**Criminal Law I Outline 1 of 2 (Midterm)**

| **Topic** | **Common Law**  | **Model Penal Code**  |
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| **Generally** | Some key jurisdictions are still C-L; California and Federal law, for example. C-L incorporated into statutes.Morality is a feature of the C-L. *Mala in se*: an action that is inherently bad, bad of itself *Malum prohibitum*: an act which is “bad” because it is prohibited | ALI drafted this in the 1950s; in the 1960s many States adopted the MPC in whole or large part |
| **Burden of Production** | This is the amount of proof a P must produce to get the case in front of a jury at all; or that D must produce to get a defense in front of the jury. Must have presented information sufficient to make it more than just a “flip of a coin” for a rational jury to find the D guilty.Almost always, the standard is preponderance of the evidence. Theoretically, a legislature could set it higher.Whether or not the Burden of Production has been met is a matter for the court (a legal decision which can be appealed.) After P makes case, D will generally move for acquittal on basis P did not meet burden of production (therefore, jury cannot consider the charge). (Note: in motion for acquittal made then, jury must be able to convict based on just that portion of the evidence—nothing offered by D.) |
| **Burden of Persuasion** | In proving the elements of the crime, the P bears the burden of persuasion Beyond a Reasonable Doubt (BRD).In a negativing defense (one which negatives one of the elements of the crime), there’s no burden of persuasion on the D; instead, the P must overcome the D’s defense and establish the element BRD.In a collateral defense (one which would result in an acquittal even if the P proved all the elements BRD), the D bears the burden of production. Who has the burden of persuasion, and the level of proof required, can vary widely. Determined by statute or by the court if it’s a C-L defense. In a vagueness or due process defense (which have Constitutional implications), the burden is on the D to establish the defense. It’s a legal decision by the judge, so now burden of proof.Whether or not the Burden of Persuasion has been met is a matter for the trier of fact (jury, or court in a bench trial).  |
| **Challenges to Unclear Statutes** | Constitutional/Due Process:* Void for Vagueness: statute doesn’t adequately describe prohibited conduct.
	+ Ambiguity
		- Ambiguity/terms are vague: lack of intelligibility (what does “loitering” mean?); Note that if terms are vague, there may well be (but doesn’t have to be) a scope problem
		- Scope is not clear: even when terms are unambiguous, there can be a scope problem
	+ Overbreadth (due process doctrine where 1st A rights are implicated, usually): prohibition extends to innocent conduct.
* Ex-Post Facto or Retroactive lawmaking : can apply to *widening* the scope of the statute (or the scope of a legal duty), or, *narrowing* the scope of a statutory defense.
* It is unconstitutional to use a non-rebuttable presumption to establish an act element of an offense.

Sub-Constitutional: * Statutory Interpretation: statutory construction, syntax, etc.
* Legislative history (if/where allowed)
* Rule of Lenity: if, after statutory interpretation and review of legislative history and previous caselaw, there is still an ambiguity, resolve it in favor of the accused. (Courts will sometimes use Rule of Lenity, rather than Ex Post Facto, to avoid Constitutional issues). A Lenity interpretation changes the meaning of the statute generally.

Courts may resolve some of these issues by focusing on separation of powers (institutional competence—who should make this decision, courts or legislature?)Selective Enforcement: Not a challenge to a statute, but to how it is enforced. |
| **Act Elements** | Act elements are real things that happen in the real world. Note that proof of act elements and mental state elements may come from the same evidence.Conduct: an action or an omission of a legal duty* In an omission case:
* Burden of production is on P to establish the existence of a legal duty in the case of an omission (legal ruling by the judge)
* Burden of persuasion is on P to establish BRD that D omitted to perform legal duty, or that the required facts giving rise to a legal duty existed (ex: there was a parent-child relationship). Judge determines if there was a duty as a matter of law.
* Legal duties can be created by statute, legal relationship, voluntarily assumed, contract, creation of risk
* Negativing defenses: there was no legal duty; acting would risk life/safety of self or others; omission was involuntary.
* If perform the legal duty and it all goes south… courts usu. say if you made a reasonable and proper effort, you’re ok.

