**CRIMINAL LAW OUTLINE (Updated 5/4/2009)**

**CRIMES AND ELEMENTS**

* **EXAM – REMEMBER, DISCUSS EVERYTHING THEY COULD BE CHARGED WITH (EVEN IF THE BURDEN OF PROOF CAN’T BE MET ON EACH ELEMENT), ALSO, DISCUSS “WHY X CRIME AND NOT Y CRIME”**
* **LARCENY**
  + **ELEMENTS:**
    - **The TAKING**
    - **By TRESPASS; and**
      * By trespass = without consent
    - **Carrying away (ASPORTATION)**
      * To determine if items has been “carried away”, weigh all circumstances – you can just go a few steps, not even leave a store, etc for there to be larceny.
    - **Of tangible personal property**
    - **of another,**
      * Of another = the property is taken from the possession of someone who had a right to possession SUPERIOR to the defendant’s right.
    - **With the INTENT TO STEAL** (“animus furandi”) **the specific item at that TIME OF THE TAKING.**
      * **INTENT TO STEAL = TO PERMANENTLY DEPRIVE\*\*, or deprive for so long as to appropriate a major part of its economic value**, whether or not the permanent deprivation or appropriation actually occurs.
        + \*\* = questionable, some jurisdictions allow the intended deprivation to be less than permanent (can be temporary) – an indifference to whether the owner recovers possession may be enough evidence for intent (Commonwealth v. Salerno)
      * If intent does not match item taken, mistake negates intent.
  + Remember, intent can be fleeting – if the person intends to steal, takes the item, then puts it back, there is still a period while they can be charged with larceny
  + Special Problems
    - Abandoned Property – CANNOT be the subject of larceny (not property of another)
    - Lost Property – CAN be the subject of larceny IF the taker HAD A HINT ABOUT THE OWNERSHIP
* **FALSE PRETENSES**
  + **ELEMENTS:**
    - **The defendant**
    - **Obtained title**
    - **To the property of another**
    - **By**
    - **Knowingly misrepresenting**
    - **A material fact**
* **RECEIVING STOLEN PROPERTY**
  + **ELEMENTS:**
    - **The accused**
    - **Receives STOLEN goods**
      * That the goods are stolen is key – once the police recover the property, it will cease to be stolen – so if sold to a third party, they cannot be guilty of receiving stolen property.
    - **Which he knows to be stolen**
    - **With the intent of permanently depriving the owner of the goods.**
* **EMBEZZLEMENT**
  + **ELEMENTS:**
    - **The ACTOR**
    - **Is in LAWFUL POSSESSION**
      * Defendant must be in lawful possession at the time of conversion.
    - **Of ANOTHER’S PROPERTY**
    - **And FRAUDULENTLY**
    - **With the INTENT TO CONVERT,**
      * An INTENT TO RETURN/MAKE RESTITUTION at a later time does not negate intent to convert. (State v. Joy)
    - **CONVERTS it.**
      * Conversion must be “in a manner seriously inconsistent with the trust relationship underlying the owner’s willing transfer of possession.”
* **CARJACKING**
  + **ELEMENTS:**
    - **The TAKING**
    - **Of a MOTOR VEHICLE**
    - **In the POSSESSION OF ANOTHER**
    - **From his IMMEDIATE PRESENCE**
    - **AGAINST his WILL**
    - **With the INTENT TO DEPRIVE (permanently or temporarily) the person and**
      * Note: Federal carjacking statute requires that the person act with “THE INTENT TO CAUSE DEATH OR SERIOUS BODILY HARM”.
    - **Accomplished by means of FORCE or FEAR.**
* **ROBBERY**
  + **ELEMENTS:**
    - **The TAKING**
    - **Of PROPERTY**
    - **By FORCE or THREAT OF FORCE,**
      * FORCE or THREAT differentiates robbery from larceny.
      * Remember to ask: Is the threat really one of force, or is a threat of something else (i.e. like blackmail?)
      * When the force OCCURRED matters – was it with the taking of the property, or used later, in pursuit, as self-defense? Questionable how much delay there has to be in force before it is not part of the taking – TEST IS USUALLY “CONTINUOUS SEQUENCE OF EVENTS”.
      * Examples of no force:
        + Pickpocketing – b/c no force
        + Snatching from the victim – arguably no force b/c so sudden
    - **With the INTENT TO STEAL.**
  + **AGGRAVATED ROBBERY = WITH USE OF A DEADLY WEAPON**
* **EXTORTION (blackmail)**
  + Common Law:
    - = The corrupt collection of an unlawful fee by a public officer under color of office.
  + **CURRENT ELEMENTS:**
    - **The TAKING**
    - **With THREAT OF FUTURE HARM TO THE VICTIM, and**
      * Threats include – threats to injure a person or property, accuse a person of a crime, or expose a secret affecting another.
    - **Of something of another,**
    - **With the INTENT TO STEAL** (“animus furandi”)
  + Larceny v. Robbery v. Extortion: Threat of IMMEDIATE harm (within the next few minutes) is robbery, threat of FUTURE harm is extortion, NO threat is larceny
* **LARCENY BY TRICK**
  + **ELEMENTS:**
    - **The defendant**
    - **With the intent to steal**
    - **Fraudulently obtained**
    - **Possession of (BUT NOT TITLE TO)**
    - **Another’s personal property.**
* **ARSON**
  + Old Common Law ELEMENTS:
    - Malicious
    - Burning of a
    - Dwelling house (or a close/attached building)
    - Of another person.
  + **TODAY’S ELEMENTS:**
    - **malicious** 
      * Means either:
        + Intent to burn;
        + Knowledge that the structure would burn; or
        + Intent to create an obvious fire hazard.
    - **SETTING of fire**
      * Note: only damage must occur, not burning of entire building
    - **With INTENT TO DAMAGE or DESTROY**
      * Intent to DESTROY necessary – not enough to just intend to start the fire
    - **PROPERTY – Building or Occupied Structure**
      * Property can include home, building, vehicles
        + Note on test: “In common law, it must have been a dwelling, but today, the burning of X here would fall under arson”.
    - **UNLESS it is part of a controlled, lawful burning – GOVERNMENTAL IMMUNITY**
* **BURGLARY**
  + Old Common Law ELEMENTS:
    - Breaking AND
    - Entering of
    - A DWELLING PLACE
    - Of another
    - AT NIGHT
    - With the INTENT TO COMMIT A FELONY therein.
  + **TODAY’S ELEMENTS**
    - **BREAKING (ACTUAL OR CONSTRUCTIVE) AND or UNLAWFUL** 
      * Someone may first legitimately enter a place and then be asked to leave – once asked to leave, they are arguably “breaking” – varies by jurisdiction
      * Actual v. Constructive
        + Actual = with physical force
        + Constructive = by threats, fraud or conspiracy
      * AND = BREAKING MUST CAUSE ENTRY
      * Note: In some jurisdictions today, breaking is no longer required – all that is required is that the entry is UNLAWFUL or WITHOUT CONSENT.
    - **ENTERING of**
      * Entry may be by the person (as a whole), a part of his body, or an extension of his body (i.e. like a gun? – varies with jurisdiction), by an “instrument” (if instrument is used for intended felony, not just to make entry)
