# Culpability / Mens Rea and Defenses

(Moral blameworthiness depends on mental state and defenses)

<table>
<thead>
<tr>
<th>COMMON LAW</th>
<th>MPC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>MIS LAW</strong></td>
<td><strong>MIS FACT</strong></td>
</tr>
<tr>
<td>NOT a defense</td>
<td>Any HONEST mistake = defense if negates intent (even if unrsbl)</td>
</tr>
<tr>
<td>UNLESS punishes omission and status and is malum prohibitum and would violate due process (by not allowing D to comply once knew rule; no defense if reporting requirement for an activity that, by its nature, would give notice of likely regulation): Lambert (didn’t register as felon in CA)</td>
<td>EXCEPT for malice, which needs honest and rsbl</td>
</tr>
<tr>
<td>(Don’t need to know jx, ie, that Federal: cert denied to Green by SC: guy who lied to: nuclear-containment vessels; see also Yermian: DOD lie: none or “should have known”)</td>
<td>HONEST and RSBL mistake = defense if negates intent</td>
</tr>
<tr>
<td>NOT a defense (b/c SL creates an affirmative duty to check and prevent harm)</td>
<td>STRICT LIABILITY</td>
</tr>
</tbody>
</table>

The govt must prove EVERY element beyond a rsbl doubt (In re Winship).

If a statute treats levels of intent differently, the degree shall be the lowest for which the actor is proven to have had (eg, if D kills person by intentionally shooting him in the heart under the honest but mistaken belief that the victim is about to kill him, the killing is done purposely, but the D is merely negligent with respect to a material negative element of the crime: lack of a self-defense justification; D is guilty of negligent homicide, not murder).

“Diminished capacity” defenses = insanity, provocation/EED, intoxication, unconsciousness...

---

**Mental state is often inferred from person’s conduct or surrounding circumstances**

**Register: intoxication should negate where “under circumstances depraved indifferent to human life” is an element, this is MORE than reckless so intox SHOULD be a defense to mitigate (b/c implied MALICE)

SOME states say yes to intox as a defense to recklessness b/c it is a “conscious” running of a risk (and MPC drafters agreed at first and said yes)
1. **Strict Liability?**
   a. Look at statute on its face and in other sections and at legislative hist.
   b. Consider: Severity of the punishment (if more severe, then more likely that D must be blameworthy so less likely to be SL). When the statute is a codification of a common-law crime, it is much less likely to be held to be a SL offense than where the statute has created a new type of offense not known to the common law.
   c. **YES SL:**
      i. Balint and Behrman involved with “new” malum prohibitum offenses (unlawful for doctor/pharmacist to distribute heroin and cocaine) and were not created from common law, so when legislature “created” the crime, it did so as a “regulatory offense” and could specify the mens rea required (b/c it didn’t specify, can assume that intended to be SL).
      ii. Weitzenhoff (sludge in ocean SL); Freed (SL for having hand grenades even though D didn’t know unregistered)
      iii. Garnett v. State: Retarded 20-year-old D had sex w/ 13-year-old girl but believed she was 16; convicted of second-degree statutory rape (a SL crime) b/c, for public policy reasons, want to put an affirmative duty on ppl to check; D’s mistake of fact NOT a defense to SL (b/c no mens rea to negate in SL).
         1. Compare w/ MPC: MPC only has “violations” that are SL; in statutory rape, ignorance of age IS a defense UNLESS victim is under 10 years old (if MPC here, D would have been acquitted).
   d. **NO SL:**
      i. Morissette: bomb casings; common-law larceny always had mens rea element (intent to steal) and statute was merely a codification of that so just b/c Congress didn’t specify requisite intent didn’t warrant the assumption that SL was intended.
      ii. Garrett: D tried to board a flight w/o knowing that she had a loaded gun in her bag; charged with a concealed weapon in violation of the Federal Aviation Act. Just b/c there is no mention of mens rea in the statute doesn’t mean it is SL; b/c this is misdemeanor that is punishable by a fine of up to $10,000 and a year in prison (severe punishment) the court believes that the std should be a “should have known” (negligence) mens rea requirement, which a rsbl finder of fact could find here (big signs, had been in and out of bag all day, had flown before, knew illegal to bring a gun on a plane, had carried gun in that bag before); D was convicted but not on SL.

2. **Mistake of Law:** “Ignorance of the law is no excuse” (b/c knowledge-that-the-crime-exists/knowledge-of-the-law is NOT an element of the crime itself). Utilitarian policy (prevents bogus defenses and subjective args re: meaning of the law) BUT to punish under honest mistake of law is contrary to the concept of only punishing for moral blameworthiness.
   a. Ignorance of the existence of a criminal prohibition usually not a defense.
      i. Bryan: D didn’t have a federal license to deal in firearms; used “straw purchasers” who lied to purchase guns he then sold; ignorance that needed license not an excuse
      ii. US v. Yermian: D lied on DOD questionnaire: knew he lied, didn’t have to know it was illegal.
   b. BUT can be a defense IF the D acts in rsbl reliance on an official statement of the law, afterward determined to be invalid or erroneous (NOT own interpretation like in Marrero) OR the conduct is passive and the statute/law that defines the offense violates due process.
      i. Lambert: D required (as a “convicted person” b/c had been convicted of forgery previously) under the CA Municipal Code to register herself; she was unaware of this provision, had been living in CA for 7 years when she was arrested on suspicion of another offense and charged with violating the reporting code. For a crime to be SL, it has to give you actual NOTICE that you are doing something unlawful (lack of notice constitutes a violation of due process). This was a crime of “status” not of “conduct” with a PASSIVE actus reus (her mere presence in LA creates the violation), and there is nothing that would alert her to the fact that she is in violation of the ordinance. Must balance the rule of that “ignorance of the law is no excuse” with individual due process rights. In this case, the ordinance was for mere convenience and was without real social utility.
      ii. People v. Weiss: Lindbergh-baby kidnapping; not guilty b/c Ds had good-faith belief that acting under legal authority (mistake of law).
      iii. What if the SL statute is ambiguous? Dissent in Bryan favored lenity.

3. **Mistake of Fact:**
   a. Ignorance/mistake of fact is a defense if the mistake negatives the mens rea required as a material element of the offense (ie, if D makes mistake of fact that creates rsbl doubt that particular mens rea existed) OR the law provides that the state of mind established by the ignorance constitutes a defense.
      i. NOTE: Many mistake of fact questions are mens rea questions in disguise.

4. **Specific Intent:** “the intent to accomplish the precise criminal act that one is later charged with” (in addition to desiring to commit the actus reus, D must have desired to do something further). **General Intent:** must merely be shown that D intended to commit the act that served as the actus reus (not that the bad result was intended). General intent includes acts that are not always considered to be “wrong” (eg, trespassing). If D charged with specific-intent crime (eg, “assault with intent to kill”), usually charged with general-intent crime as well (as a backup; eg, “assault with a deadly weapon”).

