Criminal Law Outline

1. **Goals of the Criminal System**
   1. **Retribution/Retributivist** 
      1. **Just Deserts:** gov’t should punish according to moral desert/ culpability
      2. **Punish because it is deserved**
      3. **Right to punish, Duty to Punish**
      4. Can Retribution be Utilitarian? It can be an effect, but is not the goal.
         1. Assaultive Retribution
            1. Deter private vigilantes
            2. Send messages to others
            3. Right balance between victim and criminal
         2. Protective Retribution:
            1. Allow criminals to repay debt?
            2. Showing respect for criminals as persons?
   2. **Utilitarian**
      1. Many theories under one “umbrella”
      2. Punishment should serve a societal purpose
      3. Punishment is evil, and should only be used if it excludes a greater evil from society
      4. **Deterrence (general):** others will not commit the crime
      5. **Deterrence (specific):** aka **recidivism**, keeping the same offender from more crime
      6. Requires that pain of punishment, at least in appearance, outweighs pleasure
      7. **Incapacitation:** depriving of liberty or otherwise preventing committing more crimes (death penalty, disbarment, breath analyzers)
         1. Works on future criminality assumption (we can assess)
      8. **Rehabilitation:**  mostly dropped after war on drugs, but still an option
      9. **Educational Role of CJ system:** Madd, seatbelts, educating about right and wrong
   3. Retributivism and Utilitarianism as limiting principles
      1. Retributivism: punishment MAY NOT exceed what is just, even if it would serve society. (prevents excessive punishment)
      2. Utilitarianism may help us call punishments into question if they are harsh but don’t benefit society in any other way.
      3. Negative retributivism-from book-R for distribution of punishment, U justification
   4. Objectives of the Penal Code- TPC 1.02
      1. **Public Safety-** through
         1. deterrence,
         2. Rehabilitation, and
         3. Punishment to prevent likely recurrence
      2. **Fair Warning** by definitions and grading
      3. **Proportionate** penalties that permit **recognition of differences in rehabilitation possibilities**
      4. **Safeguard conduct that is without guilt** from condemnation as criminal
      5. **Guide and Limit exercise of official discretion in law enforcement** to prevent arbitrary or oppressive treatment of persons suspected, accused, or convicted of offenses.
      6. **Define scope of state interest** in law enforcement against specific offenses and to systematize exercise of **state criminal jurisdiction.**
2. **Definitions and Sources of Criminal Law**
   1. **Crime:** conduct that excites moral condemnation from society
      1. Includes a lasting **stigma**
   2. **Common Law: criminal law, means the TYPE of TERMINOLOGY AND DEFINITIONS**
      1. sometimes called judge-made law; often codified later by legislatures
   3. **Model Penal Code (MPC):** created by ALI; adopted in 37 states, sometimes modified
      1. Has commentary that judges can cite
   4. **Constitutional Limits on State Power to Criminalize Conduct**
      1. Statutes give way to Constitution
      2. 5th, 14th amends: due process, equal protection clauses
      3. 8th Amends: no cruel and unusual punishments clause
      4. 1st Amend: speech and religious freedoms
   5. **Government Burden of Proof: BEYOND A REASONABLE DOUBT**
   6. Defense burden of Proof: NOTHING, if prosecutor doesn’t prove BRD
3. **Statutory Interpretations and Clarity**
   1. **Any non-petty crime gets a jury trial under Constitution**
   2. **Elements:** Gov’t must prove facts for each element beyond reasonable doubt
      1. **Conduct-** what act?
         1. **“Cause”** implies “do some act to cause”
      2. **Result-** not present for all crimes
      3. **Attendant Circumstances**
      4. **Mental State/ Mens rea**
      5. **Causation:**
         1. If there is a result, you need a causal link to the conduct
   3. **Types of Crimes:**
      1. **Conduct Crime:** punishment based on specific behavior, no result needed
      2. **Result Crime:** punishment based on unwanted outcome
      3. **Circumstance Crime:** culpable mental state attaches not only to conduct, but also to circumstances. (Example: Operating vehicle w/o owner’s consent, statutory rape)
      4. **Social Harm:** harm to society, tangible or not, essence of all crimes
   4. **Vagueness:** statute gives no fair notice of what is required
      1. *In Re Banks:* “Peeping Tom” statute not considered vague because it uses “peep” and “secretly” to alert people of spying requirement; not overbroad either.
   5. **Overbroad:** statute criminalizes innocent conduct- that is conduct that is everyday and expected and generally lacks moral condemnation.
      1. *Desertrain:* Statute about using car as “living quarters” used to indict people getting out of rain, driving, and eating in car was overbroad. Discrimnatory enforcement towards homeless unacceptable.
      2. *Papachristou:*case cited in Desertrain; attempt to criminalize “shiftless” behavior must fail due to freedoms granted in America- too broad.
   6. **Why forbid vague and overbroad?**
      1. **Vague:** Must give fair notice; must not allow arbitrary and discriminatory enforcement
      2. **Overbroad:** Must not sweep so broadly as to prohibit innocent conduct; must not allow arbitrary and discriminatory enforcement
   7. **Other Claims:**
      1. TX Constitution Section 19 on Due Process
      2. Purposes of TX Penal code- guide discretion (section 5), Protect innocent conduct (Section 2)
4. ***Actus Reus* and the Voluntary Act Requirement**
   1. ***Actus Reus*:** can refer to conduct as well as causation of harmful result, use TPC terms instead of this common law term.
   2. ***VOLUNTARY IS FOR ACT, NOT MENS REA!***
   3. **Voluntary Act:** under the MPC, an act is not voluntary if…
      1. Reflect or convulsion
      2. Body movement during unconsciousness or sleep
      3. Conduct during hypnosis or resulting from hypnotic suggestion
      4. Bodily movement not otherwise a product of the effort or determination of the actor, either conscious or habitual.
         1. Note that this is consistent with both utilitarian/deterrence and retributivist
   4. **TPC 1.07:** Act means a bodily movement, whether voluntary or involuntary, and includes speech.
   5. **TPC 6.01: Requirement of Voluntary Act or Omission:** A person commits an offense if he voluntarily engages in conduct, including an act, omission, or possession.
   6. *Martin v. State:* Man who was dragged to public place by cops and arrested for public drunkenness was not guilty b/c his act was not voluntary; he did not voluntarily manifest his drunken condition in public.
   7. *State v. Utter:* Father who stabbed son with no witnesses cannot raise defense of **automatism** (not insanity) due to lack of evidence; **automatism** or involuntary behavior would negate the voluntary aspect of the act.
      1. **Intoxication** is generally not counted as unconsciousness for voluntary determination (so you can’t make self unconscious)
   8. **Foreseeability:** If a person commits some act voluntarily and involuntary events result in something criminal, the person is liable if foreseeable.
      1. Applies to entire course of conduct, gives a sense of fairness
      2. Gov’t has burden of proof here
      3. Example: epileptic driving car- driving voluntarily as voluntary act w/ foreseeable consequences.
   9. Automatism and other affirmative defenses- D’s Burden of Proof.
5. **Possession Crimes:**
