

CRIMINAL LAW OUTLINE  
**Actus Reus + Mens Rea – Exculpation = Crime/Punishment**

**ACTUS REAS**

- I. The actus reus of an offense is the physical or external component of a crime and requires a voluntary act or omission that cause social harm
  - a. Voluntary: willed bodily movement
    - i. An act committed while unconscious is not an act at all, but a mere spasm
  - b. Social harm: injury or endangerment of some socially valuable interest
    - i. Conduct crimes (DUI, attempted murder, conspiracy)
      1. No damage or injury resulted from actions, but the actors conduct itself is punishable
    - ii. Result crimes (murder): law punishes because of unwanted outcome
  - c. MPC §2.01: what is not voluntary
    1. A reflex or convulsion
    2. Bodily movement during unconsciousness or sleep
    3. Conduct during hypnosis (Varies by jx)
    4. Movement that is not a product of the actors conscious or habitual will
- II. Defense: Automatism
  - a. Automatic response to certain stimulus
  - b. Need past evidence- scripts learned over time
- III. Omission
  - a. No liability for failing to act, unless there is a legal duty
    - i. Relationship
    - ii. Contractual Obligation (doctor, innkeeper, babysitter)
    - iii. Voluntary assumption to care
      1. Begin to render assistance
      2. Failure to complete, if puts in a worse situation than maybe liable
      3. secludes the helpless person to prevent others from rendering aid
    - iv. When a person creates a risk of harm to another
  - b. Defense: Innocent risk creation: no mens rea for creating the risk
- IV. Inchoate Offense
  - a. Accessories before the fact- help you before crime
  - b. Accessories after the fact- help you after the crime
  - c. Solicitation: intentionally invitation of another to commit a crime
    - i. Merges into conspiracy
  - d. Conspiracy- An agreement between two or more people to commit an unlawful act
    - i. does not merge into target offense, can be charged with both
    - ii. Whartons Rule: if crime requires more than one individual to carry it out, then can't also be charged with conspiracy
      1. Or within class of victims the statute is trying to protect
    - iii. Defense:
      - a. Explicitly communicate withdraw from conspiracy, then not charged with target crime
      - b. Pretending to be co-conspirator, no meeting of the minds
    - iv. Everyone liable in conspiracy for anything that happens- even if you don't know
    - v. R: enticed other into corruption
    - vi. U: more dangerous to society
  - e. Attempt: an attempt occurs when a person, with the intent to commit a crime, beginning perpetration, rather than mere preparation, of the target offense

- i. R: only punish for results, so no
- ii. R: yes, wanted same result, same mental state

### **MENS REA**

I. Broad: a person has acted with “mens rea” if she committed the actus reus with a “morally culpable” state of mind

II. Elemental: if she committed the actus reus with the particular mental state of the defined offense

a. Doctrine of transferred intent

- 1. Regardless of who/what the individual intended to harm, the intended social harm still occurred and is thus punishable
- 2. Some courts say only 1 intent, other say it can't get used up

b. Can presume intent based on force

III. Specific Intent

a. Purposely: acting with conscious object to cause the result

i. Awareness or belief that the attendant circumstances exists

b. Knowingly: acting with awareness that the result is a practical certainty

- i. Ostrich doctrine: willful blindness satisfies knowledge requirement
  - a. Put on notice based on circumstance

IV. General Intent

i. Reckless: consciously disregarding a substantial and unjustifiable risk or result

a. Foreseeable to a law abiding person

ii. Negligently: acting in ignorance of a substantial and unjustifiable risk of the result when one should be aware of that risk

a. Should have foreseen risk, but didn't- reasonable person

b. Gross negligence: differ in magnitude, usually required for liability

iii. Purposely: may be a grading element, or go to motive

V. Application (MPC 2.02(4))

a. Mens rea term must be distributed to each “material element” of the statute:

- a. Nature of forbidden conduct
- b. Attendant circumstances
- c. The result of conduct
- d. *Not* Grading of offense level

b. Unless contrary purpose

i. Punctuation

- 1. 1<sup>st</sup> clause can be set apart with punctuation, and second clause then would be recklessly or strict liability if no mens rea is stated

ii. Unclear Mens Rea, or silent

1. when two mens rea are stated, go with lower one for attendant circumstances

2. when no mens rea, presume recklessly when:

- a. harsh punishment, not a regulatory offense,
- b. constitutional innocence if strict liability were applied

i. main act must be illegal on its face for attendant circumstances to be strict liability

c. Punishment of wrongdoer outweighs regulation of the social order

d. If tie, doctrine of leniency

iii. Strict Liability if

- 1. Minor offenses: i.e. Minor violations of liquor laws, motor vehicle code
- 2. statutory rape traditionally strict liability
- 3. felony murder rule

- 4. MPC assumes against strict liability (only for fines)
- 5. U: people will be more cautious
- VI. Mistake (negate mens rea- does not apply to Strict Liability)
  - a. Mistake of Law: does not ordinarily relieve an actor's liability unless: authorized reliance or negates mens rea
    - i. Duty to know the law
    - ii. Authorized reliance
      - 1. Reliance on civil code
      - 2. Reliance on lawyer is no excuse
      - 3. relying on statements of public officials
      - 4. statute or law that is not available to the public
    - iii. Purpose- To deter fraud- don't want people always relying on mistake
      - 1. avoid subjectivity of the law
    - iv. MPC: relies on CL exceptions
  - b. Mistake of Facts
    - i. no mens rea for crime because circumstances are different then they thought
    - ii. CL- general v. specific
      - 1. specific intent crime: an honest mistake
      - 2. general intent crime: an honest and reasonable mistake
    - iii. MPC: No distinction between specific and general intent
      - 1. any honest mistake of fact will negate mens rea

### CAUSATION

- I. Actual Cause: Did the act accelerate the death
  - a. A person is not guilty of an offense unless she is an actual cause of the ensuing harm
  - b. "but-for-test"- social harm would not have occurred but for the defendants conduct
  - c. Take the victim as you find it
  - d. Substantial factor test
    - i. Two separate acts, each of which alone is sufficient to bring about the prohibited result
- II. Proximate cause: event among those that that satisfy the "but-for" standard that should be held accountable
  - a. Factors in determining Proximate cause
    - i. contributory negligence of the victim- not a defense
    - ii. omission
      - 1. negative act will not cut off liability of an earlier positive act
    - iii. intended consequence
      - 1. any intended consequence of an act is proximate
    - iv. apparent safety doctrine
      - 1. when a person reaches a position of safety, the original wrongdoer is no longer responsible for any ensuing harm
    - v. Superseding act
      - 1. CL: coincidental or responsive intervening cause
      - 2. MPC 2.03: was resulting death too remote or coincidental
- III. Concurrence of the elements
  - a. Elements of crime have to line up in time

### DEFENSES

- I. Justification- was the act justified given the circumstances
  - a. Self Defense

- i. The use of reasonable force in proportion to harm threatened is justified at common law when: Δ is a non-aggressor who reasonably believed force was necessary to repel an immediate, imminent, and unlawful attack.
  - 1. Immediate and imminent
    - a. Can't act in self defense preemptively
    - b. Retaliation- not lawful, too late
    - c. Must abandon attack if you can do so safely
  - 2. Aggressor Issue
    - a. Cannot be the aggressor at the time of the conflict
    - b. Cannot deliberately put yourself in danger
    - c. Have to communicate explicitly that you are no longer looking to be the aggressor
  - 3. Reasonable
    - a. Perfect self defense claim- actions have to be reasonable in the circumstance
    - b. Imperfect self defense- honestly thought they had to act in self defense, but were irrational
      - i. Goes from murder to manslaughter
  - 4. Retreat Doctrine
    - a. Duty to retreat as far as you can go safely before acting in self defense
    - b. "Castle Doctrine"- no obligation to retreat if attacked in your own home
- ii. MPC Section 3.04
  - 1. The use of force is justifiable "when the actor believes force is immediately necessary"
    - a. Wholly subjective standard
    - b. Turned imperfect self defense into perfect
  - 2. Can't use self-defense if you can retreat
    - a. except if the perpetrator knows it is your dwelling or place of work
- iii. Transferred intent applies to Self-Defense
  - 1. Except MPC, if acting negligently or recklessly puts someone at risk
- b. Defense of 3<sup>rd</sup> Party (both CL and MPC)
  - i. The defendant may do whatever the 3<sup>rd</sup> party could do to protect himself
    - 1. Put yourself in shoes of threatened individual
- c. Defense of Property
  - i. Cannot use deadly force to defend property under any circumstance
  - ii. MPC Section 3.06
    - 1. The use of force to defend property is justifiable when in fresh pursuit after warning, unless warning is dangerous or useless
    - 2. Or perpetrator breaking into your home with intent to commit felony can use deadly force
  - iii. Can't set traps to defend your property unless reasonable, customary, and won't cause substantial harm
- d. Battered Woman Syndrome