5. **Intoxication:** Why intoxication can negate specific intent: Intoxication is relevant in determining whether the D had a specific state of mind at the time that the crime was committed. Why cannot negate general intent: An intoxicated person can...
engage in simple goal-directed behavior (although cannot always exercise the good judgment or extra intent step necessary for specific intent) and intoxication itself typically constitutes recklessness. Therefore, an intoxicated person shouldn’t be relieved of criminal responsibility for criminal acts that are frequently committed because the actor was drunk. Intoxication does NOT apply to negligence because negligence is based on a slb person standard and the intoxication defense can’t work bc when you are drunk you aren’t rslb. Again, this is a policy decision that assault is more likely to happen when a person is intoxicated (counterproductive to allow it as a defense).

### GENERAL STUFF

**Battery:** completed assault (harmful/offensive touch ‘g o’ other); not a felony but aggravated battery is (for FMR purposes)

**Assault:** assault as attempted battery (SI, eg, hit and miss) OR as threat of bodily harm (GI); MPC: purposely, knowingly, or recklessly causes bodily injury or negligently if w/a deadly weapon (§211.1)

**Kidnapping:** nab a kid (duh)

**Larceny:** unlawful taking (by trespass/trick) and carrying away of another’s personal property w/o consent with the intent to permanently deprive the owner thereof

**Robbery:** assault + larceny (must take from person or in her presence with force); “yr money or yr life” (bc threat of imminent harm) or grabbing a necklace

**Burglary:** (CL) the malicious burning of the dwelling of another in the nighttime with the intent to commit a felony therein (not B+E if through open door, commercial bldgs ng, must have felonious intent when B+E); (MPC) doesn’t have to be at night, any crime inside, any bldg

**Arson:** (CL) the malicious burning of the dwelling of another (charring insufficient but scorching okay bc had to be material wasting of the bldg’s fiber); (MPC) can be any bldg, can be own bldg, covers smoke/water/explosions

**Child abuse:** crime by statute; w. felony depends on injury; usually just physical (not just words)

**Reckless endangerment:** (CL and MPC §211.2): a person commits a misdemeanor if he recklessly engages in conduct that places another at risk of death or serious bodily injury; such recklessness is presumed if the actor knowingly points a gun at or in the direction of a person (doesn’t matter if gun unloaded).

**THEORIES OF PUNISHMENT (Why punish?)**

**Retribution:** “pay back/eye for an eye”; discourages retaliation/revenge/mob rule, reinforces goodness in others (not a goal of the MPC)

**Deterrence:** of others in general and this D in particular but remember you “Cannot deter for stupidity”

**Rehabilitation:** reformation/treatment/healing

**Incapacitation:** public safety/warehouse theory/removal from society (law protects society not individuals)

---

### NEED AN ACTUS REUS

**1. Actus reus can be any voluntary bodily movement**

But not everything qualifies for criminal liability…

Involuntary-act types (complete defenses b/c no voluntary actus reus): (1) reflex/convulsion (but if D has time to make some decision re: whether to take voluntary, eg, D is about to fall and reaches out to grab someone or something to stop himself; D has NOT acted reflexively, b/c D’s mind has “quickly grasped the situation and dictated some action” and if D knows beforehand that subject to convulsions and UNREASONABLY put himself in a position where he was likely to harm another, the initial act (the decision to put self in such a position) might subject D to criminal liability (see Decina: epileptic driver deemed negligent); (2) unconsciousness (Huey Newtowp) or sleep (but not falling asleep at the wheel); and (3) hypnosis (or otherwise not the product of the actor’s effort/determination).

Decina: D had epileptic seizure while driving and killed four kids; convicted of negligent homicide. The actus reus was voluntary b/c the conduct occurred when D consciously chose to drive the car knowing he was subject to epileptic seizures, in disregard of the consequences that he knew might follow from his act. T/f although he was unconsciousness at the time of the accident, the CONDUCT OCCURRED BEFORE THE ACCIDENT. The actus reus requirement is satisfied. This is problematic b/c follows that everyone w/ epilepsy guilty whenever they drive; D had a license (permission to drive); statute not intended to cover this type of accident.

Whitfield: there was evidence indicating that drunk-driver D may have passed out at the wheel and been unconscious at the time of impact; the implied malice/intention was formed when he got into the car (the actus reus) while drunk; unconsciousness NOT allowed as a defense b/c he was conscious at the time of the act (deciding to drive when he was drunk).

Thoughts are not enough. Words generally not enough (even conspiracy and attempt exist only where the D has gone beyond thoughts/words) but words of encouragement may be enough for aiding and abetting.

---

### PETTY OFFENSE

- up to 6 months or $5K fine (usu. don’t get jury trials)

### MISDEMEANOR

- 6 to 12 months in prison

### FELONY

- over 12 months in prison

### MODESTO DOCTRINE

If neither party makes a motion to instruct jury to consider any evidence that is material (ie, speaks to an element of the crime), then the judge should raise the motion sua sponte.

### A + R + M = C – D

(Act + Result + Men Rea/Mental State = Crime – Defenses)

Organize exam answer by either Ds or crimes: separate the transactions, IRAC each transaction by issue (whenever state rule, state the POLICY behind the rule)

### 2. Actus reus can be an omission

No legal duty to rescue, but CAN have legal duty to act by (SCRAP):

- + Statute
- + Contract (Calif: D didn’t extinguish fire at his house but omission = actus reus b/c insurance contract)
- + Special Relationship (parent-child, spousal)
- + Officious intermeddling (voluntarily assumes duty of care)
- + Where conduct created the Peril (eg, if push non-swimmer into pool, duty to save)
**Vicarious Liability** The owner or supervisor of an enterprise MAY be held liable for a violation committed by his agent/emp’ee even if not personally involved in the conduct in question, but only in certain circumstances/industries (eg, bar owner may be convicted of unlawfully selling liquor to a minor even if the sale was made by a bartender without the owner’s knowledge or approval b/c the owner has an affirmative duty and is responsible for his employees).

BUT only where no significant danger to rescuer and had capacity to aid. NOTE: having a duty is only an ACT substitute and still must prove mens rea.

The actus reus and the mens rea must co-exist, although they needn’t begin simultaneously. (In Cali [fire/insuranceK], they co-existed because the actus reus was not the setting of the fire, but the not reporting the fire once it started [the intent to injure the insurer could be formed after the fire began]).