   1. **Possession** is a voluntary act if the possessor *knowingly* obtains or receives the thing possessed or is *aware* of his control for a sufficient amount of time to permit him to terminate his control.
      1. Need not be physically holding item
      2. Mental State- “knowingly” or “aware”- needed for act to be committed here
         1. **Awareness is built in; knowingly is always required to possess something, no matter how the statute is worded.**
         2. **You can’t unknowingly possess an item**
6. **Omissions**
   1. **Omissions** under TPC 6.01c are not a crime unless law as defined in 1.07 provides that the omission is a offense or otherwise.
      1. **1.07:** defines law as “constitution, statute, written court opinion, order, or rule lawfully adopted under statute.”
         1. Basically, no legal duty, no crime.
   2. *People v. Beardsley:* Man not responsible for death of woman who voluntarily took morphine while in his home; no legal duty meant no criminal omission.
   3. **Common Law Circumstances where Duty might arise:**
      1. **Statute imposes duty**
      2. **Certain status relationships-** parent/child, spousal, etc.
      3. **Contractual duty**
      4. **Voluntarily assumed care**
      5. **Person creates risk of harm-** as where person has duty to pedestrian they hit
   4. **Reasons against criminalizing omissions:**
      1. Line-drawing
      2. Infringements on freedom
         1. People might be concerned for own safety, etc.
         2. Need everywhere- can’t make people stop living their lives to always help
      3. Awareness issues
      4. Easier to penalize acts than non-acts
      5. Bystander effect and harmful “help” from bystanders
   5. Some states do adopt statute with duty to help: Minnesota, for example
   6. Situations where helping often required:
      1. **Reporting requirements**
         1. Sexual abuse
         2. Gunshot wounds
      2. If you hit someone with car
      3. Other/misc- in “age of cell phones”, more exist
   7. *Barber v. Superior Court:* Withdrawal of care was omission, and legal duty only existed as to immediate care for emergency, not life support forever.
7. ***Mens Rea* and the Mental State: Culpability at Criminal Law**
   1. ***Mens Rea*  refers to the mental state**
      1. **Culpability** def.: guilty mind, vicious will, immorality of motive, blameworthiness
      2. **Elemental** def.: mental state of D with regard to social harm elements set out in definition of the offense.
   2. **Moral Culpability:** themens rea term/extent to which the person chose to break law
      1. **TPC 6.02:** Culpability is required; must be one of the 4 mental states, unless it is a strict liability offense
   3. **“No Act is criminal unless the mind be criminal”** (actus non facit reum nisi mens sit rea)
   4. *Regina v. Cunningham:* Man who stole gas meter and let gas escape, poisoning woman, was reckless rather than having intent toward the harm in the statute, and thus not guilty.
   5. *People v. Conley:* Kid who intended to hit other teen with bottle missed and hit third teen; found transferred intent to cause serious bodily harm from nature and force of blow.
   6. **4 Main Mental States**: I > K > R > N. See **TPC 6.03**
      1. **Purposeful (MPC) or Intentional (TPC):** actual desire to do the particular kind of harm that in fact was done.
         1. Conscious purpose to do the thing
      2. **Knowingly**
         1. **TPC:** “awareness that the circumstances exist”
         2. **MPC, Common Law:** aware of a high probability of existence of AC, unless the person actually believes it does not exist (substantial certainty type
         3. **Willful Blindness: NOT** in Texas; some jurisdictions hold that refusing to learn of facts is equivalent to knowing
            1. (D suspects, and takes steps NOT to learn of fact)
            2. In JX like TX where knowledge must be actual, this might establish recklessness instead
            3. *State v. Nations:* Woman employing 16-year-old as “dancer” at club found not guilty of child endangerment because statute requires “knowingly” in actual-knowledge JX, and she was willfully blind.
         4. Book note- practically certain, substantially certain (contrast with R)
      3. **Recklessly:** D is aware of the risk, but proceeds anyway
         1. That is, D foresees the harm in the statute might occur but takes the risk and does the act anyway
      4. **Criminal Negligence**
         1. “should have been aware but was not aware”—lowest to meet, only one that does not require awareness of risk.
   7. **Offenses with no mens rea:** assume 1 of the 4 is needed, unless statute clearly intends not.
   8. **Transferred Intent:**
      1. Applies when person intends one harm to P1 but hits P2
      2. “Mischief of transferred intent”: same harm is easy; what if you intend to break a window and accidentally kill someone?
         1. Risk analysis, need facts and knowledge to prove- more reckless than intent in some cases.
      3. **Avoid arguing for transferred intent between different types of harm**
      4. One view- intent is to transferring the result and not the act (so throwing a bottle is not going to transfer to all consequences)
   9. General and Specific Intent
      1. Common law Terms
      2. **General Intent:** 
         1. Statute does not specify intent; only need to prove act done in blameworthy manner
         2. Statute requires a lesser degree of culpability (negligence or recklessness)
      3. **Specific Intent:**
         1. Specifies mental state that must be proved
            1. Might be like a motive- “with intent to deprive owner”, etc.
         2. Specifies higher level of culpability (intentionally or knowingly)
   10. **Lesser Included Offenses:** Include everything in the greater charged offense, but a bit less (think Nesting Doll). Punishments often less.
       1. Example: Homicide can be I/K-murder, with lesser included offenses R-manslaughter or N- negligent homicide.
       2. *Reed v. Texas:*  Charge that allowed conviction on “reckless” mental state on charged offense that was indicted as knowing/intention was improper; LESSER included offense must actually be lesser, not charged offense with lesser mental state.
          1. **Fair Notice** of mental state must be given- b/c if not charged with a lesser mental state, it is a defense (but don’t want to plead it if charged with that as alternative)
          2. **As a prosecutor- include recklessness in indictment!**
8. **Strict Liability Offenses at Common Law**
   1. **Is there a mens rea?**
      1. **Compound crimes** that include things like “commit or attempts to commit” another offense, needing to consult other statutes- might have a mens rea needed for the compound part of offense.
      2. **“Without effective Consent” –** signals that the person must be AWARE of consent or not. (knowing)
         1. Ex. Burglary statutes.
   2. **Where in statute mens rea applies/Statutory Problems**
      1. *Flores-Figuroa v. US:* “Knowingly” is generally applied to all parts of statute that contain it- man did have to know not only that he was possessing fake ID, but that the ID belonged to a real other person. (skipped in class)
      2. *Morisette v.**US:* larceny statute dealing with gov’t items does indeed require intent, as it is derived from common law mens-rea-required statutes.
   3. **Strict Liability Offenses:** 
      1. **Often regulatory or “public welfare” offenses**
         1. Offenses from common law OFTEN require mens rea
         2. **Public Welfare Offenses**
            1. Regulatory in nature

Might deal with regulating dangerous items- guns, grenades, etc.