- i. A series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by a dominate male
      - 1. Cycle: (1)Tension building, (2)Culminates in a violent act, (3)Loving contrition stage
    - ii. As a Defense
      - 1. Does not meet traditional self defense criteria
        - a. No immediacy
          - i. Type of PTSD: Hyper vigilant to subtle cues that abuse will be coming, acting preemptively
          - ii. Momentary hiatus of reign of terror
        - b. May not be reasonable because should retreat
          - i. Learned helplessness: feeling that you can't escape
          - ii. Most likely to kill when she attempts to leave
          - iii. Economically dependant
          - iv. Not if you can sympathies, but if being in their shoes was the response reasonable
      - 2. Policy- don't want people to take the law into their own hands
        - a. Problem with personalizing defenses- how much should you tailor defenses to unique individual circumstances
  - e. Necessity "choice of evils"
    - i. The defense of necessity requires that: the acts were taken to avoid a greater evil, the harm to be avoided was a greater harm which was immediate and substantial, and reasonable believed there was no adequate alternative.
      - 1. Generally only in response to natural forces
      - 2. early CL: required that harm sought to be avoided was to society, not just to you
      - 3. cannot use necessity as defense to homicide
    - ii. MPC Choice of evils (3.02)
      - 1. Does not limit the defense in any way, could be used for homicide
      - 2. No immediacy requirement
      - 3. Cannot have recklessly or negligently got yourself in the position to have to choose between two evils
        - a. Can interpret recklessly or negligently to be the floor, to include purposely or knowingly
      - 4. Wholly subjective, what the actor believed
      - 5. Model Penal Code would allow either natural *or* human threats.
  - f. U: "efficient breach" - If obeying the law involves greater harm to society than breaking the law, we want people to break it.
  - g. R: *moral* value of one choice of action against another
- II. Excuse- although they caused harm, are not blameworthy
  - a. Insanity
    - i. At the time you committed offense, due to mental illness or defect, a person either:
      - 1. did not understand the nature and consequence of their act or that you don't understand what you were doing wrong; or
      - 2. you knew what you were doing was wrong but you couldn't stop yourself because of the illness

- a. serious mental illnesses- psychotic conditions out of touch with reality, delusions, usually a history of mental illness
      - b. Drug addiction- disease, permanently changes brain
    - ii. M'Naughten Test (cognitive): "right from wrong rule"
      - 1. Due to mental illness, defendant:
        - a. Did not to know the nature and quality of his act
        - b. or he did not know his actions were wrong
          - i. legally wrong, due to mental illness
          - ii. morally wrong, due to mental illness
            - 1. Did defendant think society would condone his actions?
      - 2. Criticized: does not recognize volitional or emotional impairments, only focusing on the cognitive element of the crime
    - iii. Irresistible Impulse Test (volition test): Supplement to M'Naughten
      - 1. Due to mental illness, Δ has a substantial incapacity to control his behavior
        - a. Crime committed in a sudden and explosive fix
      - 2. Criticized: does not include those crimes that were considered beforehand by a person that was unable to resist the compulsion
    - iv. MPC Standard
      - 1. As a result of mental disease or defect, Δ lacked substantial capacity to either (1) appreciate the criminality or wrongfulness of his conduct or (2) to conform his conduct to the requirements of the law
        - a. MPC- unable to appreciate- broader than simple cognition (M'Naughten: unable to *know*)
    - v. Durham Test (died out)
      - 1. A person shall be excused if their unlawful act was the product of a mental disease
        - a. Wouldn't have acted but for their mental disease
      - 2. Criticized: Hard to quantify, Subjective, depended too much on mental health experts, took it out of hands of jury
    - vi. Federal Test (got tougher)
      - 1. As a "result of severe mental disease or defect he was unable to appreciate the nature and quality or the wrongfulness of his acts"
      - 2. Mental disease has to be sever (clarified)
      - 3. Unable to appreciate wrongfulness of act
      - 4. (no more volitional standard)
      - 5. This is essentially the M'Naughten standard
    - vii. Bad v. Mad
      - 1. Even if mentally ill, cannot be driven by bad motives
    - viii. Purpose- doesn't make sense to punish if they didn't know what they were doing
      - 1. R: Not morally blameworthy
      - 2. U: can't deter
- b. **Competency to Stand Trial** (aka. Adjudicative Competence)
  - i. Defendant must have factual and rational understanding of adjudicative process in order to stand trial
    - 1. Due process constitutional requirement