**Possession:** At CL, possession is like SL (need to know you have something but don’t necessarily have to know that it is an illegal substance). For MPC, possession to be a criminal act the D must KNOW he had possession of bad thing? For both: there has to have been a sufficient period of time for D to have been able to terminate his possession.

**Defense of Infancy:** CL: under 7: no criminal liability; 7-14: rebuttable presumption of no criminal liability (MPC: over 16 have capacity); **Defense of duress, necessity:** to all crimes except homicide; **Consent** of the victim is almost NEVER a defense (except forcible rape, kidnapping, and consentual batteries [medical care and boxing]).

**Self-Defense:** Nondeadly okay when V rsbly believes force about to be used on her; Deadly only okay if rsbly believes deadly about to be used (some jx have rule that must retreat first if safe to do so except not from own home, if robbery/rape, or for cops); Original aggressor doesn’t get this defense unless V dramatically increases amount of force involved.
**VAGUENESS, STRICT CONSTRUCTION, and LENIENCY**

**Void-for-vagueness = unconstitutional**

1. Void on its face and in its application: If “ppl of common intelligence must guess as to its meaning and differ in its application”

   *Face*: Violates due process b/c doesn’t give notice that certain conduct is forbidden; makes criminal that which by modern standards are normally innocent (eg, nightwalking). Must have notice or know that what you are doing is unlawful. Papachristou: Ds were driving around and pulled over for loitering; also see Lambert.

   *Application*: Encourages arbitrary and erratic arrests; violates First Amendment Rights; you can arrest if you have a suspicion, but this is no good b/c the 4th and 14th Amendments allow the police to make arrests only on “probable cause.”

2. Void for overbreadth: If the statute punishes or burdens activities that are constitutionally protected.

   *Loitering statutes*: said to be used to prevent future criminality (assumes that all people who commit these acts are the types that are prone to commit crimes, but in this country we begin w/ the presumption of innocence).

   *MPC*: “stop and ask” (§ 250.6). Half the states have agreed that loitering statutes based on the MPC are void-for-vagueness (and traditionally used to harass people) so no good, but other half think “stop and ask” MPC loitering statute okay.

   *Not okay*: Kolender v. Lawson: Roaming-Rastafarian D walked around LA and was “stopped and asked”. Justice O’Conner said statute unconstitutional b/c gives cops too much discretion. Ppl have the right to locamote!

   *Okay*: Nelson: must be “loitering or prowling in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for safety of persons or property in the vicinity” and “stopped and asked” held to NOT be unconstitutional for overbreadth b/c “not aimed at constitutionally protected conduct”

   *State v. Anonymous*: D called other woman “tramp” and called her at work (charged w/ disorderly conduct and harassment). Although statute may be overbroad (b/c makes criminal the right to free speech), you can rehabilitate a vague or overbroad statute by giving narrow jury instructions. D’s words NOT deemed “fighting words” (words which inflict injury or incite a clear and present danger of violence) so enjoy first-amendment protection (statute bad) but b/c the harassment occurred over the phone it violates the V’s right to privacy (U/S statute okay).

   *Screws v US*: Jackass GA sheriff charged w/violation of Civil Rights Act after he beats black man to death and found guilty of “willfully” violating V’s constitutional rights. Let off (b/c jury not instructed that Screws needed more than bad purpose; needed intent to deprive V of a right); done to save statute (read “willfully” to mean “with bad purpose” so didn’t have to say void on face).

---

**SENTENCING DISCRETION**

“Sentencing is the eraser on the pencil of justice”

Policy issue for sentencing = D’s age

*MPC*: disfavors mandatory minimum sentences, except possibly for murder, b/c retribution is obsolete and inhumane as a justification for imprisonment (MPC objectives are utilitarian not punitive). Makes all convicted persons eligible for probation and states that a sentencing court should not impose a sentence of imprisonment unless “imprisonment is necessary for protection of the public” b/c:

1. There is undue risk that during the period of a suspended sentence or probation the D will commit another crime; or <incapacitation>

2. The D is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or <rehabilitation>

3. A lesser sentence will depreciate the seriousness of the D’s crime

*OVERLY RESTRICTIVE of the punishment (not invalid unless one of these three)*:

1. No relationship btw crime and punishment?

2. Punishment relates to noncriminal conduct?

3. Punishment requires/forbids conduct not rsbl related to future criminality?

The State is allowed more leeway b/c D is already guilty:

1. Look at constitutional issues (Pointer)

2. Take into consideration other, less questionable alternatives (Pointer)

3. Punishment must be proportional to the crime (Ely)

4. There must be a standard for review (Ely).

*Pointer*: Macrobio D charged w/ child endangerment and violation of a custody decree; forbidden by the court to conceive. Punishment invalid b/c it violates D’s fundamental rights of (1) privacy and (2) procreation. (OVERLY RESTRICTIVE and unconstitutional). Must test the

*RSBLNESS of the punishment (not invalid unless one of these three)*:

1. No relationship btw crime and punishment?

2. Punishment requires/forbids conduct not rsbl related to future criminality?

Meets these here BUT not enough b/c a Q of fundamental rights so must be MORE than rsbl (subject to strict scrutiny). Purposes of the punishment (rehabilitation and public safety) can be served in other ways that don’t impinge on right to procreate.

*Ely*: Cocaine-guy Ely (middleman) convicted w/ 30 years + 10 years of supervision to follow for failure to appear (had been fugitive b/c never showed up for trial); claimed his sentence not proportional as compared with those rec’d by the other Ds (10-15 years) and disproportionate to the crime. A sentence can be reduced when: 1. It exceeds the statutory maximum OR 2. It is disproportionate to the crime (more than what others similarly situated in your jx as compared to other jxs); here was high but not highest. Look at: the severity of the crime and the individual. No abuse of discretion here b/c, although Ely wasn’t the biggest fish, this was serious stuff; D had a substantial record (threatened a cop’s life and priors) and a propensity for violence. Court can look at all of these things in sentencing b/c as the trial goes on (and the presumption of innocence is eroded) your rights become more narrow: initially you have all sorts of rights; arrested (there is now probable cause) less rights; convicted (you are now guilty) very few rights.

**DISCRETION AND THE RULE OF LAW: Conflict btw rules (ie, commitment to law as a system of rules that are known in advance and applied equally to all) and discretion (ie, acceptance of discretion as a means to limit the harshness/arbitrariness of fixed rules; key yet problematic b/c affords opportunities for individualized judgments, favoritism, and unfair discrimination).**
**Common-Law Homicide**

Traditionally, death had to occur within 1 year and 1 day ofactus reus, but extended now by statute (CA = 3 years).

Not all states grade murder at CL: if fact pattern just says “murder” this does NOT necessarily mean that you aren’t at common law.