* + - * 1. Applicable usually to certain industries (encourage care)
        2. Lighter penalties- but today, legislatures have increased penalties, so this is not as clear a signal as it used to be.
    1. **Often have small penalties/fines**
       1. Serious penalty may be indication mens rea is required
  1. Policy Against Strict Liability:
     1. Unjust to attach w/o proof of culpable mental state
     2. Dilutes moral force of law
     3. Inefficacious for deterrence purposes
     4. Civil regulation suffers
     5. Book adds “may result from careless drafting”
     6. NOTE: MPC leans heavily against
  2. Policy For Strict Liability:
     1. Involves morally wrong/dangerous conduct and D runs the risk
     2. “super deterrent”
     3. Potential Harm to public outweighs potential unfairness to individual
  3. **Statutory Rape:** traditional strict-liability offense
     1. **Moral Wrong Theory:** anyone committing immoral conduct “assumes the risk” of punishment (ex: sex outside of marriage and statutory rape)
     2. **Legal Wrong Theory:** (book only) anyone committing lesser offense (in their mind) “assumes the risk” of punishment [updated version of moral wrong theory]
     3. *Garnett v. State:* Mentally challenged man who had sex with 13-year-old claiming to be 16 found guilty; held that mistake as to age was not relevant b/c the statute has no mens rea (and was not intended to, per legislative and common law history)
     4. **Is strict-liability best route?**
        1. Stigma and registration- very serious!
        2. Prosecutor’s options: refuse to charge, ask for minimum punishment (does not guarantee it, and registration may be mandatory)
     5. *Johnson v. State: \*\*\**IMPORTANT CASE FOR TX PROCESS\*\*\*: Mens rea is required in TX unless statute “plainly dispenses” with it.
        1. Majority: Statute’s history and common law make strong argument for no mens rea. Previous State cases are clear.
           1. Circumstance crime- intercourse alone is not criminal. The statute did previously have mens rea but at codification, mens rea removed from the subsection.
           2. “Knowing” applies to presence of person for Indecency with a Child (21.11 TPC) but not to knowing the age of the person.
        2. Dissent: “plainly dispenses” means expressly saying “no mens rea”
        3. **Fundamental Fairness Principle:** punishment in some cases offends a principle that is so deeply rooted as to be fundamental. (used here in dissent)

1. **Defenses and Affirmative Defenses**
   1. **Affirmative Defenses:** “come from outside” the offense
      1. Allows D to win even if gov’t proves all elements BRD
      2. Typically, BOP on D.
      3. Standard: preponderance of evidence (TPC)/may be higher standard elsewhere
      4. TPC 2.04: Prosecutor need not negate Affirmative Defenses; only submitted to jury if the evidence standard is met.
2. **Mistakes of Fact or Law**
   1. **Mistakes of Fact:**
      1. Not a defense in all jurisdictions
      2. **Genuine mistake** or **honest mistake** may vitiate intent
         1. if you honestly thought something was yours or free or w/e, you lack intent to deprive, for example- and thus there is no mental state to satisfy statute
      3. *People v. Navarro:* Belief **does not need to be reasonable** to raise the defense; credibility may play into jury’s finding of honest/good faith belief or not, but does not need to be objectively reasonable. Man who took beams- jury instruction on RSN was wrong.
         1. Jury may find that objectively unreasonable belief is not good-faith as a matter of fact finding- but could also find it is.
            1. Must instruct on correct mental state. (Could still be guilty anyway)
         2. **Subjective determination,** b/c mens rea deals with the actual, subjective desires of the person
      4. **Standard: Good-faith subjective standard**
         1. “objectively reasonable” as a standard is equivalent to “criminal negligence” in mens rea.
            1. Thus, making it rsn-standard would mean you could convict people for a higher-penalty intent crime by saying their negligence/failure to be reasonable in belief creates intent. (Absurd!)
      5. To know what mistake matters, find the mens rea- **the mistake that negates the mens rea is the sufficient mistake.**

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| **MENS REA** | **MISTAKE THAT NEGATES** |
| Intent | Not intentional (lack of intent) |
| Knowingly | Didn’t know (in some states willful blindness exempted, but not in TX) |
| Reckless: aware of risk | Honestly unaware of risk (no awareness of risk) |
| Negligence: unrsn failure to appreciate risk | Honestly and reasonably unaware of risk\* **only one to be objective!** |