    - **A STRUCTURE/Room**
      * Note: not necessarily a dwelling, just somewhere with a reasonable sense of privacy/security… may include house, room, apartment, shop, warehouse, store, barn, tent, vessel, floating home, railroad car, cargo container, trailer, house car, vehicle (if doors were locked), aircraft, etc.
    - **Of ANOTHER**
      * “Right of Habitation” determines who’s dwelling it is for purpose of burglary.
    - **With the INTENT TO COMMIT A CRIME therein.**
      * **Intent must exist at the TIME OF ENTRY.**
      * But, you don’t have to commit the crime to be convicted – intent to commit is relevant. Without actually committing the crime, circumstantial evidence becomes important.
      * **Abandonment of intent is irrelevant – the crime is complete at the moment entry is made with the requisite intent.**
  + Other Notes:
    - **Burglary cannot occur where there is consent.**
      * **Consent must be given AT THE TIME and in the PARTICULAR PART OF THE PREMISES for there not to be a burglary.**
      * Burglary CANNOT be committed by a person who is an OCCUPANT of the premises, even if they enter the room of another (i.e. like a roommate). One person must an occupant, and one must not.
      * BUT, consent by one owner, among joint owners of property, for a third party to enter to commit a crime against another owner, it not effective consent to negate burglary.
    - Defendant can be convicted of burglary and the intended crime.
* **CRIMINAL MISCHIEF – A person is guilty if he…**
  + **PURPOSEFULLY OR RECKLESSLY**
  + **[does one of three things]:**
    - **DAMAGES tangible PROPERTY of ANOTHER**
    - **TAMPERS with tangible PROPERTY of ANOTHER so as to ENDANGER PERSON or PROPERTY; or**
    - **Causes ANOTHER to SUFFER PECUNIARY LOSS by DECEPTION OR THREAT.**
* **BATTERY**
  + **Is the UNLAWFUL or OFFENSIVE APPLICATION OF FORCE TO ANOTHER (“TOUCHING”)**
  + Intent doesn’t matter – negligence by the defendant is enough (where he should have been aware that his conduct would cause the application of force).
  + Now - Bodily injury to the victim OR offensive touching required. Old – no harm required.
  + Application of force may be direct or indirect, where the defendant sets in motion the force that causes the touching.
* **ASSAULT**
  + **Is the INTENT to create FEAR of an IMMINENT BATTERY** (“reasonable apprehension of serious bodily harm”) **or ATTEMPTED BATTERY**
  + Recklessness or negligence is not enough, **MUST HAVE INTENT TO CREATE THE FEAR**.
  + **If “assault = attempted battery”, must have “progressed significantly towards completing the battery”**… just thinking about it is not enough.
    - The fact that the defendant represents that he would not commit a battery if the victim did X does not bar a conviction for assault.
  + If “fear of imminent battery = assault”, defendant must have intended to put the victim in fear.
    - Victim must be AWARE of the assault… victim must have ACTUALLY suffered fear.
    - “Fear” is based on reasonable person standard.
* **KIDNAPPING**
  + OLD COMMON LAW
    - Involved the forcible asportation of a person FROM THEIR OWN STATE TO ANOTHER.
  + **TODAY’S ELEMENTS:**
    - **INTENTIONALLY OR KNOWINGLY**
    - **ABDUCTING,**
      * Where abducting = restraining someone’s liberties
    - **with TRANSPORTATION,**
      * Where any movement is sufficient (depending on the jurisdiction).
    - **ANOTHER PERSON,**
    - **By FORCE or THREAT OF FORCE.**
      * Note: threat or force doesn’t have to occur at the beginning of movement – what starts out as willingly accompanying may become kidnapping.
  + Also known as: “the unlawful movement or confinement of another”
  + Note: many courts hold that kidnapping statutes do not apply to unlawful confinements when incidental to the commission of other felonies (i.e. kidnapping is incidental to murder).
    - Exception in some jurisdictions is whether the compelled detention SUBSTANTIALLY INCREASED THE RISK to the victim.
* **FALSE IMPRISONMENT**
  + **The INTENTIONAL**
  + **UNLAWFUL**
    - Meaning that there was no legal authority on the part of the defendant.
  + **CONFINEMENT OR RESTRAINT**
  + **Of another person,**
  + **By FORCE OR THREAT OF FORCE.**
    - Note: confinement doesn’t have to be by force – may be by threat.
* HOMICIDE – GENERAL
  + ELEMENTS:
    - **CAUSING the DEATH**
      * If a person hastens death, he is considered the cause – must have “materially accelerated” the death of the victim.
      * Result must have been a “natural and probable cause” of the defendant’s act.
      * Superseding Cause – (in proximate cause analysis)
        + Act must be independent, in that it was not caused by the defendant’s acts, and must be intervening, in that it occurred after the defendant’s actions, and it must not have been foreseeable by the defendant.
    - **of another person.**
  + ISSUES:
    - What is a “person”?
      * Generally person does not include fetus. Some jurisdictions have changed this, where a viable fetus = a person, or a fetus = a person from the point of conception.
    - When does death occur?
      * Traditionally, death = cessation of heartbeat and respiration.
      * Some courts have held death = absence of brain activity.
    - How quickly after the defendant’s actions must the victim die?
      * Old common law rule = within one year and one day of when the cause of death was administered.
      * Now = considerable time may elapse… death may occur “at any time”… varies by jurisdiction.
* **MURDER**
  + Old Common Law
    - The unlawful killing of another with MALICE AFORETHOUGHT – defendant must have had the “INTENT TO KILL”
      * **4 types of malice aforethought (Comber v. United States):**
        + **Where the perpetrator acts with the specific intent to kill;**
        + **Where the perpetrator has the specific intent to inflict serious bodily harm;**
        + **Where the act involves such a wanton and willful disregard of an unreasonable risk;**
        + **When a killing occurred in the course of the intentional commission of a felony;**
        + **When a killing occurred in the course of the intentional RESISTING LAWFUL ARREST.**
  + **TODAY:**
    - **ELEMENTS**
      * **WITH MALICE AFORETHOUGHT (PURPOSELY, KNOWINGLY) OR RECKLESSLY (when showing EXTREME INDIFFERENCE TO HUMAN LIFE),**
        + Four factors to consider in determining whether a defendant has displayed extreme indifference to the value of human life (Jeffries v. State):

The social utility of the actor’s conduct;

The magnitude of the risk his conduct creates, including both the nature of foreseeable harm and the likelihood the conduct will result in that harm;

The actor’s knowledge of the risk; and

Any precautions the actor takes to minimize the risk.