**FIRST-DEGREE MURDER**

Requires PREMEDITATION and MALICE AFORETHOUGHT

(intent ≠ premeditation but when have premeditation, usually automatically have intent)

PREMEDITATION: Willful / deliberate thought (SI) “in cold blood” (careful thought and weighing of considerations, right/wrong; preconceived design/decision to kill). Inferred from circumstantial evidence. Look at: [1] MOTIVE (but good motive not a defense; Gilbert: “mercy killing” of wife not a defense to M1), [2] PLANNING, [3] METHOD (w. method of killing so particular and exacting that the D must have intentionally killed according to a “preconceived design”). Inference of premeditation where time exists, BUT…

Enough time for premeditation/deliberation doesn’t necessarily mean actually happened: Bingham (raped/strangled retarded woman) BUT the dissent/Sirulnik say premeditation can be formed contemporaneously with the act (if D realized that he wanted to kill and didn’t stop, enough)

BUT… Time + multiple stab wounds may be enough: Ollens (D stabbed cabdriver multiple times). Ct distinguishes from Bingham and finds sufficient evidence re: premeditation: defense wounds show this is going on for a long period of time and stabs were from behind; more evidence than just enough time (like in Bingham). Dissent: Method, motive, planning (weapon procurement) enough evidence but should go to a jury.

MALICE AFORETHOUGHT: (3 types for first-degree)

[1] Intent to kill [can be transferred intent if shoot at A and hit B?]

[2] Intent to inflict serious bodily injury, or

[3] Implied malice thru FMR (“the prosecutor’s darling”); don’t need premeditation/to prove actual malice (b/c felonious intent fills in for actual malice).

States w/ FMR and graded murder enumerate felonies that support 1st-degree FMR… PA 1° FMR (BRAKK): Burglary (B+E into dwelling), Robbery (armed), Arson, Kidnapping, Rape (criminal sexual conduct).

MPC’s interp of how courts have restricted (from Aaron: D killed during armed robbery); underlying felony must be… MCFIFTI

(1) Malum in se

(2) Common-law felony

(3) Foreseeable, direct, natural, probable result of the felony (proximate cause): fireman killed in clean-up too far, but what if in an accident on the way to the fire? Toss-up.

(4) Inherently dangerous (rsbly likely to result in death; must look at felony in the abstract [objective std], not how it really went down b/c dead body would always imply inherent danger; selling cocaine is not enough: Patterson)

(5) Homicide must be in Furtherance of felony

(6) Narrowly construed period of Time (hot pursuit okay; felony begins when attempt committed and ends after rest-place reached)

(7) Predicate/underlying felony must be Independent from the homicide (not a lesser included offense to murder if not assault/battery or child abuse: Smith); Ireland Doctrine; b/c doesn’t fit with deterrence purpose (“class of careful felons”) if person already meant to hurt another.

---

**MPC Homicide**

Need dead human beings @ CL and MPC (no whale homicides).

**MURDER**

1. All homicide committed purposely or knowingly is “murder” (no grading system/concept of “malice,” but murder is a felony of the first degree), OR…

---

### (CL) FORK#1: Co-felon exception?

In some jx the D is NOT vicariously liable for death of co-felon as a result of resistance by the victim or the police (Canola: NJ owner of jewelry store shot co-rober; not liable for co-felon death b/c doesn’t deter/make more careful felons [and b/c use agency theory]) but in others yes liable for ANY deaths even of co-felons (Hoang: KS arsonists died in fire; others held responsible)

---

### (CL) FORK#2: “Proximate cause” theory (homicide must be rsbly foreseeable from the chain of events set in motion by the felony, eg, accidental discharge of a gun by an armed robber yes FMR if bystander V killed b/c direct and foreseeable result; surviving felons all liable) vs “AGENCY” theory (prevailing view; death must have been “directly caused” by the act of a felon, eg, the bullet that killed must have been fired from a felon’s gun, not the gun of a cop or store owner [see Canola]; shield law: guilty if use V as a shield).

---

### (CL) Why FMR? DETERRENCE (“creates a class of careful felons”); deters felons from killing accidentally or negligently; when the felony is merged with the homicide you already have malice intention. BUT NOT ALL STATES ADOPT THE FMR. Why not FMR? (1) FMR isn’t necessary where CAN PROVE INTENT (and usually can when homicide happens mid-felony). (2) In Aaron, Michigan (no FMR) court says FMR not fair to co-felons (violates basic principles of individual criminal culpability to hold one felon liable for the unforeseen results of another felon). Also say where death was accidental, application of FMR unjust. (3) In Bohish (PA: man sent “pliant dupe/weak-minded tool” into basement with hot plate and gas can and he died when he didn’t leave before the explosion), no need to impute malice via FMR b/c can get murder-2 via “depraved-mind.”

---

### (CL) Defenses to FMR: defenses to the underlying felony are defenses to FMR as is non-compliance with the 7 factors.
### 2ND DEGREE MURDER (no premeditation)
MALICE AFORETHOUGHT: (4 types for second-degree)
1. Intent to kill
2. Intent to inflict serious bodily injury, or
3. Implied malice thru FMR (don’t need premeditation): felonies not listed under PA five that fulfill the seven criteria (eg, aggravated battery)
4. Implied malice through gross/extreme recklessness (depraved mind, malignant heart, wanton indifference). Two prongs/elements:
   a. **Objective** reality:
      Unusually high/unjustifiable probability/risk of death
      (Malone: kid cheating at Russian Roulette)
   b. **Subjective** judgment: Act deliberately performed with the knowledge of the danger and conscious disregard for human life

Was that reckless or grossly reckless? Look at extent of risk and damage and foresight, probability of death from conduct.

### PROVOCATION
If response to provocation is not rslb, still murder 2.
1. **Objective** (whether there was a cooling off period doesn’t mean D wasn’t provoked) and words CAN be enough.
2. **Subjective** (whether or not the provocation was acted upon by D)
   a. Focus is on D’s emotional condition at the time of the offense
   b. Does NOT focus on particular act of provocation (do NOT need a triggering event; reaches past where cum prov does)
   c. Focus is on D’s emotional condition at the time of the offense (eg, significant mental trauma/shock/extreme grief)
   d. + No requirement that provocation be “adequate”
   e. + Anyone can be the provoker (does NOT have to be the V).

### VOLUNTARY MANSLAUGHTER
If response to provocation is not rslb, still murder 2.
1. **Objective** (whether there was a cooling off period doesn’t mean D wasn’t provoked) and words CAN be enough.
2. **Subjective** (whether or not the provocation was acted upon by D)
   a. Focus is on D’s emotional condition at the time of the offense
   b. Does NOT focus on particular act of provocation (do NOT need a triggering event; reaches past where cum prov does)
   c. Focus is on D’s emotional condition at the time of the offense (eg, significant mental trauma/shock/extreme grief)
   d. + No requirement that provocation be “adequate”
   e. + Anyone can be the provoker (does NOT have to be the V).

