (because he can't argue that "any" did mean any).

Monday, February 2

Mistake of fact
Strict liability

Mistake of fact

Prince: Δ argues that reasonable mistake of fact should be a defense—Δ is arguing that "negligently" should be the required mens rea, that is.

Olsen

¶0p232: "good faith belief" is a subjective standard, whereas "reasonable" is an objective one. Distinguish:

- Those who choose not to be reasonable.
- Those who are incapable of being reasonable (but can't meet the standard of the insanity defense).

Could you choose to be careless but not to be reckless? Yes, you

could, when (a) the risk it not unjustified or substantial, or (b) you choose to be careless, but don't choose to be careless w/r/t a particular material element.

Consider: I'm nearsighted and think your wallet is a gun. Will we take my nearsightedness into account in prosecuting you? Yes, but we will not allow paranoia into the account—we will draw a hard line between the two (see battered wife syndrome cases).

Why not charge Δ with statutory rape? Because of the actus reus requirement. Statutory rape requires actual intercourse (although only negligence mens rea w/r/t age). Lewd and lacivious doesn't have as high an actus reus requirement. So, prosecutor goes with L&L, but because of that choice must argue a higher mens rea w/r/t the attendant circumstance of age. Prosecutor had four chains (offenses) she could pursue:

1. L&L + ~~force~~
2. ~~intercourse~~ + ~~force~~
3. ~~intercourse~~ + age
4. L&L + age

So, mens rea w/r/t becomes the issue itc. The majority looks at the language of the statute re: probation, in response to the dissent's argument based on cruel and unusual punishment (which Anderson says is a weak argument).

Strict liability

Balint and *Dotterweich*: congress can provide for strict criminal liability to protect the helpless public. N.b., if we do this, the risk-averse people might not get into regulated industries—but we want careful people in those industries.

Considerations in the strict liability cases:

1. What did congress mean?
2. Is is constitutional?
3. Are there other arguments (e.g., voluntariness in *Baker*)?

Morissette: why does the court decide congress wanted to stick with a mens rea requirement?

- With strict liability statutes, congress is concerned with creation of risks that can cause big trouble. Those are regulatory statutes. The statute here is not regulatory, but instead it is much more like the common law of theft.
- N.b., Δ thought the shell casings were nobody's property—he wasn't even reckless.

Staples: the offense:

possession	**+**	**full auto**
(knowingly)		**(?: U.S. args. strict liabilty, Δ args. for some MR)**

This statute looks much more like a regulatory offense (than in *Morissette*). So, since Δ is acquitted, it's not <u>just</u> a line between regulatory and non-regulatory that's at play here.

<u>Friday, January 30</u>

MPC rules of construction
Mistake of fact

MPC rules of construction

- 2.02(3): statute says nothing re: mens rea—recklessly applies.
- 2.02(4): statute gives one mens rea requirement but doesn't distinguish its application to the elements—that requirement applies to all elements.

Note on specific versus general intent:

- A problem with this distinction is that people will say specific/general <u>offense</u>, but many offenses require different levels of mens rea w/r/t different elements.
- What do they mean?? Does specific intent mean "purposely"?? Does negligence suffice for general intent, at least in some cases??

Jewell: problem with jury instruction—it looks to purposeful avoidance rather than actual awareness.

Mistake of fact

Anderson warns that we will talk about "mistake of fact" again to refer to something else. There are mistakes of fact that can make you <u>not guilty</u> by depriving you of the requisite mens rea—these we will study now. There are other mistakes of fact that make you <u>guilty</u>—these we will study later.

Note that the MPC mens rea law would <u>not change</u> if we did not use "mistake of fact"; i.e., you could abrogate MPC § 2.04 and the law would stay the same. (However, some states have added "reasonably" to the § 2.04 standard, which effectively makes "knowingly" mean "negligently.")

Prince: mens rea requirement re: attendant circumstances: recklessly, <u>except</u> for

the age element.

Wednesday, January 28

Mens rea

Mens rea

Mens rea w/r/t jurisdiction? Hypo: Δ kills someone in a building that's in both ID and WA. The homicide actually happens in ID, but Δ reasonably believed he was in WA.

- Doesn't matter what Δ thought. MPC § 2.02 applies only to material elements of the offense. Where the homicide happened is an element, but not a material one. See MPC § 1.13(9) – (10).

Hypo: Δ assaults a federal officer—is "federal officer" a material element?

- Between a federal officer and a non-officer, "federal officer" is material.
- But what about between a federal and a state officer? Distinguish between "federal" versus state (non-material) and "officer" (material).

Hypo: grenade falls into a full classroom.

- You toss it into a then-empty hallway. When it goes off, one person is in the hallway, who dies. You would argue that you weren't reckless because there was a risk, but not a substantial risk.
- You toss it into the hallway, and you are aware that a pack of schoolkids is out there, but you know there are less people in the hallway than in the classroom. This looks like "knowingly": it's not your conscious purpose to cause a bad result, but you are aware to a practical certainty of what the result will be. Note that there's nothing in "knowingly" about justifiability (as there is in "recklessly" and "negligently").