* + - * **CAUSING**
      * **the DEATH**
      * **of another person.**
    - **1st v. 2nd Degree Murder Differences:**
      * **1st Degree = WILFULL, DELIBERATE and PREMEDITATED killing, or under circumstances like lying in wait, poison, etc (see list below)**
        + Where “premeditation” = the defendant intended to kill, and after forming that intent, reflected on the decision before killing.
        + Factors to determine premeditation:

Was there reflection?

Was there time for reflection? (time not sufficient alone)

Was there the planned presence of a weapon?

Was there a hiding and waiting?

Premeditation IS NOT just a reaction to a situation.

* + - * **2nd Degree = only difference = NO PREMEDITATION REQUIRED**
    - **Capital Murder v. “Regular” Murder**
      * **Some jurisdictions don’t use degrees – instead they use “capital murder”, for which death may be imposed.**
      * **In TEXAS, the Defendant must have:**
        + **Committed the murder**
        + **Intentionally and knowingly**
        + **And the victim must be:**

**A peace officer OR**

**One of multiple killed**

**Killed in the process of a felony commission**

**Under 6 years of age**

* + - * Reasons a murder may become capital murder:
        + The murder was intentional and carried out for financial gain;
        + The defendant was convicted previously of murder;
        + The murder was committed for the purpose of avoiding/preventing lawful arrest;
        + The victim was a peace officer;
        + The victim was a witness of a crime, and the killing was for the purpose of preventing testimony;
        + The murder was especially heinous, atrocious, cruel, etc;
        + The defendant killed the victim by lying in wait;
        + The victim was killed because of his race, color, religion, nationality;
        + The murder was committed while the defendant was engaged in or was an accomplice to another felony;
        + The murder involved the infliction of torture;
        + The defendant killed the victim by poison;
        + The victim was a juror;
        + The murder was committed by means of discharging a firearm from a motor vehicle;
        + The murder occurred while the defendant was an active participant in a criminal street gang, and the murder was carried out to further the activities of the gang.
* **FELONY MURDER**
  + **ELEMENTS:**
    - **CAUSING**
    - **THE DEATH**
    - **OF ANOTHER**
    - **DURING and as a NATURAL AND PROBABLE CAUSE OF THE PERPETUATION OF A FELONY.**
      * **Should consider time, distance and causal relationship between underlying felony and the killing.**
      * Coincidence is not enough – conduct causing death must have been done in furtherance of committing the felony.
      * Merger rule – some courts have said that the conduct which constitutes the felony must be separate from the acts of personal violence necessary to the homicide itself.
      * Some jurisdictions limit this to felonies that are dangerous.
  + Rationale behind felony murder:
    - Adds an extra deterrent to the perpetration of felonies.
    - Deters felons from killing negligently or accidently.
  + **Generally, all co-felons are liable of all deaths, but - Two Theories:**
    - **Agency Approach (Majority View) – Limits application of the doctrine to those homicides committed by the felon/agent of the felon.**
      * i.e. a police officer will not be an agent of the co-felon, so if the kill in the course of the felony, no felony murder for the defendant
    - **Proximate Cause Approach – Liability attaches for ANY death proximately resulting from the unlawful activity (“But for” the felony…)**
* **MISDEMEANOR MANSLAUGHTER**
  + **Same concept as felony murder – defendant is guilty of manslaughter for killing a person while in the commission of a misdemeanor.**
  + MUST SHOW CRIMINAL NEGLIGENCE on the part of the Defendant.
  + Has fallen into disfavor in many jurisdictions.
* **VOLUNTARY MANSLAUGHTER**
  + **Causing the death**
  + **Of another person**
  + **When there is REASONABLE EXPLANATION or EXCUSE (“ADEQUATE PROVOCATION”),**
    - **Like the defendant being under the influence of EXTREME EMOTIONAL DISTURBRANCE.**
    - **4 Elements:**
      * **Reasonable provocation;**
      * **The defendant was actually provoked;**
      * **Absence of adequate cooling period; and**
      * **No actual cooling off.**
    - Possible adequate provocations:
      * “Mutual combat”, where the victim and the defendant intend to fight and the defendant acts in the “heat of blood” caused by the situation.
      * Violent and painful blows
      * Aggravated assault
      * Witnessing one’s spouse committing adultery
* **INVOLUNTARY MANSLAUGHTER**
  + **UNINTENTIONALLY and RECKLESSLY**
    - With no intent to kill, but the Defendant was aware of the probable result.
  + **Causing the death**
  + **Of another person**
* **NEGLIGENT HOMICIDE**
  + **NEGLIGENTLY,**
  + **CAUSING the DEATH of another person.**
* **RAPE/SEXUAL ASSAULT**
  + Old Common law – RAPE:
    - ELEMENTS:
      * Carnal knowledge
        + Spousal exemption – a woman could not be raped by her husband.
      * Of a woman
      * Against her will.
        + With force used – force was determined in relation to the response of the victim, which was based on the victim’s state of mind.
        + “Against her will” often turned on credibility of the witness (of good fame, disclose the rape immediately, suffer signs of injury, etc) – emphasized resistance by the victim.
  + **Now – SEXUAL ASSAULT:**
    - **ELEMENTS:**
      * **SEXUAL INTERCOURSE**
      * **BY FORCE OR THREAT OF FORCE**
        + Note: not all jurisdictions would include coercion
      * **With the victim**
      * **AGAINST THEIR WILL.**
        + “The victim can just say no” – in some jurisdictions, nothing else is required to show a lack of consent, victim doesn’t have to fight back.
        + “Against their will” would also cover situations where the victim is unconscious or cannot give consent.
    - **In some jurisdictions, two different statutes – sexual assault (based on penetration) and sexual contact (other).**
    - **CONSENT BY THE “VICTIM” is an affirmative defense (if the statute makes lack of consent an element).**
      * Note: Fraud, duress or incapacity to give consent would negate consent.
      * “Withdrawn Consent Rule” – once intercourse begins, even consensually, if the partner says to stop, any action after that is Rape.
    - Other Notes:
      * RAPE SHIELD – Denies the Defendant the opportunity to examine the victim concerning her prior sexual conduct or reputation for sexual conduct.
        + EXCEPTION – If the Defendant’s prior sexual history shows her motive to fabricate.
      * NO MORE SPOUSAL EXEMPTION.
  + **STATUTORY RAPE**
    - **Common Law:**
      * **ELEMENTS:**
        + **Sexual Intercourse**
        + **By a male**
        + **With a female**
        + **Who is beneath the age of consent.**