### MANSLAUGHTER (a felony of the 2nd degree): Two ways...
1. A “murder” downgraded b/c of EED [BOP on the D (affirmative defense); constitutional b/c defense not used to negate intent but to mitigate culpability (Elliot)]

### Extreme Emotional Disturbance (EED) §210.3(1)(b): The MPC’s equivalent to provocation (but more liberal b/c MPC’s prime directive is to determine blameworthiness); mitigates culpability and reduces crime to manslaughter (a “plea in mitigation”) if committed...
- “under the influence of extreme mental or emotional disturbance for which there is a rslb explanation or excuse”
  - “detected from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be”

### History:
1. Holmes (1946 House of Lords): wife told D re: adultery; JUDGE decided whether facts should go to a jury; decided whether words would be sufficient (whether rslb; here not enough b/c had to be totally rslb); found confession insufficient b/c contemporary stds different and should have more self-control.
   - *Liberalization of the doctrine...*
2. Berry (1976 CA): D’s wife taunted him and was in love with YAKO. She began screaming (trigger) and he snapped and strangled her w/a phone cord; D convicted of M1 but judge MUST raise defense of provocation sua sponte (shift; whenever there is ANY evidence for the defense; Modesto Doctrine) to allow JURY to decide re: [1] rslbness and [2] causation (whether there was rslb diminished capacity caused by the provocation). This was CUMULATIVE PROVOCATION (just b/c there was a cooling off period doesn’t mean D wasn’t provoked) and words CAN be enough.
IN VOLUNTARY M ALSLAUGHTER
Willfull, reckless, wanton conduct (NO malicious/premeditation/deliberation)

[1] Reckless manslaughter
Omission enough if had duty: Welansky (nightclub fire; higher duty b/c invitees; didn’t have to show objective and subjective like Berry b/c here manslaughter not M2 and not implied malice)

[2] Negligent manslaughter
(gross negligence, not just a little, eg, fell asleep at the wheel)
Omission enough if had duty (and omission proximately caused the death): Williams (dead-baby toothache: breach of duty [husband assumed parent-child/became officious intermeddler when didn’t take to hospital] by gross negligence [RSBL person would have known] justifies charge of involuntary manslaughter)

Follow MCFIFEST guidelines, eg, death must be a foreseeable result of the act.

Todd: D stole from church offering plate and man had heart attack when chasing; not guilty of manslaughter b/c not foreseeable that would be followed or the proximate cause of the death; non-violent misdemeanor against property not ppl; V didn’t die of fright from watching the crime (there is indication that this would make D liable); petty theft didn’t encompass the kind of direct, foreseeable risk of physical harm that would support a conviction of manslaughter; death occurred during the chase not as a result of the commission of the act; no causation as a matter of law (can’t show that man died b/c of D’s action or that D had any knowledge of man’s preexisting condition).

Elliott (CT 1979): D went armed to his brother’s home and shot him; convicted of murder but had extreme reaction w/ loss of self-control (had problems with brother, just laid-off, kid taken away).

Shelton: Implementing guidelines for EED (allow jury to use discretion to conform to community stds): (1) Not insane; (2) Extreme unusual state (not mere annoyance); (3) Extreme emotional and unusual reaction (subjective: was it unusual for this D?); (4) Whether individual’s usual intellectual controls have failed (not thinking or plotting but has “lost it”).

NEGLIGENCE HOMICIDE (a felony of the 3rd degree)
Same as common law (criminal homicide committed negligently); “doesn’t care to know.”

>>> HYPO: If guy in Todd stole a kid’s bike and father chased after him and had a heart attack, would have been more foreseeable. Here, didn’t expect to be seen stealing; wouldn’t expect driver to have heart attack. Too attenuated for proximate cause.

- Caruso: (NY 1927) Italian-immigrant D strangled+stabbed Dr. who he thought had killed his child by treating him improperly and thought Dr. was laughing at him when he told him his child died. D charged and convicted of 1st degree murder. Held: D’s act was an act brought on by provocation, in the heat of passion, and therefore it wasn’t premeditated. For premeditation need time to deliberate and make a choice to kill or not kill (to overcome hesitation and doubt and form a definite purpose). Must look at the killing (act) as one event: Strangled Dr. and then stabbed him (this is all one event); Grieving the death of his child (so doesn’t have the ability to think about the killing). It is either 2nd degree murder or manslaughter (must now measure objectively): If the provocation is RSBL then it is manslaughter (provocation negates intent); If the provocation was unreasonable (objective standard) then it is 2nd degree murder (intent to kill, but no premeditation). That the medicine was the correct dosage doesn’t matter b/c only matters what D actually believed (even if it was unrsbl). Insufficient evidence as a rule of law to support the elements of premeditation and deliberation for murder (no direct inference of and, in fact, evidence pointed to an inability to premeditate). Facts supported manslaughter or murder2 b/c provocation w/o evidence of premeditation. Under MPC: This would be EED manslaughter b/c it can be unrsbl as long as D thought it was rsbl.

- Welansky: D owned a nightclub but was in hospital at the time. A 16-year-old emp’ee accidentally set fire. Many (492) people died of burns, smoke inhalation, or injuries suffered in the attempt to escape overcrowded club (1000 ppl there but only licensed for 500). Several emergency exits were concealed or locked (but club had passed the safety inspections, so then it might be a mistake of fact). D was charged with manslaughter for failing to prevent defective wiring, installation of flammable decoration, overcrowding, and failing to have proper exits and fire doors; convicted of involuntary manslaughter through wanton or reckless conduct.
### “SUICIDE” AS HOMICIDE