What if you're above "substantial" but below "practical certainty"??

Awareness: what do you have to be aware of? Consider *Shimmen* (glass-punching case, n6p215). MPC seems to say you have to aware of all the stuff (substantiality, unjustifiability).

D.C.destruction of property statute (p212):

- Mens rea: recklessly. Why? Rules of construction. See MPC § 2.02 (3). This means if you want recklessness for your statute, you don't have to say anything.

Hypos:

- I cut down a vine that I thought was on my property but it was really just barely on yours. I'm not guilty if I didn't even perceive a risk.
- I build a fence just barely on your side of the boundary line. Ten years and one month later, I cut down the vine that's barely on your side of the line, but on my side of the fence. I thought the statute of limitations for adverse possession was ten years, but it's actually fifteen. I'm not guilty if I didn't perceive a risk. Does it matter if my belief was reasonable or not? See MPC § 2.02(4), another rule of construction, which says when a culpability requirement is given without distinguishing between the offense elements, that requirement applies to all the elements.
- I cut down the vine that's on your property, thinking it's worth only $40. It's actually worth $60. I would argue that value is not a material element, because it's not connected to the harm or evil (see MPC § 1.13(10)(i)).

N.b., problem p217 (jury rigging): Δ's being held liable for negligent mens rea. Because the statute contains "reasonably," what was meant to be purposely becomes negligently.

Holloway (carjacking): Scalia says you can convert the mens rea requirement to an actus reus element (e.g., "take a car by threat").

Friday, January 23

Omissions
Barber
Mens rea

Omissions

Duty-to-act, sources:

- Contract
- Status
- Isolating from rescue
- Voluntary assumption (but see *Pope*)

Barber

Issues:

1. Is this an omission in the first place?
2. If so, what duty does the doctor owe because of his status?

Mens rea: knowing. So Δ's only defense is to argue no duty-to-act. If we consider the doctor's conduct an act, they can't even talk about duty.

How is pulling a hydration tube not an act?

- Consider what would normally happen.
  - Consider policy w/r/t omissions: normally, "you're you and I'm me"; the policy of individualism. I have no obligation to cross the line and help you unless I have a duty to you.
- Consider: if a bad guy comes in an pulls the plug, that is an act; normally, the respirator would have continued, but the bad guy has interrupted what would normally have happened.

Duty: if the doctor's conduct was an omission, then we have to talk about duty—did the doctor have a duty-to-act anyway?

- Consider the benefits and detriments of enforcing a duty. Note that in plug-pulling cases there is no benefit.
- Consider: is the action/omission rule a good one? I.e., does it help the patient or does it hurt him? For one thing, the rule puts the patient through having his organs dry out, rather than providing a legal, quick and dignified manner of death.

A rights-based approach allows us to draw a line between what happens and what normally would have happened. Contrast that approach with a utilitarian approach. Whereas a rights-based approach lets us define duties, a utilitarian approach may mitigate or alter some rights. Note that sometimes, the law takes a strictly rights-based approach (e.g., with contracted lifeguards).

Mens rea

Looking at mens rea issues:

1. Look at the statute.
2. Look at the jury instructions.
3. See what the appellate court said.

Cunningham: (Δ tears of the gas meter.) Δ argues that he wasn't trying to endanger the victim. Is that reckless or negligent?

- Recklessness: requires awareness of the risk.
- Negligently: satisfied as long as Δ should have been aware of the risk.

Wednesday, January 21

Voluntariness
Newton
Procedural contexts
Omissions

Voluntariness

Actus reus: is voluntariness condemnable (from a retributive perspective)? Is it deterrable (from a deterrence perspective)?

Note, again, "includes" in MPC §2.01(1). Your conduct must simply include a voluntary act. It needn't be entirely voluntary. *Martin*.

Newton

Procedural issues: itc., we don't have to figure out what happened out on the street.

If the jury believes that Δ was unconscious, there is a problem since the jury received no instruction about unconsciousness.

(N.b., in some jurisdictions, unconsciousness could be part of an affirmative defense, too. But such a defense could require an insanity element, which would lead to civil commitment. Also, alternatively, unconsciousness could be argued under the result element—i.e., "I didn't have the requisite mental state.")

Decina (n4p179): epileptic has a seizure, drives up on a curb and kills four. Look at the chain of causation:

1. Voluntary act (getting in the car knowing of seizure problems)
2. Involuntary act (the seizure)
3. Result (accident)

The involuntary act (2) does not break the chain here.

Note on procedural contexts

In this class, we'll commonly see these cases admidst these procedural contexts:

- "I didn't do it." (E.g., *Martin*.)

- Failure to instruct the jury properly. (E.g., *Huey*.)
- Excluded evidence. (E.g., the trial judge did not allow Δ's expert witness to testify or struck the testimony.) Note that trail judges often just allow lots of evidence as a sort of reversal insurance. However, if the trial judge thinks the jury might get confused by too much irrelevant evidence, she may not allow it because a confused jury means a higher likelihood of reversal, also.