* + 1. Logically, an **honest mistake can negate** intent, knowledge, or recklessness (subjective awareness of a risk), even if it is an unreasonable mistake or belief.
    2. One who **unreasonably lacks awareness of a risk** makes an unreasonable mistake and may be convicted of a crime of negligence, but not of one requiring a greater mens rea.
  1. Mistake of Fact under TPC:
     1. **TPC 8.02:** (a) It is a defense to prosecution that the actor through mistake formed a **reasonable belief** about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.
        1. This is problematic! As above, saying “rsn” creates negligence standard.
        2. **Great if the mens rea is negligence**- **do not raise otherwise**!
           1. See chart above- “lacked intent” “didn’t know” “unaware” > this!
        3. A good faith mistake would nullify intent and perhaps knowing- so this defense is useless b/c it just adds the “reasonable” stricter standard
     2. *Granger v. TX:* Bonehead shoots car because his friend shot car, believing it to be empty, and the man inside the car dies as a result.
        1. 8.02 was raised, but should not have been. “Lack of intent” better argument; could also challenge all other elements, like causation.
        2. Make fact arguments about intent, knowledge before resorting to 8.02!!
        3. Note: charging ethics here- he’s guilty of something, but they charged him with murder and so must prove intent.
  2. **Mistake or Ignorance of Law**
     1. Mistake of law can negate mens rea if the crime requires awareness of the law.
        1. Example: Bigamy requires knowingly marrying two people; but if a man thought his AR divorce was final/valid and was mistaken, so he married elsewhere, he would not be guilty. His mistake as to AR law negated the “knowing” element.
        2. **MPC** does not distinguish between fact and law for mistake
     2. Mistake and ignorance are **NARROW** defenses; usually mistake means reliance on an official statement of law.
     3. Mistake as defense is almost tautological; if a knowing mens rea is required, not knowing will negate anyway; “they cannot convict you unless they prove mens rea, but if they cannot prove mens rea because of a mistake, there is no crime.”
        1. Note however that 99% of laws don’t require proof of knowledge of the law. This is a **RARE DEFENSE**.
     4. **Common law- ignorance of law is no excuse**
     5. **TPC:** Defense if acting in **reasonable reliance on** official statement of law, admin agency permission, written court opinion, statement by public official charged with interpreting law in question, and a few other listed items.
        1. **Officials** are a narrow group, don’t include things like DAs or gun dealers
        2. *Marrero* below would not have defense
        3. **Can appeal it as fundamentally unfair-** Lambert v. CA
     6. *Cheek v. US:* Tax law has a **special** exception to “ignorance of the law is no defense” due to the vagaries and complexities of federal tax law; thus, someone must be **willful,** committing a voluntary, intentional violation of a **known** legal duty. Cheek, tax protestor type, walks free- the **mistake of law does not have to be reasonable**.
        1. Good faith mistake is sufficient.
     7. *People v. Marrero:* Guard who was advised by gun dealer that fed prison guards included in exemption to license law gets busted with gun; tries to argue mistake based on his good faith belief that he was not covered by that law, but this law does not require knowledge.
        1. NY Majority- notes that legislature did not adopt the MPC code part that would let them convict Marrero (must rely on statement of law later found to be wrong), but agrees to treat it as adopted due to concerns of lawlessness, policy concerns, and legal chaos.
           1. Utilitarian concerns- keep people from raising fake defenses, and also incentivize people to learn the law
        2. Dissent- if NY wanted to adopt the MPC provision, it would have; the majority has made it so that you must be right in your reliance on the law in order to be mistaken.
           1. Retributive concerns – basic fairness and justice
           2. NJ has looser defense, no chaos there beyond, well, NJ…
        3. Bottom line: this is about policy, not real legislative intent
     8. Other policy concern: loopholes; want to encourage knowledge of law, not seeking loopholes to get around it
     9. *Lambert v. CA:* California stat on registration based on previous felony status violated due process b/c it was wholly passive and there wasn’t a way to know/be put on notice. This fairness concern overlaps with vague/overbroad.
        1. TPC shares this purpose of notice
        2. Note that constitutional defenses are extremely narrow

1. **Ethical Duties- Prosecutorial Ethics**
   1. **Discretion:** prosecutors have discretion, not legally obligated to go forward with charges.
   2. **Purpose: do justice!** Justice is the primary role of the prosecutor
      1. Regular lawyers “fight for client” and try to win; less broad role, focusing on zealous advocacy
      2. Prosecutors, by contrast, are almost judicial- officers of court
         1. Nat’l prosecution standards- 1.1 primary responsibility is to see justice done
         2. NPS 1.3: zealous in need to protect individuals, but society’s rights are paramount!
         3. ABA 3-1.2: seek justice, not convictions
            1. Prosecutors have an important function to reform and rehabilitate justice system/admin of criminal justice. Should stimulate reform efforts when inadequacies arise.
   3. **If unsure of guilt,** look to **probable cause**. IF no probable cause, cannot proceed
   4. **How much evidence is enough?**
      1. Minimum (Constitutional): **probable cause**
      2. Nat’l Prosecution Standards and ABA CJ standards: **sufficient admissible evidence to convict**
      3. US Atty manual recommends: **proof BRD**
         1. Higher standard, but also injects prosecutor’s judgement and belief
            1. Why higher? Conserve resources (limited), and avoid administering strict punishment where not warranted
   5. Prosecutors are **not obligated to file most serious charges supported by evidence**
      1. Discretion works on case-by-case determinations
      2. There is no appeal on decisions not to prosecute
   6. **Factors on charging/bringing or not bringing certain charges:**
      1. **ABA 43.6:** everything from environment to civil penalties, deterrence
         1. Adequate civil remedies might provide reason not to charge
         2. One factor is ‘undue hardship to the accused’
            1. Victim’s interest is as well; this is a balancing test
      2. The prosecutor, representing the community, thus also represents the defendant as part of the community; at the end of the day, the goal is justice and appropriate convictions. (on right grounds, etc.)
   7. There is **no legal way to force a prosecution to happen**
      1. Even if the grand jury indicts, no obligation (rare problem)
   8. Prosecutors **should not attempt to use the charging decision only as a leveraging device**
      1. Bring what is “necessary to fairly reflect gravity of offense”
      2. The only ethical thing to do is to charge the right punishment- **what is appropriate for the offense?**
   9. Training and enforcement: very little training, and enforcement is rare/extreme- takes a large and extreme thing to trigger it.
   10. Prosecutors **not obligated to file charges at all**
   11. IT is not per-se unethical to offer to drop charges on a person’s spouse to get a guilty plea
       1. “not coercion, just offering them a benefit”
   12. Prosecutors **may consider government informant status of D**
   13. Limits on charging:
       1. Discriminatory pattern remedy: civil lawsuit, but hard to win
          1. Need overwhelming empirical evidence
          2. Must show “discriminatory effect and purpose”, but may not always be allowed access to data
       2. **Arbitrary prosecution claims**  are possible but often fail
       3. **Vindictive prosecution claims** also available, but prosecutors have discretion
          1. in most of these types, must have evidence to prove case to get access to further evidence.
   14. **Presumption of good-faith** acting from prosecutors
   15. Obligation to **turn over exculpatory evidence to defense**
       1. **TX** goes further, broadest turnover requirements in country; police must turn over some evidence as well.
2. **Causation**
   1. **Two parts: But For and Proximate**
   2. Key Concept: **Foreseeability!** Do not confuse with foreseeability for voluntary act, or with mens rea.
   3. **But-For Causation:** “but for” d’s action, it would not have happened. (**substantial factor** sometimes used if more than 1 person causing an act)
      1. *Oxendine:* D who beat child could not be convicted of death b/c state’s medical experts did not establish that the beating was what caused the child’s death (even by accelerating). Could not use later testimony by co-defendant’s expert since state had rested.
         1. **Acceleration:** person who accelerates V’s death may also be charged with it
         2. **Remoteness:** causes can be **too remote** to result in responsibility despite being but-for causes
   4. **Proximate Cause:** deals with fairness; not “for want of a nail” remote
      1. **Factors:**
         1. **Foreseeability**
         2. **Apparent Safety Doctrine:** if a person gets to safety, not F that they get injured in some way later
         3. **Remoteness**
         4. **Third Party Acts** can break the chain
            1. **Intervening force-** 3rd party act
            2. **Superceding cause-** 3rd party act that severs chain of cause
      2. *Rideout:* in case where car crashed and V left roadway to check on car, D found not to be responsible despite causing the crash. Since V was apparently safe, not F that he would leave and go check on car- but some of the courts that handled it felt it was foreseeable.
      3. MPC: but-for is codified explicitly. Foreseeability/proximate is codified by use of “awareness” and foresight in definitions of offenses.
         1. If you knew/contemplated it, it was foreseeable
         2. Built into recklessness and negligence too.
         3. **Transferred intent in MPC 2.03:** 
            1. If the harm differs only in that the harm intended was MORE serious or a different target was hit, then **intent preserved**
            2. If the actual result differs only in that it occurs in a different way or was a different type of injury than that intended, contemplated, or risked, then determine whether actual result is too **remote or accidental** to have a just bearing on the actor’s liability or the gravity of his offense.
      4. *Velazquez v. State****:*** In drag race case, where one man continued to race after challenge was over, crashed, died, it was found that he killed himself by his recklessness, and race opponent was not responsible.
         1. The death by Victim racing and continuing to speed and flipping the car was too remote from the race in the other direction that had ended.
      5. **TPC** proximate cause- 6.04A; codifies substantial factor test but does not speak to proximate cause. **Courts still recognize proximate cause in TX, it is fundamental**
      6. **TPC Transferred intent:** nevertheless responsible if the only difference is:
         1. **A different offense** was committed, or
            1. Problematic b/c you could aim to break window and accidentally kill someone, yet be liable.
         2. **Different person/property** was affected or harmed
      7. *Henry v. TX:* Drunk driver hits person who ran red light
         1. D should move for acquittal; the offense charged specifically ties the death as a result of the intoxication while driving. He was driving intoxicated, but the intoxication did not cause the death!
         2. Is there a reckless-death charge available?
            1. Might be able to get mens rea
            2. If he followed all traffic requirements despite BAC, not F that someone would get hit (or at least a hard argument)