<table>
<thead>
<tr>
<th>COMMON LAW</th>
<th>MPC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SECOND-DEGREE (depraved-heart/gross recklessness) MURDER</strong>&lt;br&gt; If wound V (mental/physical), rendering V irresponsible for own acts (like crazy), liable if commits suicide (when suicide follows a wound inflicted by the D, his act is homicide if the deceased was rendered irresponsible by the wound and as a natural result of it).&lt;br&gt;Even if numerous instrumentalities (eg, malnutrition, poisoning, infection) contribute, a particular D may be held to be liable for the entire death if the act is of such magnitude and a causal relationship can be perceived.&lt;br&gt;To be guilty of murder through a suicide/cause by other acts of V, D’s acts must:&lt;br&gt;[1] render the deceased mentally irresponsible and&lt;br&gt;[2] be the natural and probable consequences of such unlawful and criminal treatment.&lt;br&gt;<strong>Stephenson</strong>: Klan guy abducted teacher who poisoned self&lt;br&gt;Randy hypo: if criminal conduct (child abuse) foreseeably causes another to the point of incapacity/irresponsibility, responsible for all results (even if the results are unforeseeable)</td>
<td><strong>CRIMINAL HOMICIDE</strong>&lt;br&gt;Guilty if purposely causes another to commit suicide by force, duress, or deception</td>
</tr>
<tr>
<td><strong>IN Voluntary MANSlaughter</strong>&lt;br&gt;Participants in reckless conduct liable if coparticipant kills self: <strong>Atencio</strong>: B killed after drinking wine w/ friends decided to play Russian Roulette; D (one of the ppl there) charged with involuntary manslaughter, predicated upon wanton/reckless conduct (for concerted action and cooperation of the D in helping to bring about B’s foolish act); D’s participation and mutual encouragement was the cause of the death (not necessary that the D force/suggest the game); can be liable for mutual ENCOURAGEMENT (this is the actus reus).</td>
<td></td>
</tr>
</tbody>
</table>
**INSANITY (no criminal capacity):** Only raised in 1% of cases and only successful in 1-5% of those; sometimes bifurcated trial. What then? If D insane and put in mental ward, not let go until no longer threat to self/others (D has the BOP on this). D must have been suffering from some recognized mental disease/defect, which must have had a prescribed relationship to the D’s behavior…

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>½ states now (CL)</td>
<td>D driven by sudden + overpowering uncontrollable irresistible impulse and loses power to choose btw right and wrong so actions beyond D’s control (lacked capacity for self-control and free choice)</td>
<td>Not responsible if D’s act was the PRODUCT of mental disease/defect</td>
<td>Because of mental disease or defect, D lacked SUBSTANTIAL CAPACITY to …</td>
<td>Because of SEVERE mental disease or defect, D UNABLE to…</td>
</tr>
<tr>
<td>Because of defect of reason from disease of the mind, D didn’t…</td>
<td>[1] “Know” could mean formal or affective knowledge; trying to exonerate a D w/o mens rea; person might know in a sense that can identify with the phenomenon, but still might not have a full emotional appreciation of what it means. [2] “Wrong” could mean either moral or legal wrong (problematic). Ex: if D thought God told her to kill &amp; knew murder to be illegal, she would be sane if “wrong” meant legal wrong and insane if it meant moral wrong. Any “deific decree” (God telling you what to do) is considered legal insanity. [3] Tight shackles on psychiatrist testimony ⇒ “professional perjury” AND deprives jury from knowing all information (once psych says he had the ability to know or that he didn’t then there is nothing left for the jury to do; decision put in hands of psychiatrist) [4] Very narrow scope; “unable to know” doesn’t allow for degrees of incapacity (black or white; only complete incapacity allowed). [5] Focuses on cognitive ability (knowing right from wrong), rather than volitional ability (to control behavior), which is not in line w/ medical science. [6] BOP on the P</td>
<td>[1] Rationale is that the act isn’t voluntary and therefore isn’t blameworthy. [2] Very narrow (must be sudden and explosive fit; excludes crimes w/ brooding, melancholy); black/white b/c used w/ McNaghten. [3] Raises problematic causation issues; do “irresistible impulses” actually exist?</td>
<td>[1] Use “but for” test… [2] If defect collapses the entire inquiry into w. D had a mental disease (b/c how can you say that the act was not somehow caused by the mental disease); raised near-impossible problems of causation. [3] Psychiatrists could provide all relevant medical info (ended “professional perjury”) BUT… co-opted from jury mind); why? Don’t want to reward D for being a bad actor US v. Freeman (1966): D charged with selling narcotics; argued that he didn’t do it, but that if he did, he was insane and lacked the capacity to be liable for his acts. Ct applies the M’Naghten Rule but doesn’t like it; analyzes the other tests that have been used and decides that the best one is MPC.</td>
<td>[1] Must be “severe” instead of substantial (not just any mental disease/defect) and “unable” is more strict than “substantial incapacity.” [2] THERE IS NO VOLITIONAL PRONG (looks suspiciously like M’Naghten all over again but with “appreciates” instead of “know”). [3] In 1984 MPC abandoned for FEDERAL b/c of John Hinckley. [4] BOP on the D (by clear and convincing evidence, which is bigger than preponderance of)</td>
</tr>
</tbody>
</table>

Affirmative defense. Doesn’t negate mens rea; provides excuse. “Diminished capacity” = a mitigating defense (less than insanity) to reduce grade. “Temporary insanity” fulfills all above criteria at the moment and then goes away (very difficult to prove). Rationale: (1) utilitarian (no deterrence for insane ppl b/c cannot see cause-effect relationship btw their actions and the punishment and rehabilitation of insane D is impossible in prison) and (2) retributivist (insane ppl lack “free will” to make choices and without that there cannot be moral blame).
### INCHOATE CRIMES

Not fully formed: attempt, conspiracy, and solicitation (“enough conduct to accompany the required specific intent?”)

#### ATTEMPT

<table>
<thead>
<tr>
<th>COMMON LAW</th>
<th>MPC (§5.01):</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Specific intent</strong> (so not reckless, negligence) to commit a felony, even though the crime itself may be general intent (elements are intent, overt act, failure) w/ affirmative step toward commission</td>
<td><strong>Purposefully</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>COMPLETED BUT FAILED BEHAVIOR (w/o success)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. LAST PROXIMATE ACT, OR</strong></td>
</tr>
<tr>
<td>Legal impossibility = defense (turns out to be your bank): “thinking” it to be a crime is not an inculpating factor</td>
</tr>
<tr>
<td>Factual impossibility ≠ defense (MPC: attempt is in the actor’s mind and there is blameworthy intent even where there is not a threat)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NOT YET COMPLETED PLANNED BEHAVIOR</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2. POINT OF NO RETURN</strong> (locus poenitentiae)</td>
</tr>
<tr>
<td>Must go WAY beyond mere preparation; must be dangerously close to the accomplishment of the act (way at the end); anything short of almost consummating the crime is preparation</td>
</tr>
<tr>
<td>Not need to be last prox step, but no way to tell what that point is</td>
</tr>
<tr>
<td>(1 and 2 answer “Has the actus reus of attempt occurred?”)</td>
</tr>
<tr>
<td>The act can be small if the proven intent is big; need to prove less in terms of conduct. Also see Cardozo’s idea of attempt = “within dangerous proximity” (the act can be small if the harm would be really big, eg, getting blueprints to B+E less likely to be enough than for blowing up big bldg and kill ppl).</td>
</tr>
</tbody>
</table>

| **Overt act** looks at what remains to be done (last proximate act, dangerous proximity) |
| Need overt act b/c won’t punish mere thought, only conduct, which must strongly corroborate the actor’s criminal purpose |