Omissions

Question: can an omission ever qualify as an actus resus? Sure.

- Some omissions are defining in the offense statute as such (e.g., selective service).
- But what if the crime is defined as an "act"?

Pope

(Δ takes in an indigent mother and her child; mother subsequently goes into a religious frenzy and seriously injured the child.)

Δ can't be liable just for taking the mom in—she did not have the requisite mental state at that point. But what was Δ's mental state at the time of the harm? She at least "knew" (i.e., was aware to a practical certainty).

Δ's status: does Δ fit into § 35A (p184)? The broadest clause in the statute is § 35A(1)(d), "reponsible for a minor child." Δ does not fit into it. Note that Δ wouldn't even fit if she actually participated in the beating itself (but, of course, she'd likely be guilty of other crimes).

Policy: don't we want Δ to bring this family in off the street? Δ would hestitate to be such a good samaritan if she faced criminal liability. See *Oliver*, n3p195.

Jones

What about innocent acts with culpable omissions? (See also *Kuntz*, n5p197).

Procedural context: failure to instruct. N.b., the prosecutor might have won at trial if he'd ask for the correct instruction. Anderson advises: don't get overwrought with the emotion provoked by the facts; maintain a professional attitude without being cold-hearted.

Friday, January 16

Background policies
Martin

Policy considerations

Identifying policies: line drawing, categorizing, &c.

- Retribution
- Incapacitation
- Deterrence
- Reform

In this class we will be mapping facts to defenses, or, in other words, outcomes to policies. N.b., this mapping is not going to a function: the same facts may map to multiple defenses (likewise, different facts may map to the same defense).

Hypo: suicide bombing

Deterrence: we can speak of specific, or special, deterrence – deterring the actor; and we can speak of general deterrence – of everyone else.

- Specific deterrence: if the suicide bomber detonates the bomb but doesn't die and will be lying immobile in hospital from now on, can we deter her? Yes, we can – we can deter her from being a conspirator or an abettor in the future.
- General deterrence: punishing the bomber may encourage worse badness in the future – prospective suicide bombers may try to do a better job; or consider hostage situations – if the hostage holder has killed one hostage, why shouldn't he just kill all of them?

Enhancing deterrence: we could kill the bomber's family. Note that this strategy is used in the criminal world. Why doesn't the state do it? For one thing, we don't want to punish innocence. This is the flip-side of retribution – retribution is largely a fancy version of vengeance.

Enhancing deterrence: consider the criminal's economics: let P be the magnitude of the punishment and p be the probability of punishment (i.e., getting caught and getting punished); let B be the magnitude of the benefit

of the crime and q be the probability of realizing that benefit. Let D be the expected delay, in time, between the potential benefits and detriments. So, for effective deterrence, we need:

$$p(P - D) > Bq$$

How do we increase P? Torture, e.g.
How do we increase p? More surveillance, more roadblocks, e.g.

Voluntariness

Note that the deterrence enhancing is not relevant (i.e., it doesn't work) if the actor is not making a choice. Consider the assaulting grandfather with alzheimer's. So, we have to ask if the actor made a choice, and, if so, if it is choice we want to punish.

Martin

Elements

- AC: intoxicated or drunk; public place; persons present.
- AR: appear; manifests; boisterous or indecent or loud, profane discourse.

The issue here is about the "appearance" required under AR. Must the appearance be voluntary? See MPC §2.01(1), (2)(d). In §2.01 (1) note "includes": state will argue that Δ's conduct did include some voluntary conduct – that is his "manifesting" was voluntary.

Wednesday, January 14

Elements of criminal conduct

Look at MPC §§ 2.01 ("acts") and 210.2 ("murder") -- where is the connection between the two?

State power: one thing that does not separate this course from the other first year courses is that the state's power is for use and in question. For instance, in civil cases, the sheriff has the power of the county and so may enforce those judgments.

The elements of criminal conduct. If I do not cause any harm, am I not guilty? If I did cause any harm, am I guilty?

- Actus reus (AR)

- Attending circumstances (AC)
- Results (R)

Defenses

- "I didn't do it."
- Affirmative defenses (n.b., that the burden of persuasion shifts for these).
- Circumstances; e.g., reasonableness.

Mental states: can be difference for each of AR, AC, and R

- Purposely
- Knowingly
- Recklessly
- Negligently

Hypo: I take your book and then decide to destroy it. Note that I have knowingly taken it and knowingly acted. But what if the police bust in and prevent me from destroying it? There has been no result – so we look for an offense that requires no result. "Theft" is such an offense. N.b., there is also "attempted theft" for use in other situations.

Do we need to sort out the people who have caused harm from those who haven't? Mostly we're concerned with those people who have caused harm but claim they are not guilty. See Lady Wooten's ideas, contrast them with a "kill 'em all, let god sort 'em out" philosophy.

Hypo: suicide bombers. Should we punish such a bomber who is caught before detonating the bomb?

Not also that the state has different options for dealing with harm causers. Consider a grandfather with alzheimer's in a nursing home who harms nurses. Civil commitment, rather than, e.g., imprisonment, may be most appropriate.