**Note: This makes the female’s consent irrelevant.**

* + - **Strict liability offense – no mental state required, no defense of mistake of fact (consent).**
    - **Affirmative Defense (in Texas) – If the girl is over 14, and there is only a 3 year difference in ages, then the Defendant can raise defense by showing only this age difference.**
* INCHOATE CRIMES – GENERAL
  + Functions of penal law served by inchoate criminal liability:
    - When a person is seriously dedicated to the commission of a crime, there is need for a firm legal basis for the intervention of law enforcement to prevent its consummation.
    - Conduct designed to culminate in a crime is an indication that the actor is disposed toward criminal activity.
    - When the actor’s failure to commit the offense is due to a fortuity, his exculpation on that ground would involve an inequality of treatment that would shock the common sense of justice.
* **ATTEMPTED X CRIME**
  + **ELEMENTS:**
    - **INTENT TO COMMIT X crime and**
    - **A SUBSTANTIAL ACT going toward the commission of X crime.**
      * Some jurisdictions required “last proximate act” or “substantial step”.
      * Attempted Murder requires that the DEFENDANT ACTED WITH THE PURPOSE OF CAUSING DEATH.
  + **Merges into the completed crime.** (i.e. can’t be charged for murder and attempted murder of the same victim).
  + **Defenses against attempt:**
    - **Renunciation - Is a defense if the defendant abandoned his effort OR prevented the crime from occurring UNDER circumstances showing COMPLETE and voluntary renunciation.**
    - **Impossibility – legal impossibility is a defense, factual impossibility is not.**
      * Legal Impossibility – even if the actor believes the conduct is criminal, the law does not actually prohibit the action.
      * Factual Impossibility – exists when the defendant intended end is a crime, but she fails to finish it because of a factual circumstance unknown to her.
* **SOLICITATION**
  + **ELEMENTS:**
    - **The Defendant**
    - **Solicits, Counsels, Incites or Induces**
      * Solicitation is all that is required – no “agreement” required
    - **Another**
      * Note: the intended solicitee MUST actually receive the solicitation.
    - **To commit an offense.**
      * **Note: the solicitor does not have to be successful in inducing the crime – the solicitation is enough.**
      * **Requirement of Specificity – not the time and place, but just the crime itself must be specifically induced.**
  + **Defenses:**
    - **RENUNCIATION IS AN AFFIRMATIVE DEFENSE,** if the actor persuaded the person not to commit a crime or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of criminal purpose.
    - **There is NO DEFENSE IF THE CRIME IS FULLY COMMITTED.**
  + Combination with other crimes
    - Can be liable as an accomplice + a solicitor
    - Solicitation v. Attempt
      * Solicitation doesn’t have the substantial step requirement of attempt.
      * Solicitation is a lesser included offense within attempt – cannot convict of both.
* **CONSPIRACY**
  + **ELEMENTS:**
    - **An agreement between parties**
      * Rule of consistency – the acquittal of all persons the defendant is alleged to have conspired with requires the acquittal of the defendant.
      * “Concert of Action defense” – An agreement is not conspiracy when the target offense is defined such that it can ONLY be committed only by the participation of more than one person in a preliminary agreement.
      * Agreement is usually not express, so no direct evidence – typically the government must rely on circumstantial evidence
      * **1 agreement = 1 conspiracy**
      * **Knowledge is not enough – must have purpose of promoting/facilitating commission of the crime, profit from the conspiracy, etc.**
    - **With INTENT TO AGREE and INTENT TO ACCOMPLISH THE OBJECTIVE**
      * Bilateral v. Unilateral Theory
        + Bilateral - Cannot conspire with yourself - If one person doesn’t really agree, there is no conspiracy.
        + Unilateral – someone can be punished as a conspirator who believes they have agreed with another to commit a crime, even if the other person had no intent to commit the crime.
      * A stake in the venture = proof of intent
    - **With an OVERT ACT to commit a crime by ANY MEMBER**
      * Overt act = one that furthers the objective of the conspiracy.
      * A single act of one member suffices – doesn’t have to be an act by the Defendant.
  + **Conspiracy ends when ALL OBJECTIVES OF THE AGREEMENT HAVE BEEN COMPLETED.**
  + **Liability of Co-Conspirators**
    - **A co-conspirator may be liable for a REASONABLY FORESEEABLE offense committed by another because the two were part of the same conspiracy.** Some jurisdictions give liability for ALL OFFENSES committed as a result of the same conspiracy.
  + **Defenses:**
    - **WITHDRAWAL IS A DEFENSE if:**
      * **the Defendant manifested a complete and voluntary renunciation,**
      * **COMMUNICATES HIS WITHDRAWAL TO OTHER MEMBERS and**
      * **does something to thwart the success of the operation** – must do more than just back out. (Model Penal Code, Texas agrees)
    - **BUT, if you withdraw, you are still guilty of any already completed crimes.**
  + Conspiracy with other crimes:
    - Parties CAN be convicted of both the object crime AND the conspiracy if the conspiracy is carried out.
    - Prosecutor won’t charge solicitation and conspiracy – they merge.
* **COMPLICITY - PARTIES TO THE CRIME**
  + Generally – Liability for a crime will extend to all who ENCOURAGED OR ASSISTED the crime or HINDERED APPREHENSION after the crime.
  + **AIDOR**
    - **Elements:**
      * **The Defendant intends to aid the commission of a crime AND**
      * **Acts (knowingly) contributing to the execution of the crime.**
    - **= the aider/abettor’s mens rea + the acts of both actors**
    - **The aidor/abettor will be held liable for an offenseS committed by any member of the group made IN PURSUANCE OF THE COMMON PURPOSE or AS A NATURAL/PROBABLE CONSEQUENCE.**
  + **ACCOMPLICE**
    - **A person is liable for an offenseS committed by any member of the group made IN PURSUANCE OF THE COMMON PURPOSE or AS A NATURAL/PROBABLE CONSEQUENCE when he:**
      * **Intentionally or Knowingly**
      * **Incited/abetted the perpetration of the crime and** 
        + Abbetted = provided assistance in A SIGNIFICANT WAY
        + Incited = encourages (and is aware of his encouragement)
      * **Person incited/abetted ACTUALLY committed the offense.**
    - Is NOT LEGALLY ACCOUNTABLE IF:
      * He is a victim;
      * The offense is defined to his conduct is incident to its commission;
      * Withdraws - He terminates his complicity prior to the offense AND
        + Completely deprives his complicity of its role in the offense OR
        + Gives timely warning to the police/makes other effort to prevent the commission of the offense.
  + **ABETTOR - ACCESSORY AFTER THE FACT**
    - **Elements:**
      * **Knowing that a crime has been committed**
      * **Receiving, comforting or assisting the offender**
      * **In order to**
      * **Hinder his apprehension, trial or punishment**
    - **Is NOT liable for the crime that was committed, but for the SEPARATE CRIME OF ACCESSORY AFTER THE FACT.**
    - Does not apply to:
      * The victim of a crime
      * A protected group, absent legislative policy to include them as aidors/abettors
      * When the crime is defined so that participation by another is necessary for its commission
  + **VICARIOUS LIABILITY**
    - **= Liability for the acts of others because of the relationship between the two persons.**
    - **NO AFFIRMATIVE PARTICIPATION REQUIRED.**
    - **Minor Offenses**
      * **A corporation/employer may be found guilty of an offense upon a showing that THE OFFENSE WAS COMMITTED BY A CORPORATE AGENT acting WITHIN THE SCOPE OF HIS AUTHORITY.**
    - **Serious Offenses**
      * **A corporation/employer may be found guilty only if THE OFFENSE WAS DIRECTED/ACQUIESCED by a relatively HIGHLY PLACED CORPORATE OFFICER**
    - **Defense:**
      * **LACK OF FAULT - May be mitigated by a defense that the accused could not have prevented the crime.**
* **STRICT LIABILITY CRIMES**
  + **These are usually cases that involve PUBLIC WELFARE, where statutes regulate POTENTIALLY HARMFUL OR INJURIOUS ITEMS.**
  + Idea is that as long as the defendant knows he is dealing with a device that places him in “reasonable relation to public danger”, he should be alerted to the possibility of strict regulation. Guns that are commonly owned do not fall into this category. (Staples v. United States)
  + Policy reasons for strict liability:
    - If proof of mens rea was required, convictions might be more difficult to obtain,
    - Then courts would be overburdened with extensive litigation, and
    - Social regulation would be frustrated.
  + Policy reasons against strict liability:
    - Defendants may not have “done” anything wrong;
    - Mens rea should be easy to prove;
    - Applying strict liability without a mens rea requirement is not constitutional.
      * **How do we get around constitutionality requirement? Strict liability not okay when there is:**
        + **No advance notice of potential liability AND**
        + **Grossly disproportionate punishment to blameworthiness of conduct.**