Consider more generally, or as a fact issue- was he swerving, and was he actually aware of risk?

* + - * 1. SUBJECTIVE mens rea requirement here—we do not allow ‘I was too drunk to know’ as an excuse for this.

Especially today, w/education, hard to claim negligence instead of recklessness, b/c everyone knows.

1. **Murder and Killing**
   1. General
      1. Murder- I/K
         1. SBI murder- under TPC, intent for SBI + act clearly dangerous to human life that causes death (no intent need)
      2. Manslaughter- R
      3. Negligent Homicide
      4. Felony Murder
      5. Unintentional Killing
   2. Under TPC
      1. Subdivided into Capital and Murder
         1. Capital- 9 aggravating factors; need 1
            1. Police, firefighter, child under 10, corrections officer, hired to kill, killing in course of felony (NOT FELONY MURDER)
      2. **Sudden passion** does NOT reduce charge to manslaughter, as it does at CL.
         1. **UNDER TPC, IN SENTENCING PHASE**
      3. Mens Rea for murder
         1. Intentionally or Knowingly
            1. Must be aware of nature of conduct or that circumstances exist; knowingly w/r/t “result” when he is aware that conduct rsn certain to cause result.
         2. *Medina v. Texas:* In drive-by shooting case, defense argues that the court should not have instructed on “knowing”; poor defense, but there was error in conflating knowledge of nature of conduct with knowledge of result.
            1. From circumstances, shooting into crowd = awareness that would cause death under precedent
            2. But knowing of circ/nature does not always = knowing result

Shooting into air on New Year’s- know conduct, not result

* + - * 1. Intent issue- inferred from facts; lethal weapon, manner of use suggest intent.
  1. Heat of Passion Killing
     1. At CL, reduces to manslaughter, but in TX, only lesser punishment
     2. Must be result of **adequate provocation**- person of ordinary temper rendered incapable of cool reflection
        1. **Words alone not enough**
           1. *Girouard v. State:* cruel words + minor touches from tiny wife not adequate provocation for tall husband to kill her.
        2. **Sudden Passion in Texas:**  provocation **by individual killed** or person acting with that person; must arise **at time of offense, not solely former provocation.** 
           1. Causal connection between passion and death as well
     3. Sudden passion NEVER applies to Capital Murder.
        1. *Wesbrook v. Texas:* no sudden passion defense in case where man killed 5 people as a result of ex-wife promiscuity and stolen car keys; once jury decided murder was capital, defense no longer available.
     4. Must be **immediate/in passion-** time delay breaks it (amt is jury Q)
     5. **Adequate Provocation-**used to be list of defined examples (adultery, mutual combat, assault and battery, illegal arrest, harm to relative or 3rd party), but modern trend is to leave to jury
        1. **Rsn person** depends on framing.
           1. Objective person in subjective facts of case
           2. **Gravity of provocation** affected by some factors:

**More offensive = less self control expected**

Factors for this controversial

“rsn person with X condition” fairly common but we still expect the same degree of self control as everyone else.

“we expect a 7/10 of control. If the provocation is a 3/10 to normal person, 5/10 to person with X, and he displays anything less than 7/10, still guilty.”

**Short temper is not a factor**

* + 1. **Provocation is only a partial justification, not complete defense**
    2. Excuse or justification?
       1. Excuse contributes to mitigation; but we don’t excuse the murder totally
       2. Partial justifications- victim at fault (provocation by killed person)
          1. NOT A CONCESSION TO HUMAN FRAILTY- we still punish
  1. Unintentional Killings
     1. *People v. Knoller*: Presa Canario Case; CA “implied malice” charge for D whose giant vicious dog mauled someone to death; heavily dependent on mens rea and awareness of risk.
        1. Causation- Foreseeability helps us establish the proximate cause and MR
     2. **Texas does not have common-law impled malice/recklessness murder**
     3. For awareness or failure to recognize a risk, the risk must be **substantial** and **unjustifiable.** 
        1. **Substantial**
           1. “It depends”- even a 2% chance could be substantial
        2. **Unjustifiable**
           1. May have a justification that is simply insufficient
           2. Foreseeability of conduct can negate justification

“getting home” v drunk driving- F harm cancels out

* + - 1. Examples:
         1. Dentist- substantial but justifiable
         2. Russian Roulette- less substantial but unjustifiable