- a. Have to know what is going on in order to assist your attorney in your own defense
    - 2. Look at present and future mental state
    - 3. Low bar- basic understanding
  - ii. Applies to all adjudicative proceedings
    - 1. Yes or No decision- can't carve out certain preceding
    - 2. Can arise at anytime and multiple times
  - iii. Contextual, depends on complexity and characteristics of the case
    - 1. Recently immigrated- give you education before CST
    - 2. Incompetent- go to state psychiatric hospital for "restoration of competence"
- c. **Intoxication**
  - i. Don't want to sanction intoxication v. not being able to form mens rea
  - ii. Substances abuse- #1 risk factor for violence
  - iii. Involuntary
    - 1. Coerced
    - 2. Injest unknowingly
    - 3. Pathological intoxication: prescribed medication with unusual side effects
  - iv. Voluntary
    - 1. Knowingly injest substances
    - 2. Some jx. Allow to negate mens rea in specific intent
    - 3. Injesting could be reckless or negligent (depends on time frame you're willing to look at)
      - a. Elemental v. general mens rea
        - i. Only reckless in getting drunk
      - b. Some jx. Only will take it into account for specific crimes
        - i. Knock down 1<sup>st</sup> degree to 2<sup>nd</sup> degree
    - 4. Settled Insanity
      - a. Chronic, habitual alcoholic, changed brain
      - b. Some jx- predicate mental illness for insanity
  - v. MPC §2.08
    - 1. Can be used to negate mens rea
    - 2. Can't negate for general mens rea when voluntary
    - 3. Not a mental disease for insanity
  - vi. voluntary almost never a defense, except for specific intent murder
- d. **Duress** (more common then necessity)
  - i. In the face of unlawful coercion, the excuse of duress requires (1) immediacy of the threat to kill or seriously injure, (2) no reasonable opportunity to escape (3) the defendant was not at fault in exposing himself to the threat.
    - 1. Not a defense for murder (anger v. fear provocation?)
  - ii. MPC (p.987)
    - 1. Does not limit to threat of death or serious bodily harm
    - 2. Can be used as a defense of murder
    - 3. No imminence requirement
    - 4. Reasonableness- subjective objective mix
    - 5. Limited to "unlawful force"- by a human
- e. **Cultural Defense** (not formally recognized)

- i. A persons good faith belief in the propriety of specific conduct, based on cultural up bringing
      - 1. Yields to criminal law in most cases
      - 2. Taylor punishment to fit degree of culpability
      - 3. Maintain social order: Society must lay down body of positive law
      - 4. Specific deterrence Factors: possibility of recurrence, severity of crime, size of exempt group, degree of assimilation
- III. U: Conduct is not deterable, so punishment is an unnecessary evil
- IV. R: free choice- excuse maximizes choice when you know you will be free from the law