**DEFENSES**

* **DEFENSIVE THEORIES - GENERAL**
  + **Alibi = “I didn’t do it because I was somewhere else”**
  + **“I did it, but I have a reason…”**
    - **Insanity** (note: defense must be raised before trial)
      * **Elements:**
        + **AT THE TIME OF COMMITTING THE ACT**
        + **THE DEFENDANT,**
        + **AS A RESULT OF MENTAL DISEASE/DEFECT,**
        + **HE LACKS SUBSTANTIAL CAPACITY**
        + **TO APPRECIATE THE CRIMINALITY/WRONGFULNESS OF HIS CONDUCT or TO CONFORM HIS CONDUCT TO THE LAW.**
      * Conditions giving rise to insanity:
        + Mental illness or disease (possibly psychotic personality)
        + Mental retardation
        + Involuntary (NOT VOLUNTARY) Intoxication
      * **May lead to a verdict of GUILTY BUT MENTALLY ILL.**
        + This will usually trigger a procedure for confinement of the acquitted defendant, generally in a high security mental hospital.
    - **Doctrine of Diminished Capacity**
      * **Defense if Defendant’s mental condition shows that he LACKED THE REQUIRED MENS REA for the crime.**
    - **Self Defense**
      * **Elements of the Defense:**
        + **Defendant is threatened by physical harm;**
        + **Defendant reasonably believed the harm was IMMINENT;**
        + **Defendant has a REASONABLE BELIEF that is it necessary to defend himself;**
        + **The self-defense is PROPORTIONAL to the threatened harm.**
      * **Limitations:**
        + **Begins when the necessity begins and ends with the necessity.**
        + **An aggressor is not entitled to use self-defense unless he attempts to withdrawal** (then he may become the victim). **Same is true for both individuals in a situation of “mutual combat”.**
        + **Deadly Force**

**Can only be used when the victim is being assaulted with/threatened with deadly force.**

Usually means the victim must show that his assailant was armed with a deadly weapon.

* + - * + **Retreat**

Old Common Law Rule – A person must retreat where possible in safety before using self-defense.

**Now – Many jurisdictions say the victim has NO DUTY TO RETREAT as long as the “victim”:**

**Didn’t provoke the confrontation,**

**Is in a place where he has a lawful right to be,**

**And has a reasonable fear that he is about to be seriously harmed/killed.**

* + - * + **Unlawful Arrest - Generally no right to use force to resist an arrest which the actor knows is being made by a police officer, even though the arrest may be unlawful.**
      * Two parts to jury analysis:
        + Subjective – Jury stands in the defendant’s shoes and considers all facts and circumstances known to the defendant.
        + Objective – Jury determines what a reasonably prudent person in a similar situation would do.
      * Variation – Battered Women/Child Syndrome
        + Victim becomes able to sense the escalation and frequency and intensity of violence and thus becomes more sensitive to the abuser’s behavior – may be arguably constantly feeling threat of imminent danger.
        + Has been used as a defense either where the killing occurs during the midst of a confrontation, or where the defendant kills there partner while he is sleeping/otherwise incapacitated.
        + USUALLY WILL BE TREATED LIKE SELF-DEFENSE – “victim” must prove that danger was IMMINENT
    - **Defense of Another**
      * **Helper must be (1) justified in using the level of force he does + (2) believe intervention is necessary for the protection of the 3rd party.**
      * **Two different approaches:**
        + **Alter-Ego Rule – The right to defend another follows the victim’s right to defend themselves… if the helper accidently aided the aggressor, he is not covered by self-defense.**
        + **Perception Theory - As long as the helper reasonably believed that the other was being unlawfully attacked, he can use reasonable force to defend him, and is covered by self-defense.**
    - **Defense of Property**
      * **Owner can use non-deadly force to defend his property in hot pursuit, after a REQUEST TO DESIST.**
      * **Deadly force MAY be justified in situations where the resident has a reasonable apprehension that a trespasser intends serious injury to the occupants of the house where he has entered.**
      * Spring guns, etc – are justified in inflicting ONLY the same harm had the owner used the force himself (i.e. usually can’t be deadly)
    - **Duress**
      * **NOT A DEFENSE TO INTENTIONAL KILLINGS.**
      * **Excuses criminal conduct where the Defendant has:**
        + **Objectively reasonable belief,**
        + **Of an imminent threatened harm,**
        + **Based on an actual, sufficient threat made,**
        + **And there was no better alternative.**
      * A defendant’s fault for placing himself in the situation may bar him from relying on that situation to establish duress.
    - **Unconsciousness**
      * **Affects the INTENT and ACT aspect of the crime.**
      * **This does NOT cover VOLUNTARY INTOXICATION.**
    - **Mistake**
      * **Mistake of Fact**
        + MISTAKE MUST BE REASONABLE TO COURT.
        + **Affects the INTENT aspect of the crime**