**Substantial is partially dependent on justificability**

* + 1. *State v. Williams:* In case of infant death from sickness, parents still criminally responsible under objective negligence standard; considering “ordinary Shoshone w/lim education” would be too subjective a standard.
       1. **TPC requires GROSS negligence,** gross deviation from standard of care of ordinary person as **viewed from actor’s standpoint.**
       2. Value of punishing people who did not know?
          1. Others will be more careful to be aware, not forget
          2. Punish insensitivity
          3. Discourage people from trying to avoid prosecution
       3. Reasons not to punish:
          1. Parents have suffered enough
          2. No moral culpability of conscious wrongdoing.
  1. Felony Murder Rule
     1. **Death that occurs in course of committing a felony is a murder**
        1. Limited to certain felonies by statute in many JX
        2. TX: not manslaughter or negligent homicide
     2. *People v. Fuller:* non-TX case; felony murder b/c broke into locked cars; lesser BOP for gov’t (felony, death, cause rather than substantial and unjustifiable risk analysis).
     3. Purpose and justification of FMR:
        1. Culpability in felony; respect for victims of crime
        2. Efficiency and preventing perjury; efficiency justified by societal dislike of felons
        3. Deterrence- both death and underlying felony
           1. Overdeterrence risk?
        4. Crump’s reasons-
           1. efficiency,
           2. reaffirming societal judgement and value of life,
           3. clarity in having one felony-related offense, not many
           4. fewer resources used
           5. Perjury prevention
     4. Texas FMR: 4 limits in statute
        1. Flight- from felony ends at safe place; then murder is no longer w/felony
        2. Manslaughter cannot be the felony
        3. Act clearly dangerous to human life (resulting in death)- CAN be same as the felony
        4. Dangerous act must proximately cause death
  2. Merger Doctrine and TX FMR
     1. *Garrett v. Texas:* aggravated assault with deadly weapon where man kills clerk while pulling gun to scare him; **court declares merger doctrine** that **excludes** other forms of **homicide & LIOs** from felony options for this.
        1. Idea is that homicide and predicate felony should address different harms- burglary, rape, arson, robbery [**property** offenses or **diff harms** to person]
        2. intent-to-SBI not available, so lacking FMR, would be manslaughter
        3. Why merger? Any assault or homicide ending in death would be FMR, no need for those other offenses if so.
     2. *Johnson v. State:* Injury to child results in death; FMR proper because “injury to a child” contains an **extra element** despite being an assaultive offense; thus, it will not always escalate to FMR, and is appropriate predicate felony.
        1. Criminal mischief and arson similarly appropriate predicate felonies b/c are **property harms**
        2. Assault on police officer would also work as underlying felon
     3. *Lawson v. State:* aggravated assault resulting in death leads to felony murder charge; court decides it is FMR and that’s proper.
        1. *Current law is still law even if wrong;*
        2. Could have been charged as murder by itself, no need for FMR.
        3. Any assault can now be LIO
     4. State of Merger today- **no neg homicide or manslaughter but can use assaults**
  3. **Lesser Included Offenses:**
     1. **Proof by same or less than all facts required**
     2. **Differs from offense only in less serious injury/risk**
     3. Differs from offense only in lesser mental state
     4. Consists of an attempt

1. Rape and Sexual Assault
   1. General/CL
      1. Previous **resistance requirement** now largely abolished by modern forms
         1. Where force rules are in effect, passive victims do not get justice
            1. Suggested that women “freeze up” often, hence problem
      2. *State v. Alston:* For statute that defines rape as “vaginal intercourse by foce and against her will,” generalized fear is not enough to show force; must be force or threat that overcomes victim’s will to resist.
         1. This state JX thus defines force relative to victim’s resistance- policy we don’t like.
         2. In some states, before reforms, can have nonconsensual sex that is not rape due to lack of force.
      3. *Rusk v. State*: In case where man stole car keys and “lightly choked” woman, court finds no explicit threat- victim must resist or be prevented from resisting by threats to safety.
      4. *Berkowitz:* credibility issue case; he says it was consensual, she says not (details like time to untie sweatpants, reason for locking door, etc. – class trial case).
      5. **False conviction issues**- lifelong registration, lifelong stigma
         1. Most cases are very simple and only the margins are tricky
      6. *Commonwealth v. Lopez:* for proof of intent, force shows no consent but also shows intent (cannot accidentally force someone to have sex).
         1. ***Rape is not strict liability***
         2. If JX defines “force” as penetration, **elements collapse on themselves** and become circular- intercourse = penetration = force = no consent
      7. **Mens Rea of Rape**
         1. Common law- “force” requirement = intent
         2. **Majority rule** that mistaken belief of consent is defense, not all JX follow
            1. Equates to negligence standard, just like in 8.02
         3. **Mistake may be unavailable** when stories are night/day disparate (no grounds for mistake)
         4. **BoP** may also be issue- if D gets instruction does Gov’t have to prove negligence or intent?
            1. One solution- intent intercourse, neg w/r/t consent
      8. *Boro v. Superior Court*: **Rape by fraud** in inducement not recognized because **consent under fraudulent inducement is valid, unlike fraud in fact.** 
         1. May reflect policy consideration- “lies in bed are common”
   2. Under TPC
      1. Sec. 22.011. SEXUAL ASSAULT. (a) A person commits an offense if the person: (1) **intentionally or knowingly[MR]**: (A) causes the **penetration of the anus or sexual organ[ACT]** of **another person[AC]** by any means, ***without that person's consent*** [AC]
      2. Section 22.011(b): A sexual assault under Subsection (a)(1) is **without the consent** of the other person if:
         1. (1) the actor compels the other person to submit or participate by the use of **physical force or violence**;
         2. (2) the actor compels the other person to submit or participate by **threatening to use force or violence** against the other person, and the other person believes that the actor has the present ability to execute the threat;
         3. (3) the other person has not consented and the **actor knows** the other person is **unconscious or physically unable to resist**;
         4. [Many other reasons given in statute]
      3. *Mull v. Texas:* In dorm room gang rape case, **force may include laying on top of and penetrating**, which leads to guilty conviction for third rapist.
         1. *Note* subdividing of men’s actions into separate parts so that 1st 2 acquitted.
      4. **Is simple nonconsensual sex rape in Texas?** 
         1. Not exactly by plain language
         2. But if “force” includes laying on top and penetrating, as necessary for the act, you could almost always prove force, so basically in practice, yes.
      5. **No resistance requirement in Texas.**
      6. **Mens Rea-** “intent or knowing” for act in subsection (a)
         1. **“without consent” mens rea-** embedded in the particular type selected. Force does not provide. Others, like unconscious have “know…”
2. Conspiracy
   1. **Inchoate** or incomplete crime; Higher than solicitation (asking) but less than attempt and completed crime
      1. **Solicitation:** asking person to commit crime (lowest)
      2. **Conspiracy**: agreement
      3. **Attempt:** tried the crime
      4. **Completed crime** (highest)
   2. Common Law- agreement to commit crime or do legal act by unlawful means, wider than TX
   3. Purposes
      1. Pre-emption of crime by LE
      2. Disincentivize agreement where people egg each other on to extremes
      3. Prevent mob mentality
   4. *Pinkerton v. US:* In case where one brother committed more crimes in furtherance of conspiracy while other brother was in prison, conspiracy liability upheld.
      1. **Aiding and abetting NOT necessary for liability-** no direct participation in crime required as long as crime done in furtherance of conspiracy
      2. **In furtherance + reasonably foreseeable = all co-conspirators liable**
         1. Even if no personal aid
         2. Even if no intent to commit
   5. Don’t need to know WHO other co-conspirators are, just that they exist.
   6. **Procedural Oddities of Conspiracy**
      1. **Vagueness of evidence-** overt act can be trivial yet count
      2. **Concerns of Free speech& association-** street gang classifications and Pinkerton liability (did you “agree” to biker friends’ crimes?)
      3. **Can prosecute anywhere a crime under conspiracy took place-** may lead to faraway trials
      4. Book adds mass trials as well
   7. **Mens Rea of Conspiracy**
      1. *People v. Swain:* No conspiracy for a crime that has no intent (implied malice murder), since conspiracy covers **intent to agree** and **intent to commit crime**, and if the crime has implied/no explicit intent, you can’t intend it.
      2. Other example- intending one offense and accidentally committing another, as with **assault on police officer**:
         1. Will apply if **moral wrong theory** applied (intent to cause BI sufficient)
         2. JX Split on **AC and MR-** 
            1. Yes because no commas, etc.- stat construction does not apply mens area to AC
            2. No b/c mistake of fact, they didn’t realize nor intend higher offense
         3. Moral culpability will depend on the offenses in question- how society thinks of assaulting a cop vs. random dude
      3. *People v. Lauria:* Insufficient involvement to convict man who took messages for prostitution services as part of message service offered as business.
         1. **merchants** must have:
            1. **stake in venture, + knowledge, or**
            2. **disproportionate sales**