| **Overt act** looks at what has already been done (substantial step) |
| t/f dangerous criminals can be apprehended at an earlier stage |

| Voluntary abandonment IS an excuse: Staples (D rented office above bank, drilled in floor; abandonment wasn’t “voluntary” and anyway had already gone too far [past the locus poenitentiae]); discourages criminals from abandoning [Technically, it IS a defense SO RAISE IT BUT it isn’t going to work b/c if you are far enough along to have attempt, you are too far for the defense to work]. |
| Voluntary and complete abandonment IS an affirmative defense w/BOP on the D; encourages criminals not to complete; better measure of blameworthiness; Latraverse (“Sal: my turn asshole,” gas, bat in D’s car; allowed option to try to defend on abandonment grounds) |
| BUT: Abandonment IS NOT voluntary and complete if: Unanticipated difficulties, resistance, circumstances that increase probability of detection/apprehension OR Doesn’t finish b/c wants to postpone until later or substitute a new but similar objective (pick a new V) |
| Show intent with circumstantial evidence / motive (if don’t have actual evidence like the note in Latraverse) |

| Attempt is a lesser-included offense to the crime, but CANNOT be convicted of both attempt and the actual crime |

| Punished as a misdemeanor (but statutes have changed) |
| Punished as if committed (but had more chance to back out) |

**POLICY re: ATTEMPT:**
- Why punish attempt? Lets police arrest before harm occurred; deters ppl from pursuing criminal objectives (deterrence).
- Why blameworthy? Because there is the intent to harm.
### CONSPIRACY

<table>
<thead>
<tr>
<th>COMMON LAW</th>
<th>MPC (§5.03)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Specific intent</strong> (intend to agree and to pursue unlawful objective of agreement): if 2 ppl have intent and 3d does not, 3d not guilty (b/c lacks element of intent)</td>
<td><strong>1. Purposely</strong> (agreement must be formed “with the purpose of promoting or facilitating” the commission of a crime)</td>
</tr>
<tr>
<td><strong>2. Agree’t between 2+ persons to commit a crime</strong> (the agreement itself is the actus reus; agreement also shows intent): Mens rea and Actus Reus are intertwined b/c conspiracy is an agreement to commit a crime and therefore if you are agreeing (actus reus) you are intending (mens rea).</td>
<td><strong>2. Agrees that one or more of them will attempt / solicit / commit a crime</strong> OR <strong>3. Agrees to help that person plan / attempt / solicit / commit that crime</strong></td>
</tr>
<tr>
<td>Agree’t must be bilateral (TAKES TWO [guilty minds] TO TANGO): if 1 of 2 ppl is a cop, was drunk, is dead, kid (w/o capacity to conspire/agree) – NEED TWO GUILTY PPL or neither can be prosecuted</td>
<td>Agree’t can be unilateral (blameworthiness is in the mind of the actor); do NOT need TWO TO TANGO (punishing the intent, which is in the mind of the actor, so if agreeing to commit a crime doesn’t matter who with b/c has already established intent) so CAN conspire with an undercover cop</td>
</tr>
<tr>
<td>NEED overt act in furtherance of the conspiracy (to corroborate agree’t and intent) BUT very broad, does not need to be criminal; the more evidence of the agree’t itself, the less overt act needed (other jx: agreement alone sufficient).</td>
<td>Need overt act (in furtherance of the conspiracy) by D or co-conspirator to corroborate intent <em>UNLESS 1° or 2° felony (so serious that agree’t is corroboration enough w/o overt act b/c ppl don’t agree to these things lightly)</em></td>
</tr>
<tr>
<td><strong>Defense of WITHDRAWAL</strong>: abettor (must voluntarily) tell co-conspirators that you renounce (still liable for conspiracy itself, but not for crimes after abandonment)</td>
<td><strong>Defense of WITHDRAWAL</strong>: Only a defense if actually try to thwart the conspiracy (prevent commission of the crime), although need not be successful.</td>
</tr>
<tr>
<td>CAN be convicted of both conspiracy and the offense that is the subject of conspiracy</td>
<td>CANNOT be convicted of both conspiracy and actual crime (also cannot be convicted of conspiracy, attempt and solicitation: have to pick one)</td>
</tr>
<tr>
<td>CAN be punished for ALL crimes of other co-conspirators that are committed in furtherance of the goals of the conspiracy and are reasonably foreseeable (even if D didn’t specifically agree to them)</td>
<td></td>
</tr>
<tr>
<td>Conspiracy was a felony at CL (even if you were agreeing to commit a misdemeanor). Hearsay allowed as evidence. Impossibility is NOT a defense to conspiracy.</td>
<td></td>
</tr>
</tbody>
</table>

**POLICY re: CONSPIRACY:** More than one guilty mind is more dangerous. More support/mutual encouragement/resources is more dangerous and efficient, harder to detect (BUT opposite could be also true). Less likely to abandon than if acting alone. Ongoing and continuing criminal enterprise. Lets police arrest before harm committed (same w/ attempt). Agreement = evidence of firm intentions.

### ACCOMPlice LIABILITY/SOLICITATION/COMPLICITY (vicarious responsibility; aiding and abetting)

<table>
<thead>
<tr>
<th>COMMON LAW</th>
<th>MPC (§2.06)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Specific intent</strong></td>
<td>Responsible for another’s crime if law says so or if, w/ required mens rea, causes innocent person to commit crime.</td>
</tr>
<tr>
<td>Purpose to help/support, that crime succeed, WANT to aid and abet; Mere presence (there and not objecting) CAN be enough to aid and abet: Parker (D watched while buddy kicked law student’s ass, took his car/wallet; enough)</td>
<td><strong>Accomplice</strong>: w/ purpose of promoting/facilitating commission: 1. Solicits (asks/encourages another to commit crime w/SI that they do; crime of solic is over when D’s asked), 2. Aids or agrees/attempt to aid in planning/commission, 3. Has duty to prevent and doesn’t. Accomplices are liable for the crime itself and all other foreseeable crimes but must be more than present, not just a bystander (must be actively in on the crime).</td>
</tr>
<tr>
<td>SOLICITATION can be uncommunicated (eg, person doesn’t hear you/get your letter of request). Once solicitation results in a “Yes” response, merges into conspiracy (only crime = conspiracy; cannot have both).</td>
<td></td>
</tr>
<tr>
<td><strong>[1] Principal in the first degree</strong>: immediate perpetrator of the crime (w/own hands or instrument or by use of an innocent agent, eg, child/animal/idiot)</td>
<td></td>
</tr>
<tr>
<td><strong>[2] Principal in the second degree</strong> (abettor): constructively/ actually present at scene and aided/encouraged (eg, the lookout)</td>
<td></td>
</tr>
<tr>
<td><strong>[3] Accessory before the fact</strong>: aided/encouraged before but not present at the scene</td>
<td></td>
</tr>
<tr>
<td><strong>[4] Accessory after the fact</strong>: knowingly assisted felon to escape/ avoid punishment (more than just not turning felon in).</td>
<td></td>
</tr>
</tbody>
</table>
## CAPITAL PUNISHMENT: THE DEATH PENALTY (DP)