Attendant Circumstance: something that is objectively observable in the world and not under the control of the defendant (day or night; the presence/existence of another human being)Result: something that is caused (criminal law causation is similar to torts)Recall that it is unconstitutional to use a non-rebuttable presumption to establish an act element (b/c means P doesn’t have to prove BRD). Act element defenses: alibis; I had permission to take car (not: I thought I had permission). |
| **Involuntariness** | Act is presumed to be voluntary in both C-L and MPC. (Do not confuse involuntariness with duress). “Voluntary” means that there is a mind-body connection between the actor and his/her action. In the case of a legal duty, an omission must be voluntary.D must raise involuntariness as a negativing defense (D has burden of production), so P has to overcome BRD on burden of persuasion.Typically ways to argue: reflex action; PTSD; sleepwalking; etc.; habits are not involuntary. (Case where police carried drunk to highway was defended as “involuntary” presence on the highway.) An involuntary omission is one where D is physically restrained.Court may expand the time frame (or trace back) to an earlier, voluntary act in the chain of events that was somehow culpable in itself and which gave rise (in the logical, chain of events) to the “involuntary” act. Ex: epileptic fails to take meds to control seizures; later drives and has accident which kills pedestrians. There are cultural parameters about how far back a court will go. |
| **Concurrence** | P must show that act element and m/s elements occurred at the same time—not enough to show “recklessness” after the moment of the act. Note that sometimes in a “trace back” analysis for involuntariness, it may not be possible for P to show that the crime P wants to charge can be linked to the moment of volition. In C-L: with GI, that is very unlikely to come up, but with SI, it may mean P can’t charge at all. In MPC: may mean P has to charge a lower degree of the crime. |
| **Mental State Generally** | Mens rea: lots of terminology used inconsistently and imprecisely.It’s what the P has to show wrt the social harm covered by the statute.Old fashioned usage: “mens rea” as broad culpability; wickedness.Modern usage: narrow/elemental meaning; attitude D had about the precise social hare in the statute. (Not general wickedness.) Can’t transfer intent from one harm to another.C-L breaks crimes into “general intent” and “specific intent.”Specific intent crimes have:* An intent to do something in the future (ex: to deprive owner permanently of property)
* Special motive or purpose (ex.: with intent to humiliate)
* Actor’s awareness of an attendant circ (ex.: knows victim is under 18)

In a general intent crime, if P proves the act element, plus the inference that people intend the natural/probable results of their actions, that suffices for the P’s case in chief.(That business about a mental state word applying individually to each act element of the offense is NOTHING do to with C-L—only comes up in MPC.) | Four words:* Purposely (conscious objective; aware of attendant circ, or hopes/believes it exists)
* Knowingly (awareness, but not goal orientation of purposely; aware result is “ practically certain”)
* Recklessly (awareness of a risk, but not to extent of a “virtual certainty”)
	+ Where mental state is not stated, P must show at least recklessness. MPC 2.02(3)
* Negligently (lack of awareness of a risk that person should have been aware of)

Showing a higher mental state always suffices to establish a lower one (ex.: if knowing required and P shows purposely, that’s fine). MPC 2.02(5)A mental state word applies individually to each act element of the offense UNLESS they are distinguished by grammar, punctuation, syntax. MPC 2.02(4)4 steps of statutory interpretation (handout 6)1. Identify all act elements (aka material elements)
2. Label each as conduct, attendant circ, result
3. Figure out required m/s for each (MPC 2.02(3-5))
4. Make matrix listing each act element P must prove (1, above) and applying 2.02 (2a-d) to identify exactly what P must prove for each m/s element

Recklessly: * P must prove D was aware for factors that made the risk substantial (subjective inquiry)
* Reasons D had for taking the risk (what D knew) (subjective inquiry)
* Jury’s evaluation is whether D’s disregarding the risks was a gross deviation of the standard of conduct (objective)

Negligently: * P must prove the existence of factors that made the risk substantial (subjective inquiry)
* Look at what D knew (what D knew) (subjective inquiry)
* Jury’s evaluation is whether D’s failure to be aware of the risk violated the standard of conduct (objective)