**May be a defense if the mistake negates the intent required to establish a material element of the offense, OR**

**The law provides that the state of mind established by the mistake constitutes a defense.**

* + - * + **If the SITUATION IS NOT AS THE DEFENDANT SUPPOSED, the defendant’s mistake may reduce the grade/degree to the offense the defendant would have been guilty of it the situation were as he supposed.**
        + **Mistake ≠ “willful ignorance” –** the defendant cannot willfully and intentionally and remain ignorant of a fact where he was aware there was a high probability that X was a fact, but he deliberately and consciously avoided confirming the fact to deny knowledge. (United States v. Rodriguez)
      * **Mistake of Law**
        + **Generally DOES NOT act as an excuse.**

Why? Facilitates the judicial system, encourages knowledge of and obedience to the law, and preserves integrity and legal norms.

* + - * + **EXCEPTION is if the defendant acts in REASONABLE RELIANCE ON AN OFFICIAL STATEMENT OF THE LAW.**

**Possible justifications:**

**Law hasn’t been published.**

**Reasonable reliance on a lower court decision.** (Ostrowsky v. State)

**Statements of law by government officials.** (Commonwealth v. Kratsas)

**If the statute or rule of law the defendant operated under is later invalidated.**

Ex. Violation of a tax law – when the person has a bona fide misunderstanding as to his liability under the law. (Cheek v. United States)

* + - **Intoxication**
      * Affects the INTENT aspect of the crime.
      * **VOLUNTARY INTOXICATION IS usually NOT A DEFENSE.**
        + Questionable whether voluntary intoxication may be a defense when offense requires recklessness – so sometimes it may be a way to negate specific intent.
      * **INVOLUNTARY INTOXICATION**
        + Involuntary = the Defendant did not know the substance was intoxicating, or consumed it under direct or immediate duress, or consumed such a small amount that a normal person would not have become intoxicated and they reasonably did not expect to become intoxicated.
        + **MAY BE A DEFENSE – varies by jurisdiction**
        + **Where applied, uses the same test as insanity.**
    - **Necessity**
      * **“breaking the law is the lesser of two evils”**
      * **Defendant must show:**
        + **He was faced with a choice of evils, CREATED BY A PHYSICAL FORCE OF NATURE, and chose the lesser evil,**
        + **He acted to prevent imminent harm, and**
        + **He reasonably believed that**
        + **He had no alternative but to violate the law.**
      * Limitations:
        + A defendant’s fault for placing himself in the situation causing necessity may bar him from relying on that situation to establish necessity.
        + Economic necessity ≠ defense
        + Medical necessity in drug cases ≠ defense
        + In situation of escape from prison – necessity may be a defense if the defendant surrenders as soon as the necessity is over
    - **Consent**
      * **Elements:**
        + **Must be LEGALLY EFFECTIVE and**

Must have been:

Given voluntarily

By a person with legal capacity to consent and

The consent must be free of fraud and mistake.

* + - * + **NEGATES AN ELEMENT of the crime OR is used as a DEFENSE TO A MINOR ASSAULT/BATTERY.**
* **DEFENSIVE THEORIES – AGAINST CRIMES RE: PROPERTY**
  + **Defenses affect the INTENT aspect of the offense.**
  + **Affirmative defenses – The actor…**
    - **Was unaware that the property was owned by another;**
    - **Acted under an honest claim of right; or**
    - **Took property exposed for sale, intending to pay for it promptly.**
  + **NOT AVAILABLE FOR ROBBERY in many jurisdictions – idea is that the law should discourage self-help.** (People v. Tufunga)