grossly disproportionate to legal use

High proportion of seller business

* + - * 1. **No legit use of product**
      1. Criminalize to prevent facilitation, but don’t criminalize b/c it will lead to businesses refusing to deal with marginal people or discriminating to protect selves.
      2. **Merchant knowledge** may be sufficient for felonies
         1. **In texas, only for felonies,** so distinctions don’t apply here.
    1. *Commonwealth v. Azim:* driver of getaway car in robbery convicted; **agreement implied from facts before and after the act.**
    2. *Commonwealth v.* *Cook:* Man who encouraged brother to rape as crime of opportunity not guilty of conspiracy b/c there was no agreement beforehand and no overt act; **is liable under accomplice liability.**
  1. **Texas Penal Code**
     1. **Only for felonies**
     2. **Conspiracy to commit any preparatory offense is not crime**
     3. **Requires OVERT ACT** in pursuance of agreement
     4. **DO NOT CONFUSE ACCOMPLICE WITH 7.02b!**
        1. Conspiracy liability is NOT accomplice liability!
        2. “aiding and abetting” = accomplice
        3. Agreement = conspiracy
        4. 7.02b **incorporates Pinkerton liability!**
     5. *Highfill v. Texas:* Man who bought paper as part of ruse leading to robbery/murder convicted of capital murder on the basis of conspiracy to commit robbery.
        1. Note that he wasn’t charged with murder, but that he is liable for murder because he conspired to commit robbery with female perp and a murder occurred during robbery.
           1. Capital murder may be PROVED by conspiracy, and conspiracy defenses will not apply.
        2. **Being at scene is not a crime/agreement in itself**
     6. **Agreement** may be **express (said) or implied (inferred from actions) –** *Azim* applies, but only if felony, of course.
     7. *Texas v. Williams:* One man in conspiracy was informant faking involvement; other man acquitted since there was no agreement between two people to intend crime.
        1. **Unilateral approach** holds that intent is enough even if partner faking
        2. **Bilateral approach** used in TX says two must actually mean it
        3. Defenses with other’s innocence – Thompson reads to say that someone may be factually guilty but if partner not criminally responsible, still guilty because BOTH parties intended. Here, only one party intended.
        4. Cannot convict JUST ONE person of conspiracy if no immunity and others acquitted; applied here as well.
  2. **Defenses to Conspiracy:** 
     1. **Renunciation (TPC variant 15.04)**
        1. Withdraw, voluntarily, from conspiracy
           1. 15.04(c)- not voluntary if

motivated by added difficulty in committing crimes,

decision to postpone criminal conduct until another time

Decision to transfer to another but similar objective/victim

* + - 1. Prevent commission of offense
         1. Attempted but failed prevention is a mitigating factor AT PUNISHMENT STAGE. Still guilty.
      2. This is **affirmative defense**
    1. Other defenses- see statute (example: 2 acquitted and only one not)

1. Defenses
   1. Self-Defense
      1. Requirements
         1. **Not aggressor**
            1. If person terminates conflict and you aggress, no SD for you.
         2. **Proportionality**
         3. **Immediate** threat
         4. Actor **reasonably believes imminent peril/death/SBI**
            1. Words alone are not sufficient; need threat of force with it.
      2. *US v. Peterson:* No SD in case where man ended conflict by going inside and then restarted conflict by emerging with gun.
      3. Common law has **retreat requirement-** if possible, retreat before deadly force- but only if can do so without risking injury
      4. **Castle doctrine**- special protections for people in home/can SYG there
      5. Generally, either SD or no SD; rare to see split on “justified but not to that degree”
      6. **TPC:** 
         1. 9.31: **When and to degree actor believes it is immediately necessary to protect actor against other’s use of unlawful force**
            1. Not available if provoking other person/engaged in criminal activity.
            2. Verbal provocation alone is not sufficient
         2. Evaluate “force” and then deadly force- make sure to use right test
         3. **Texas is Stand Your Ground- has special home protections but not same as castle doctrine**
            1. Much of SD is jury question
   2. **Defense of Property- TEXAS!**
      1. 9.41 for force
      2. 9.42 for deadly force- only certain crimes but includes theft during night
         1. Criminal mischief as well-but that only covers things not attached to land
      3. *Crammer v. TX:* Force instruction given in dispute where man attacked toher man and his truck; Thompson notes improper b/c should have been a 9.42 not 9.41 instruction. (force was deadly- caused SBI
      4. For self-defense, D must believe “reasonably believe” force is necessary- but what does reasonably mean?
         1. Combined **objective-** rsn**- and subjective-** in D’s circumstances**- standard.**
      5. Traditional factors
         1. “**circumstances**” – more than physical movements
         2. Any **relevant knowledge D had about that person** (V)
         3. **Physical attributes of all involved** including D
         4. **Past experience** that could provide basis for rsn belief **that other person** intended to injure or rob him, or that the use of deadly force was necessary under the circumstance
      6. Proportionality- usually, **cannot repel nondeadly force with deadly force**
         1. **TPC**- defines deadly force as SBI- and if a 5’4” broken leg-old lady fights a 6’2” dude, she’s gonna get SBI- big size disparity
         2. **So “nondeadly”** doesn’t need to mean knife and gun!
         3. Court mentions lack of access to training (State v. Wanrow)- may disadvantage women to not be able to respond with “Deadly” force
      7. Imminence requirement may disadvantage battered women, who perceive imminence differently
   3. **Necessity:** 
      1. Common Law
         1. Elements
            1. Prevent significant evil
            2. No adequate alternative
            3. Harm caused not disproportionate to harm avoided
         2. *Nelson v. State:* Truck stuck case- harm prevented by possible truck tipover does not outweigh harm to machinery he stole to get truck out of mud.
         3. CL- must be necessity caused by common forces, TX does not say either way. Just imminent harm.
         4. *Dudley and Stevens-*  at CL, no defense to homicide (cannibalism case)
      2. TPC
         1. **TPC 9.22**: Actor **RSN** **believes** conduct **immediately necessary** to avoid **imminent harm.**
            1. **Desirability and urgency** of avoiding harm **clearly outweigh,** according to ordinary standards of rsnness, harm sought to be prevented.