**PURPOSE OF PUNISHMENT:** *Two broad theories of punishment exist: R and U*

- I. Retributivist Goals: (backward)- Punish in response to wrongdoing, criminal gets his just deserts
  - a. Assaultive retribution (Stephen)
    - i. Criminals should be hated, punishment should reflect that hatred
    - ii. Remorse is not relevant- crime is complete
  - b. Protective Retribution (Morris)
    - i. Punishment of a truly culpable individual as a way of respecting the wrongdoer's personhood (free agent)
    - ii. Pay his debt to the community and return to it in moral equilibrium
    - iii. Assumed people have free will and are responsible for their actions (as opposed to determinism)
    - iv. Respecting the free will of the victim
  - c. Immanuel Kant (Categorical imperatives)
    - i. Must never use a person as a means to an end rather than as an end in itself.
    - ii. Obligation to punishes, means for righting moral wrongs
    - iii. Eye for an eye, right the wrong
    - iv. Same punishment for same offense, doesn't matter if it's the second one
- II. Utilitarian Goals: (forward) pain of punishment of undesirable unless it has a social benefit
  - a. Deterrence (Specific & General): focus on will/desire to commit crimes
  - b. Rehabilitation: Improve members of our society
  - c. Incapacitation (most effective): eliminate ability to commit crime
  - d. Founded by Bentham
    - i. As little punishment as needed to achieve utilitarian goals
    - ii. No punishment when it would be ineffective or costly to society (Death penalty)
    - iii. each punishment adjusted to the particular offense and offender
- III. Proportionality (Coker): punishment should be proportional to offense
  - a. Punishment fits the crime (does not mean equal)
    - i. Minor offense→ substantial punishment→ yes test
  - b. Factors
    - i. Gravity of the offense and harshness of penalty
    - ii. Sentence imposed on other criminals in the same jurisdiction
    - iii. Sentence in other jurisdiction
  - c. 8<sup>th</sup> Amendment does not require strict proportionality
    - i. 3 strikes not a violation of 8<sup>th</sup> amend
      - 1. Deter career criminals and recidivists, violent crimes up because people don't want to be caught
      - 2. U: to ensure public safety, policy decisions, deter, career criminals commit most of the purported property offenses
  - d. Outside capital punishment, proportionality analysis has been increasingly rare

**LEGALITY:** there can be no crime/punishment without preexisting law

- I. **Statutory Construction:** How word/term is used throughout the statute
  - a. Plain language, general interpretation
  - b. If ambiguous, then look to legislative intent at time of enactment
  - c. Court can't redefine law v. legislature wrote the law to be interpreted by judges
  - d. Terms meant to evolve v. stay with original intent
  - e. Construe physical act as narrowly as possible
- II. **Fair Notice**
  - a. Void for Vagueness
    - i. Allows for arbitrary and discriminatory law enforcement
    - ii. Criminal statutes must be strictly construed
    - iii. Requirement that legislature establish minimal guidelines to govern law enforcement
- III. **Ex Post Facto**
  - a. Cannot pass law after a crime- By evidence or aggravating the seriousness of crime
- IV. **Non-discriminatory Enforcement**
  - a. Overly Broad- Crime must be legislatively defined with sufficient specificity
    - i. Broad statutes encourage discrimination (equal protection)
    - ii. Enforcement may not encompass innocent conduct
  - b. Can't target a specific group of people (equal protection)
  - c. Prohibits bills of attainder: Cant pass a crime against an individual
- V. **Constitutionality Presumed**
  - a. No cruel and unusual punishment
  - b. No double jeopardy
- VI. **Lenity Doctrine:** tie breaker
  - a. Statute should be read in favor of the individual Δ

**HOMICIDE**

<b>Common Law</b>	<b>Model Penal Code</b>
<u>Murder with Malice Aforethought</u>	<u>Murder</u>
<i>First degree:</i> Intent to cause death (intent= Intentional or Willful; Premeditation/ Deliberation often required)	Purposeful
Felony Murder	Knowing
<i>Second Degree:</i> Intent to cause grievous bodily injury	Recklessness, with extreme indifference to the value of human life (presumed when you commit certain felonies)
Depraved Heart/Abandoned and Malignant Heart (Extreme Recklessness)	
<u>Voluntary Manslaughter</u>	<u>Manslaughter</u>
Heat of Passion with adequate provocation	Above mental state with extreme emotional or mental distress
Imperfect Self-Defense	Recklessness
[Recklessness]	
<u>Involuntary Manslaughter</u>	<u>Negligent Homicide</u>
Negligent Killing	Negligent Killing
[Misdemeanor-Manslaughter]	

VII. Murder (CL): unlawful killing of a human being, with malice aforethought.

i. **1<sup>st</sup> Degree Murder** (expressed malice)