**GENERAL/POLICY BASED**

* CRIME = act or omission prohibited by law for the protection of the public, prosecuted by the state, and punishable by confinement, fine, or a combination of the two
* **Construction of Penal Codes and Criminal Statutes:**
  + **“Rule of Lenity” – principle that statutes/code is to be construed using strict (literal) construction principle – Government should speak in a manner that is clear and definite.**
    - Two reasons:
      * Fair warning should be given in language that the common world will understand, of what the law intends to do if a certain line is passed.
      * Because of the seriousness of criminal penalties and because those penalties usually represent the moral condemnation of the community, legislatures and not courts should define criminal activity.
  + **Due Process (5th and 14th Amendments) prohibit conviction of a person based on insufficiently precise criminal offense, based on idea that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.**
    - DUE PROCESS = NOTICE + OPPORTUNITY TO BE HEARD + WHO KNOWS
    - **What does insufficiently precise mean? Means that the statute fails to define the crime with definiteness such that:**
      * **Ordinary people can understand what conduct is prohibited OR**
      * **So as to discourage arbitrary and discriminatory application.**
    - Attack of law for lack of precision:
      * Defendant can challenge only whether a criminal statute is vague as applied to the facts of his own case… must show that the statute failed to give him notice that the conduct for which he is being prosecuted was prohibited.
      * Exception may be if statute has “scienter” or willfulness requirement
      * BUT, if the criminal statute covers a large amount of constitutionally protected conduct, the Court will challenge “on its face” – will look at all conduct.
* **CRIMINAL TRIAL**
  + **SEE P. 1 “CHART OF CRIMINAL TRIAL” FOR BASICS**
    - **Law enforcement identifies offense 🡪 Prosecutor gets more information 🡪 Case is Dismissed or accused is charged 🡪 Grand Jury 🡪 Indictment 🡪 Arraignment 🡪 Trial 🡪 Finding (not guilty, guilty, guilty of lesser offense) 🡪 Sentencing 🡪 Appeal or Habeas Corpus (possibly)**
  + **PLAINTIFF = STATE/UNITED STATES, DEFENDANT = ACCUSED PARTY**
    - Note: state usually must initiate the case
  + **BURDEN OF PROOF = each element of offense must be proved BEYOND A REASONABLE DOUBT (by the State) (In re Winship)**
    - “Beyond a Reasonable Doubt” requirement comes from Due Process Clause
      * **Due Process Clause only requires that the prosecutor bears the burden of persuasion ONLY IF the factor at issue makes a substantial difference in punishment and stigma. (Patterson v. New York; Apprendi v. New Jersey)**
      * **A presumption, or inference, that effectively shifts the burden of proof may be a Due Process problem – ask: Does it affect one of the elements? If yes, PROSECUTION must prove that element.**
    - Burden of proof for things other than elements of the offense (in TX):
      * For an EXCEPTION, prosecution must negate the existence beyond a reasonable doubt.
      * If existence of a DEFENSE is submitted to the jury, reasonable doubt requires that defendant is acquitted. Burden of proof is usually on defendant.
      * If existence of an AFFIRMATIVE DEFENSE is submitted to the jury, then the Defendant must prove the affirmative defense by a preponderance of the evidence.
    - Capital Case – for death penalty, must prove that the Defendant is still a danger to society, even if given a very long sentence and imprisoned
  + **Grand Jury = group collected by judge to determine whether from the public’s point of view the case should go forward.**
  + **Capital case = case where death penalty can be given 🡪 if given, must be given by jury**
  + **Plea Bargain**
    - Note: most federal cases end as plea bargains.
    - Potential problems with plea bargains:
      * Shorter sentences
      * People may plead guilty that really are not
      * DA may indict and get the sentence through plea bargaining – possibility of no “check” on the DA’s decisions
    - Benefit of plea bargains: moves cases through the system faster
    - **If the case is dismissed before a plea is entered, the state can bring the same indictment again** (so tactically better for defense to have it dismissed after plea is entered)
  + **6th Amendment – Right to Jury Trial (12 jurors)**
    - **Jury Trial is default in criminal cases**; can get bench trial if requested by accused
    - **Element of Crimes cannot be treated as “Matter of Law”, decided by the judge – 6th Amendment requires prosecution prove all elements beyond a reasonable doubt to the JURY**
  + **Sentence – must be a unanimous decision by the jury.** If not unanimous, Prosecutor may move to dismiss the case, get a new jury with the original judgment set aside, etc.
  + **Lesser Included Offense**
    - **Same or less than all facts required to establish offense OR**
    - **Less serious risk of injury to the same person/property OR**
    - **Less culpable mental state OR**
    - **Consists of an attempt to commit the offense.**
  + **Who can appeal (from trial court to first appellate court)?**
    - **By a former defendant who has been found guilty.**
      * Possible reasons: mistake in the law as interpreted by the trial judge, evidence should not have been admitted, bad jury instructions, jury misconduct, incompetence of counsel, etc. (not “harmless error”)
    - Note: Once a verdict has been given for the Defendant (found not guilty), Prosecution cannot do anything about it.
    - **By the prosecution, on an Interlocutory Judgment (when an issue has been decided by a trial judge that effectively ends the case).**
* **GENERAL ELEMENTS OF THE OFFENSE**
  + **Crime consists of *mens rea* and *actus reus***
    - ***Mens rea* = mental state**
    - ***Actus reus* = all nonmental elements – physical act, results, circumstances**
  + **Four Categories of elements of offenses:**
    - **ACT**
      * **Act = a specific thing you DO, through CONSCIOUS and VOLITIONAL MOVEMENT, or DON’T DO (OMISSION)… not just a thought**
      * **Act must generally be VOLUNTARY, through the “effort or determination” of the actor (factors into intent)**
        + Some INVOLUNTARY ACTS would include: epileptic seizures, accidental acts, reflexes, unconsciousness, hypnosis. If the person knows they are prone to these, however, **liability may be based on voluntary action they took before then – “knowledge of pending unconsciousness”- (like driving knowing that you are prone to seizures or starting a fight, becoming unconscious, then killing someone)**
        + **May be a FAILURE TO ACT, even though there is ORDINARILY NO DUTY TO ACT.**

**Liability under failure to act may be based on:**

**Personal Relationship**

Parent/Child; Husband/Wife or vice versa; in some jurisdictions, BF/GF or vice versa.

Usually NOT child to parent, unless the child has assumed a specific duty.

**Statute** (ex. to pay taxes)

Remember Due Process Requirements

**Contract (if a contractual duty to protect someone)**

**Voluntary Assumption of Care**

**Creation of the Peril (and failure to render assistance)**

**Control of the Conduct of Others**

**By Landowner Status**

Remember: If a person is in a situation, and they haven’t done anything, ask: “Can they be held liable by omission – are they under an exception?”

* + - * Possession may be considered an act, if the person knowingly received the thing or was aware of his control of it.
      * The “act” punishable cannot be based on a condition/status – i.e. like being “addicted to drugs”. (Robinson v. California) An act can however be motivated by a condition – i.e. like an alcoholic being charged with PI (Powell v. Texas)
    - **STATE OF MIND (INTENT)**
      * **Question: What was the accused’s state of mind at the time of the offense? (culpable mental state required?)**
        + Q1 – What “thing” must the state of mind concern?
        + Q2 – What must the state of mind about that “thing” be?
      * **Intent is usually seen through the circumstances, actions, etc., not directly – very rarely will an actor leave a note with specific plans. Intent cannot be inferred – there must be specific proof (although circumstantial evidence).**
      * In Texas, there is a requirement of a culpable mental state for an offense unless the definition “plainly dispenses with any mental element”.
      * Different “kinds of mental states” (based on the model penal code):
        + **Purposely = WITH DESIRE** = the defendant has made a conscious decision to engage in conduct of that nature or to cause such a result.
        + **Knowingly = AWARENESS OF A CERTAINTY** = the defendant is AWARE of his conduct or that certain circumstances exist OR he is AWARE that a certain conduct will cause a certain result.
        + **Recklessly =** **AWARENESS OF HIGH RISK** =when the defendant CONSCIOUSLY DISREGARDS a substantial and unjustifiable risk that something will result from his conduct, and such risk is a GROSS DEVIATION from the expected/normal standard of conduct.
        + **Negligently =** **EXISTANCE OF HIGH RISK** = when the defendant SHOULD BE AWARE of a substantial and unjustifiable risk that something will result from his conduct.
      * **In general, a defendant must act with the requisite mental state (purposely, knowingly, recklessly, negligently, etc) with respect to EACH ELEMENT OF THE OFFENSE to be found guilty. (Model Penal Code)**
        + Note: A presumption in favor of mens rea requires a court to read into a statute ONLY that mens rea that is NECESSARY to separate wrongful conduct from otherwise innocent conduct. (Carter v. United States)
      * **“Conditional intent” – the intent to commit a wrongful act may be conditional, but a defendant cannot negate intent by requiring the victim to comply with a condition that the defendant has no right to impose.**
      * **“Transferred Intent” –** If the statute does not require intent to match a specific victim, then no doctrine of transferred intent necessary, **BUT, if the statute requires that intent match with the victim, then transferred intent MAY be used to allow a conviction.**
      * **Strict liability crimes DO NOT REQUIRE INTENT.**
        + (see later in outline for specific liability crimes)
    - **Results**
      * **Prosecution must show that there was a causal relationship between the defendant’s act and state of mind and occurrence of the result.**
      * **Two parts to causation:**
        + **Cause In Fact – “But For the Defendant’s conduct, the harm would not have occurred.”**
        + **Proximate Cause**

Note: model penal code does not address proximate cause, emphasizes culpability (but is this really the same?)