“Free floating mental states”: Knowingly XYZ “with purpose to commit a crime therein.” Figure out what type of act element is the “purpose” for the free floating mental state (is “commit a crime therein” an Act, Attendant Circ, or Result?) and apply what the m/s requires for that type of act element under 2.02(2a-d). |
| Courts will regularly infer that people intend the natural and probable results of their actions; that they are aware of the laws of physics, how the world works, etc. Actions are circumstantial evidence of mental state; often very strong evidence.Intent can be transferred from one victim to another, but not from one crime to another. |

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| **Mental State: Mistakes of Fact** | General intent: mistake must be honest and reasonable (objectively). Jury’s evaluation of what the RP would think is a stand-alone test, not part of its assessment of whether D’s mistake was honest. Essentially changes the charge to negligence—if P can show objective unreasonableness, that’s it.Specific intent: mistake must be honest | Mistake of fact is a negativing defense. MPC 2.04(1) If m/s is “negligent,” mistake must be reasonable.* D and P will argue about RP as standard—what would RP be aware of

Any other m/s, mistake must be honest.* P will use RP as circumstantial evidence that D is lying about being mistaken.
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| **Willful Blindness** | Most C-L jurisdictions recognize some form of willful blindness to a fact. (Federal courts allow it.) | 2.02(7) says that if a person is aware of a high probability that the fact exists, their knowledge of it is established (if required by the statute) unless they actually believe the fact is not true/does not exist. |
| **Mental State: Mistakes of Other Law** | General intent: For a GI crime, mistake of other law is not a defense. Essentially, encourage people to know the law of the areas in which they operate (taxes, environmental, creditor, corporate, etc.)Specific intent: mistake must be honest (and mistake must be about other law that is relevant to the specific intent of the crime) | Mistake of other law is a negativing defense. MPC 2.04(1). Mistake must be “logically relevant” to a m/s P has to prove in order to be negativing.If m/s is “negligent,” mistake must be reasonable.* D and P will argue about RP as standard—what would RP be aware of

Any other m/s, mistake must be honest.* P will use RP as circumstantial evidence that D is lying about being mistaken.
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| There is sometimes room to argue over whether something is “other” law—ex.: if pollutant is defined in the CWA, is that “other” law from the criminal provisions of CWA? P will argue criminal provisions incorporate other provisions by reference; D will argue admin and criminal provisions are separate (courts accept this most of the time). Doesn’t come up much in practice.Different jurisdictions will take different view of whether a mistake of other law from an outside jurisdiction is allowable as a mistake of other law defense. |
| **Mental State: Mistake of Criminality** | Mistake of criminality is never a defense. Ex.: I thought I would get a fine, not go to jail. No dice. So P never has to prove that D knew it was a crime (unless statute says so specifically). In MPC, because knowledge of criminality is never an element, mistake as to criminality cannot be a negativing defense. MPC 2.02(9). |
| **Collateral Defense in Mistake of Law** | We didn’t cover any C-L examples. Some C-L juris have “entrapment by estoppel.” Works same way as MPC 2.04(3) and (4)D bears burden of production and persuasion. | MPC 2.04(3) and (4) work together to create a collateral defense. Could be for mistake of other law or mistake of criminality.D must show 2.04(3)(a) or (b) applies and meet the burden of persuasion (preponderance) in 2.04(4). |
| **Strict Liability** | There are various meanings of “SL”: 1. Basic: even a reasonable mistake of fact is no defense (ex.: statutory rape)
2. Sophisticated: comes from the 16th c view of *mens rea* for crimes involving a moral wrong. SL could exist w/o mens rea if there were a moral wrong.