1. Specific Intent to Kill: intentional, deliberate, and premeditated killing, after a period of prior consideration
  - a. Premeditation- to think about beforehand (only a second required)
  - b. Deliberation- measure and evaluate the major facets of a choice or problem, in a cool, dispassionate way
  - c. Inferred from circumstantial evidence: Conduct and statements of defendant before and after killing, ill-will, Lethal blows after victim has been rendered helpless, nature and number of wounds
2. Felony Murder- strict liability for homicide committed during the commission of a felony
  - a. Have to prove mens rea for felony, then intent transfers to killing
  - b. Does not have to be foreseeable, but still need causation
  - c. U: deterrence- dissuades dangerous felonies
  - d. Ways courts have cut back on Felony Murder Rule
    - i. Seriousness of felony determines 1<sup>st</sup> or 2<sup>nd</sup> degree
    - ii. Courts look at facts underlying felony, ask if it was committed in a way that posed a risk to human life
    - iii. Ask if Killing was in furtherance of the felony
    - iv. Some courts require an underlying relationship between the felony and the murder
    - v. Some courts require if felony needs to be inherently dangerous
    - vi. Res Gestae requirement: within ambient of felony:
      1. temporal proximity
      2. death related to felony in a meaningful way
      3. some say death of co-felon not covered
  - e. MPC: disfavors Felony Murder Rule (Section 210.1 (b))
    - i. Extreme recklessness can be inferred/presumed if death occurs within one of the enumerated felonies.
      1. Arson, burglary, deviant sexual behavior, felonious escape, rape, kidnapping
    - f. Merger principal: part and parcel of felony that resulted in death

ii. **2<sup>nd</sup> Degree Murder** (implied malice)

1. Intent to cause grievous bodily harm
  - a. knowledge that conduct would cause serious bodily injury
2. Depraved heart murder/ Extreme Recklessness
  - a. extreme recklessness: when unreasonable human risk is foreseeable and disregarded
    - i. whether individual has knowledge that they are taking the risk
    - ii. motive for risky act taken is unjustifiable (anti-social)
  - b. Attractive nuisance

b. Murder (MPC)- purposely or knowingly

- i. distinction between 1<sup>st</sup> and 2<sup>nd</sup> degree is too fine
- ii. jury instructed to presume extreme recklessness

VIII. Manslaughter (CL): unlawful killing of a human being without malice aforethought

i. **Voluntary**-

1. Provocation ("heat of passion killing"): An intentional homicide done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the person to cool

- a. Causal connection between provocation, passion, act
- b. Enough to inflame the passion of a reasonable man
  - i. Was defendant provoked into losing his self control (subjective)
  - ii. Was provocation enough to make a reasonable mad do as he did (objective)
    - 1. Abnormal characteristics of individual typically not taken into account
    - 2. can consider age, gender, physical disability
- c. Words alone are not adequate provocation- must have unlawful act
- d. CL categories: extreme assault or battery, mutual combat, illegal arrest, abuse of close relative, sudden discovery of spouse's adultery
- 2. Recklessness
- 3. Imperfect Self Defense
- 4. MPC: Manslaughter- Section 192 (significantly broader than CL)
  - a. Extreme Emotional Disturbance
    - i. reasonable reaction as defendant believed the circumstances to be (subjective)
- ii. **Involuntary**- Acted with criminal negligence and caused death in doing so
  - 1. Misdemeanor Manslaughter Rule
    - a. Unintended homicide that occurs during the commission of an unlawful act not amounting to a felony
  - 2. Negligent homicide (MPC) : requires gross negligence
  - 3. Purpose
    - a. R: justice requires punishment be inflicted to the extent that the offender deserves, punish the evil doer, wrong doer
    - b. U: can maybe deter negligence at the margins, make people more cautious about taking risks
  - 4. Defense
    - a. CL: Defense if parents refuse medical care for religious reasons
    - b. MPC: intentionally ambiguous, put yourself in defendants situation
- iii. Protected interest- human beings
  - 1. cessation of brain activity as a measure of death
  - 2. Fetus has to be born alive for murder (MPC)
  - 3. Year and a day rule: Death has to occur within year and a day of defendants acts
- iv. Doctrine of lesser included offenses

**CAPITAL MURDER:** If guilty of 1<sup>st</sup> degree murder, must decide if death penalty is merited

- I. Purpose of DP
  - a. Retributivist
    - i. Deserve it, eye for an eye
    - ii. Respect their Personhood
  - b. Utilitarian: what are societal benefits?
    - i. Deterrence- no conclusive evidence that DP deters
      - 1. punishment is "cruel" if there is no purpose
      - 2. After execution, homicide actually spikes for a little
      - 3. Model acceptability of violence
  - c. Proportionality Arguments
    - i. Not grossly out of proportion to severity of crime
- II. 8<sup>th</sup> Amendment "cruel and unusual punishment"