<table>
<thead>
<tr>
<th>Deterrence: w. the DP prevents future murders</th>
<th>Retribution: w. a just society requires the DP for the taking of a life</th>
<th>Innocence: w. risk of executing innocent people precludes the DP</th>
<th>Arbitrariness and discrimination: w. the DP is imposed unfairly so shouldn’t be used</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PRO-DP:</strong> Punishment discourages would-be criminals and b/c society has a high interest in deterring murder it should go with the strongest punishment available; punishment should be even more swift and sure; “deters” the murderer who is executed (b/c he can never kill again: permanent incapacitation)</td>
<td><strong>PRO-DP:</strong> Must restore balance of justice when a life is taken (an eye for an eye). Execution brings closure to the murderer’s crime for the V’s family. Any lesser punishment would undermine value society places on lives. Killers shouldn’t have the prison “good life” of meals and TV b/c “for justice to prevail, some killers just need to die.”</td>
<td><strong>PRO-DP:</strong> There is no proof that any innocent person has actually been executed since increased safeguards and appeals were added to our death penalty system in the 1970s (and if so it has been rare and also justifiable if any lives are saved). The need for reform doesn’t mean that we should get rid of the DP. If a person is innocent, governor can grant clemency; usually ppl claim innocence to stall.</td>
<td><strong>PRO-DP:</strong> Must give discretion to prosecutors and juries b/c different sentences for different crimes. More white ppl get DP in US black ppl, who proportionately commit more murders than whites. The existence of some systemic problems is no reason to abandon the whole death penalty system.</td>
</tr>
<tr>
<td><strong>ANTI-DP:</strong> No proof that DP works as a deterrent any more so than life in prison (and may even brutalize society so that it increases the likelihood of murder); how can it deter when most murderers do not expect to be caught? Not even the pro-DP believe this. Frequently, murders are committed by drug addicts or in heat of passion or anger (ppl aren’t thinking “hmmm, I could be executed for this”). Because there exists life w/o parole, don’t need DP.</td>
<td><strong>ANTI-DP:</strong> Retribution = revenge. The stds of a mature society demand a more measured response than this emotional impulse and vengeance. Our laws should lead us to higher principles than “pay back” and extending the chain of violence. Many victims’ families denounced the DP so using it to “right” their loss is an affront to them and only causes more pain. We do not torture the torturer or rape the rapist and this is similarly disproportionate (especially b/c small % of convicted murderers are put to death and usually not the worst crimes but the Ds with the best lawyers who need DP).</td>
<td><strong>ANTI-DP:</strong> DP is irrevocable and no amendments can be made for mistakes. Evidence indicates that mistakes have been made in using DP (ppl released from death row as innocent all the time). For every 7 ppl on death row, 1 should never have been convicted. The system is unreliable. The risk of putting innocent ppl to death is intolerable. Most releases of ppl from death row results from factors outside the justice system (journalism, citizen groups). Wrongful executions are a preventable risk b/c there is life w/o DP. It comports w/stds of decency, unnecessary pain?</td>
<td><strong>ANTI-DP:</strong> DP doesn’t, in practice, single out the worst offenders but selects arbitrary group based on such irrational factors as quality of the defense counsel, place where crime committed, or race of the D or V. Almost all Ds facing the DP cannot afford their own attorney and depend on state-appointed lawyers of poor quality (so more likely to be convicted and given death sentence). DP more likely where V white than black (racially divisive). Until arbitrary factors (race, economics, geography) eliminated as a determinant of who lives and dies, DP must not be used.</td>
</tr>
</tbody>
</table>

8 objections to DP: 1. Not a deterrent; 2. Unfair; 3. Irreversible; 4. Barbarous; 5. Unjustified retribution; 6. Costs more than incarceration (b/c high litigation costs for appeals); 7. Less popular than the alternatives; 8. Internationally, DP is widely viewed as inhumane and anachronistic

1. **Furman v. Georgia** (US 1972): Supreme Court held that unconstitutional to impose the DP w/o criteria to exercise discretion (“the imposition and carrying out of the death penalty... constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments”). Objections focused on the way death-penalty laws had been applied, finding the result so “harsh, freakish, and arbitrary” as to be constitutionally unacceptable. The Court summarily reversed death sentences in the many cases then before it.

2. **BUT** within four years after the **Furman** decision, hundreds of ppl had been sentenced to death under new capital-punishment statutes that provided guidance for the jury’s sentencing discretion (states that didn’t get rid of DP changed statutes).

   a. Some states changed DP to say that where there is a specific crime (eg, treason, hijacking) there is an automatic DP sentence (thereby eliminating discretion)

   b. Mandatory DP sentences for certain crimes (such as the one Georgia has for hijacking and treason) have generally been held to be unconstitutional b/c they don’t solve the problem of unbridled jury discretion.

   c. Other states limited discretion by asserting more safeguards into statutes.

   d. **Gregg v. Georgia** (US 1976): Supreme Court moved in the opposite direction and held that “the punishment of death does not invariably violate the Constitution” where statutes contained “objective standards to guide, regularize, and make rationally reviewable the process for imposing the sentence of death.”

   e. These statutes typically (as in **Gregg** require a bifurcated (two-stage) trial procedure, in which the jury:

   i. first determines guilt or innocence and then chooses imprisonment or death in the light of aggravating or mitigating circumstances (everything admissible); must find one of 10 aggravating circumstances to apply DP; auto-appeal to GA SC, who test for [1] prejudice, [2] evidentiary support of decision, [3] proportionality to the crime, [4] violations of the 8th Amendment (excessive, comports w/stds of decency, unnecessary pain?)

   f. NOTE: the MPC has no position, but included provisions

   i. D’s mental incapacities are taken into consideration and if one is mentally incapacitated you are NOT allowed to impose the DP (Ford v Wainwright)

   ii. Insane ppl shouldn’t be executed b/c no retribution, no deterrence, cannot defend selves properly.

   g. In 1980’s Congress restricted appeals: you have only one shot to appeal

   h. No DP for non-intentional killings (D who doesn’t himself kill, attempt to kill, or intend that a killing take place or that lethal force may be employed)

   i. If a D can prove that the judge/jury’s decision to sentence him to death was motivated by racial considerations, the Supreme Court would find that use of the DP in that situation violated either D’s equal protection or 8th amendment rights.