* + - **Attendant Circumstances**
      * **Some offenses require a showing that particular circumstances existed at the time of the offense.**
  + **Unit of Prosecution**
    - Determines not only the appropriate units for prosecution, but also the number of convictions that are appropriate. May also impact sentencing for current and future convictions based on how many are given for the offense.
    - Determined by reading the statute 🡪 often a matter of interpreting legislative intent
      * **3 considerations when analyzing legislative intent:**
        + **What interests did the legislature seek to protect?**
        + **In a general sense, how did the legislature decide to go about protecting those interests?** (i.e. property v. person interest; “single larceny” rule v. one assaultive offense per victim)
        + **How did they do that in more specific terms?**
      * Things to consider:
        + Phraseology used in defining crime – actual verbage, “any” v. “a” (where “any” suggests not a narrow unit of prosecution) – PLAIN MEANING
        + Legislative history – committee reports and hearings
        + General purposes of law
      * **Remember “Rule of Lenity” – crime is construed as creating the minimal number of distinguishable offenses unless a legislative purpose to create multiple offenses is clear. (Bell v. United States)**
* **SENTENCING**
  + **Felony v. Misdemeanor**
    - **Felony = can get >1 year prison term**
    - **Misdemeanor = lesser offense**
  + **Two Different Approaches to Sentencing:**
    - **Seriousness of penalty = legislative characterization (set sentencing)**
    - **Individualization of sentences based on individual circumstances**
  + **Determinate v. Indeterminate Sentencing**
    - **Determinate – specific terms of imprisonment specified by legislature**
    - **Indeterminate – legislation gives a sentencing judge considerable discretion to impose a sentence between a minimum and maximum term**
      * **Might include probation or parole** 
        + Note: probation varies from parole in that probation is supervised liberty in the community without preliminary service of a prison sentence
  + **Recent Reform – swing back to determinative sentencing**
    - Federal Sentencing Reform Act of 1984 incorporates a determinate feature… it assures that a convicted defendant sentenced for a crime in federal court will serve at least 85% of the sentence actually imposed.
    - “Presumptive Approach” – a specific sentence is specified and the legislative intent is that it be applied as a general rule.
    - “Guideline Sentencing” – guidelines set by legislature are to be used by judges to determine length of sentence
      * Note: US v. Booker – left Guideline System in place, but no longer as binding on federal judges.
* **PROPORTIONALITY Aspect of Sentencing**
  + **8th Amendment, US Constitution – “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”**
  + **“Inherently Impermissible Punishments”** 
    - **Because 8th Amendment draws standards from society (with “cruel and unusual”), some punishments are so inherently barbaric or degrading – disproportionate to the defendant’s culpability – that they will not be upheld.**
  + **Death Penalty as a Punishment**
    - History of Death Penalty: given for wide range of crimes 🡪 intermediate suspension of death penalty 🡪 Furman case (see below) 🡪 states re-wrote capital punishment guidelines (apx. 1972)
    - **General Rule: Death Penalty not prohibited by the 8th Amendment, but procedure in which it is given matters.**
      * **Arbitrary sentencing of the death penalty, with no individual considerations, is a violation of the 8th Amendment. (Furman v. United States) The sentence must be permitted to consider any relevant mitigating factor. (Lockett v. Ohio)**
      * **The 8th and 14th Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. (Roper v. Simmons)**
      * **The death penalty can only be given in the case of murder/manslaughter. Rape is not grounds for the death penalty. (Coker)**
        + Note: there may be an exception for rape of a small child.
      * **Death penalty can also not be given in “nontriggerperson in murder” cases or “insane” or mentally retarded persons.**
    - **Death Penalty is said to serve two purposes:**
      * **Retribution** – idea that certain crimes are so grievous an affront to humanity that the only adequate response is the death penalty (note – this is where proportionality comes into play)
      * **Deterrence** – of future capital crimes by the specific or other offenders
  + **Imprisonment**
    - **Mandatory penalty of life imprisonment does not constitute cruel and unusual punishment. (Rummel v. Estelle)**
      * Court rejected that constitutional disproportionality could be established by weighing three factors (unless extreme case):
        + Gravity of the offense v. severity of the penalty
        + Penalties imposed within the same jurisdiction for similar crimes
        + Penalties imposed in other jurisdictions for the same offense
    - **The 8th Amendment is said to contain no proportionality decree – “cruel and unusual” is determined based on societal views, the punishment, and the crime. (Harmelin v. Michigan)**
      * Note: Because of plurality opinion in Harmelin, it is unclear whether there is really no “proportionality decree” in the 8th Amendment – an extremely “disproportional” confinement may be found “cruel and unusual”.
* **CRIMINALIZATION POLICY**
  + **“Innocent until proven guilty.”**
  + Malum Prohibitum v. Malum in se
    - Malum prohibitum = a prohibited evil
    - Malum in se = morally wrong
  + **Theories of justification for criminalizing and punishing conduct:**
    - **Retributionism**
      * **Theory: One who violates the law merits punishment, whether or not punishment can be shown to have socially desirable effects.**
      * **Two Premises:**
        + **No punishment is appropriate unless evil has been done – offender must have “chosen” to do wrong.**
        + **The punishment imposed must be proportionate to the gravity of the offense.**
    - **Utilitarianism**
      * **Theory: The harm inherent in the infliction of punishment is only justified if it will be outweighed by the good for society achieved through it.**
  + **Individual v. General Prevention**
    - **One purpose of punishment for crimes is prevention.**
    - **Individual = effect of punishment on man being punished who committed the crime**
    - **General = effect of punishment on the members of society in general (messages are sent to members of a society when a punishment is given)**
  + **Rehabilitation**
    - **General Theory: Punishment provides an opportunity to alter the character of the offender so as to prevent future offenses.**
    - **Includes efforts in two areas:**
      * **Attempts to strengthen ties to institutions that reinforce law-abiding conduct (families, religions, etc).**
      * **Address conditions which are seen to directly correlate with criminal behavior – reduce illiteracy, lack of employment skills, and alcohol or drug dependence.**
  + Why do we put someone in confinement as punishment?
    - Public safety, rehabilitation, prevention, retribution
      * Is prevention “warehousing”? Is retribution “revenge”?
  + Who determines what moral lines we draw – what is a crime and what is civil?
    - Legislature sets the criminal code, but the state (through the District Attorney) determines what cases to bring (what things are worthy of criminal charge)
* Assorted Notes:
  + The date the crime was committed determines the year of penal code that is used (i.e. 1990 crime = 1990 penal code)
  + “three strikes and you’re out” – many states hold that if you have been convicted of three felonies, you can be given a life sentence on your fourth conviction
  + Problem with life sentence: person may be free to “do whatever they want” if he/she escapes… a new conviction will not really add to their sentence