- a. Public Perception determines what is “cruel and unusual”
    - i. Only objective test available
    - ii. 65% of population are in favor of DP
    - iii. Cuts does to 45-50% if given life without parole, family of victims get \$
    - iv. CL mandated DP
    - v. Maintain link between law and society
  - b. Unusual
    - i. Racial Discrimination- violation of 14<sup>th</sup> and 8<sup>th</sup> amendment
      - 1. *McKlesky* (1987) (DP for black man who kills white police officer)
        - a. Professor Baldus Study
          - i. Largest chance for DP is black killing white
          - ii. Black victims are not getting justice
        - b. suggestive evidence, but does not prove anything in his case
        - c. assault to the entire system (POH)
  - c. Against DP:
    - i. Warren Dissent: evolving standards of decency that mark the progress of a maturing society.
    - ii. Affront to human dignity
    - iii. Marshall Hypothesis: People wouldn’t support if they knew what it actually entailed
      - 1. Many maintain their position
- III. Due Process- right to an impartial jury of one’s peers
- a. Death Qualified juries (“Witherspoon excludable”)
    - i. Ask potential jurors if they can impose death if law require
    - ii. Process may lead jury to find guilty in the 1<sup>st</sup> place
    - iii. More conservative/retributive jury
    - iv. More likely to believe testimony of police
  - b. How juries decide
    - i. Aggravating: usually many and broad
      - 1. who was the victim- child, cop, pregnant, prosecution witness
      - 2. circumstances: torture, contract killing
      - 3. who is defendant: history of prior felonies
      - 4. Jury reaction: if DP, usually have to have aggravating
    - ii. Mitigating: mainly, who is defendant
      - 1. age, history of mental problems, duress, disturbance
      - 2. Jury reaction: can find mitigating factors to also be aggregating
  - c. Errors in process itself
    - i. 68% of DP were reversed for serious errors at trial
      - 1. Incompetent attorneys
      - 2. Police misconduct
      - 3. Jurors misunderstanding law
  - d. Evidence of predication of future danger
- IV. Supreme Court Cases ( Trend: slowly cutting back on DP by imposing more standards)
- a. *Furman* (1972) (struck down death penalty statutes as “cruel and unusual”)
    - i. Focus on implementation- arbitrary, capricious, racially discriminatory
      - 1. no guidance given to judges/jury discretion
      - 2. or made it too bright line
    - ii. reserved for the worst, most culpable and heinous killings

1. should look at the individual and circumstances
- iii. States responded by amending their statutes to make them constitutional
- b. Gregg (1976) (found DP constitutional again, based on actions of state legislature)
  - i. look towards objective indicia that reflects public attitude
    1. 35 states re-wrote their statutes
  - ii. emphasis on proportionality and objective criteria of state action
  - iii. Has to have bifurcated procedure: 1) guilt phase 2) sentencing phase
  - iv. Give judicial discretion
- c. *Coker v. Georgia* (1977) (DP disproportionate for Rape)
  - i. Did conduct a proportionality test
    1. but, 8<sup>th</sup> amendment has not proportionality analysis, so have to result to other forms
      - a. Objective test: looking at other states, precedent cases, legislative history, and the actions of other jurisdiction to assess the punishment in relation to the 8<sup>th</sup> amendment cruel and unusual punishment clause
      - b. Subjective Test: what the judges think- utilitarian and retributivist viewpoints to ultimately decide the case
    2. After coker, court focuses on objective analysis

#### **PROSECUTORIAL DISCRETION AND PLEA BARGAINING**

- prosecutor has absolute immunity in deciding who/whether to investigate/charge
- represents society
- goals: ensure innocent are not punished, fair, similarly situated defendants are treated equally
- no one can compel the filing of charges, only prosecutor initiates (HUGE DISCRETION)
- Overcharging: intentionally charging a more serious crime, with a hope that the D will plead lower
- 91% of cases result in a guilty plea
- Ultimate goal: justice. Not winning

Strategy when:

- v. faced with a statute:
  1. Purpose
    - a. Justification- adequately punish ....
    - b. Address R and U
  2. Constitutional issues/ Legality Problems
  3. Mens Rea
- V. Assume 2<sup>nd</sup> Degree then use specific facts to bump up or down
  - a. Give arguments and counter arguments
  - b. Conclusion- say what you think it would be