CL “alternatives” element worked in**- “necessary = no alternatives.”**

* + - * 1. Unless legislative purpose to exclude- TX caselaw says this must be explicit so it never gets used
      1. Much broader than CL
      2. *State v. Williams:* Man claims had to shove wife to keep car from crashing; instruction should have been given b/c there was evidence. Legislative purpose question never goes to jury!
      3. Once you know there’s harm to be avoided, go to jury if asked to instruct.
      4. *Bowen v. Texas:* Necessity and self defense instructions may be given together as in case of woman who kicked cop during arrest. N and SD are independent; resisting arrest SD is very limited.
      5. *Spakes v.* *Texas*: Prison escape case- necessity does apply to prison escape b/c legislature not EXPLICIT about prohibiting it. Dissent artfully argues that there should be limit about turning self in.
  1. Intoxication
     1. CL: no defense. Modifications: defense to **specific intent** crimes.
     2. States may choose to bar evidence or not, as they will- no constitutional issue
     3. **Settled insanity-** mental defects from long-term alcoholor substance use, treated as insanity- **is defense in TX**.
     4. **Texas-** 
        1. **No defense on voluntary intox**
        2. **Intox causing temp insanity is mitigating factor**
     5. **Involutary** can be defense-
        1. **Mendenhall v. TX:** recently-diagnosed diabetic argues involuntary intoxication via hypoglycemia that caused temporary insanity; court denies instruction on grounds that his “unconsciousness” argument makes lack of MR and lack of voluntary act appropriate instead.
  2. Insanity
     1. If client insane, seek incompetency, then raise defense and submit to court-appointed psych eval
     2. This defense may lead to civil commitment, does lead to temporary treatment after auto transfer to psych facility
        1. May take longer than prison sentence
     3. **Justifications to excuse insanity:** 
        1. Punishment purposes:
           1. Utility to protect others
           2. No deterrent purpose
           3. No retributive purpose
        2. Mens rea and voluntariness
           1. Not as satisfied; not aware of actions or uncontrollable actions
           2. May lack awareness of actions
        3. Evil v sickness
           1. We don’t consider morally culpable.
     4. Tests of insanity
        1. Oldest, M’Naghten rule – did not know nature or did not know wrongness
           1. Doesn’t take in account volition impairments
        2. Irresistible impulse/control test as supplement to M’Naughten; hard to determine irresistible
        3. Product/durham test
           1. Act was product of mental disease or defect
           2. Too broad
        4. TPC
           1. Lacked substantial capacity to appreciate criminality – basically M’n mental prong
           2. Lacked substantial capacity to conform conduct to law – basically impulse test prong
        5. Some courts try a broad jury-q fairness test
     5. TX is similar to pre-M’Naughten case, must not know action is wrong
        1. Wrong defined by society
     6. *Wilson:* ***not tX case:*** wrongness is defined by society not subjectively.
     7. **Deific decree cases-** if G-d tells you to do it we will generally treat that under insanity defense, b/c G-d tells you to do it = higher power above the law and you think it is right
     8. **Juries tend to ignore all this and go for signs of remorse…**

1. Special Classes and Symposium
   1. Process of criminal booking:
      1. Arrest
      2. Booking- searched for contraband and entered in police blotter/log
      3. Decision to charge
         1. Police
         2. Prosecutorial review
         3. Ongoing prosecutorial review
      4. Filing Complaint
      5. First appearance- arraignment/prelim appearance, bail set
      6. Prelim hearing- not set if D waives or grand jury indicts/ Grand Jury Indicts
         1. Information States- file on charging instrument known as “information”
         2. Indictment/Limited indictment states- need indictment for all/some crimes
      7. Arraignment
      8. Pretrial, Trial, Sentencing, Appeals
   2. TX Bail Practices
      1. Currently too many money bail cases, driving up jail population
         1. Most of these people can be safely released on PR.
         2. Minorities disproportionately disadvantaged by current system.
      2. Should let people go on personal recognizance if low-risk
      3. **Jailhouse Docket:** haul people into court, tell them “plead guilty and your time so far is the sentence, you can go home” (if not, see you in a month)
      4. Actuarial risk management tools are raceblind and efficient, should be used.
         1. May not even need an interview yet good results
      5. **Two purposes of bail: Make sure person comes to court, and public safety.**
      6. **Evidence based practices:** risk assessment tools and policy based on empirical, real research and data.
         1. Better tools for both detaining high-risk and releasing low-risk
   3. Mental Health diversion from jails- multiple point model at all points of system.
   4. Keep in mind—detention decisions are essential to case outcomes! NEED COUNSEL
   5. 6A and 8A excessive bail, cruel and unusual – how do we know it is excessive w/o financial info? Blind bail might be unconstitutional
   6. 5th Amendment Due Process Problems: no counsel means people want to speak up- the lawyer gets people to STFU for their own good.
2. Exam review:
   1. If it’s in the indictment, it was charged that way, must be proven that way!
   2. Break down each element, explain where mens rea applies
      1. Don’t repeat statute alone.
      2. Wrong: They must prove knowing/intent. The circumstances are…[list.]
      3. Right: The prosecution indicted him as knowing. The knowing requirement will apply to each attendant circumstance. Thus, the prosecution must prove that D knew of V’s student status, and that she was a student at the school he was employed at…
   3. Remember Constitutional Defenses
   4. Don’t write a treatise paragraph!!