SCOTUS allows SL offenses most of the time. Usu. in public welfare offenses. Does not like SL resulting in heavy penalties. | If there is no m/s word, we apply “recklessly.”If legislature wants negligently, it must say so. If legislature wants a true strict liability (even a reasonable mistake as to other law or facts is no defense), it must say something very specific.*Compare* 213.3(1)(d) rape includes sex with child under 10; *and* 213.6(1) mistake as to age below 10 is not a defense. Upshot is strict liability.MPC 2.05 has exception to MPC 2.02 m/s requirements |
| **Moral Wrong; Legal Wrong Doctrines** | D is charged with a crime and offers a reasonable mistake of fact as a defense: If everything was as the D thought it, and it was still morally wrong, he’s guilty of the greater crime (that he was charged with). Transfer of intent—general wickedness.D is charged with a crime and offers a reasonable mistake of fact as a defense: If everything was as the D thought it, and it was still illegal (legally wrong), he’s guilty of the greater crime (that he was charged with). Transfer of intent. | These do not exist in MPC jurisdictions. MPC 2.04(2)  |
| **Cause in Fact** | Same analysis in C-L and MPC MPC 2.03(1)A & B each act independently and simultaneously, but each is insufficient to cause the Result. Cause Result by acting together. Each is a cause-in-fact. (But-For Causation)A&B each act independently and simultaneously, and either one alone is sufficient to cause the Result. Each is a cause-in-fact. (Substantial Factor, aka Modified But-For, Causation)A & B each act independently and simultaneously. A is sufficient to cause the Result, but B accelerates the time of death. Each is a cause-in-fact. (But-For Causation)[A & B each act independently and simultaneously. A is insufficient to cause the Result, but B is sufficient. A is not part of the causal chain] |

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| **Proximate Cause****(Comes up only if there is an intervening cause in fact between the D’s action and the Result)** | Does the intervening cause-in-fact break the chain from D’s voluntary act or omission? Or, is it still fair to hold D accountable for the result?Responsive intervening cause: one which is in response to D’s initial voluntary act/omission. A responsive intervening cause does notdisrupt the causal chain unless it is “abnormal.” Abnormality includes gross (but not regular) negligence of a third party (such as a hospital). Regular/ ordinary negligence is foreseeable. Unlike torts, criminal law does not have a cut-off rule for suicide—it may not be “abnormal.”Coincidental intervening cause: being in the wrong place at the wrong time. Will break proximate cause UNLESS it was foreseeable.If the analysis of Responsive v. Coincidental doesn’t help, courts look to other factors:Foreseeability is the courts’ preferred first line of analysis. Other factors/lines of analysis: was the intervening cause a “voluntary, knowing and intelligent” action by another? Did V reach a place of “apparent safety” and then abandon it? Was the result the “intended consequence” of the D, even if it came about differently? Was the intervening harm more than a de minimis contribution to the social harm caused by the D’s actions? (Ex.: D punches V who heads to hospital and is killed there by ordinary negligence.) | MPC 2.03(2) and 2.03(3)Purposely/Knowingly (2.03(2)):Was actual result “within the purpose or contemplation” of the actor?* If yes, proximate cause is met.
* If not, proximate cause met only if
	+ Only variation was that different person/property was harmed, or
	+ Harm designed/contemplated was worse than actual result, or
	+ Actual result is the same kind of injury as that designed/contemplated and it is not too remote or accidental for it to be [just] to hold actor accountable. (Compare to the result element of the crime.)

Recklessly/Negligently (2.03(3)):Was actual result “within the risk” which actor was/should have been aware of?* If yes, prox cause is met.
* If not, proximate cause met only if
	+ Only variation btw actual result and probable result was that different person/property was harmed, or
	+ Probable harm was worse than actual result, or
	+ Actual result is the same kind of injury as was probable and it is not too remote or accidental for it to be [just] to hold actor accountable.
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| **Common Law** | **MPC** |
| **Mistake of Fact** | **Mistake of Other Law** | **Mistake of Criminality** | **Mistake of Fact** | **Mistake of Other Law** | **Mistake of Criminality** |
| **SI:** Must be honest**GI:** Must be honest and reasonable | **SI:** Must be honest**GI:** No defense | **SI:** No defense**GI:** No defense(May be a collateral defense.) | If m/s is “negligent,” mistake must be reasonable.Any other m/s, mistake must be honest. | No defense(May be a collateral defense.) |