Crim Law Outline

- Purposes of Criminal law:
  - Deterrence
  - Incapacitation
  - Some say rehabilitation
  - Retribution.

- 5th Amendment: To answer for an “infamous” crime, one must be first indicted by a grand jury. (Only applies to federal courts)

- Model Penal Code: Most states have incorporated many/some of the sections.

- Classification of felonies:
  A. Federal definition—crime punishable by imprisonment of more than one year.
  B. State law determines the definition used in relation to state statutes re: rights of felony offenders. (in Melton, it looked at actual punishment given)

- Classifications of Crimes: Felonies, Misdemeanors, Petty Misdemeanors and Violations (not really even true crimes, more of a civil offense).

I. General Principles

A. Actus Reus:

1. Can’t convict someone of a thought crime (there must be an overt act)

2. To be a crime, it must be a conscious (or voluntary) act
   Ex: the epileptic person’s actus reus: consciously drove his car knowing he had the condition. (still must be the mental—gross deviation, tho)

3. MPC: definition of voluntary act (p. 379) MPC Section 2.01.
   “The following acts are not voluntary acts…
   - a reflex or convulsion
   - a bodily movement during unconsciousness of sleep
   - conduct during hypnosis or resulting from hypnotic suggestion
   - a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.”

4. Where the act has been a failure to act:
   a. Where there is no clear evidence of a legal duty of care, a defendant can’t be held liable for omitting said duty.
b. *Situations where a person is usu required to act*:
   i. statute imposes it (ex: taxes, hit and run statutes)
   ii. “status relationship” (ex: parent/child; captain of ship/passengers crew; man/wife)
   iii. Contractual duty
   iv. voluntary assumption of care for another and secluding that person from others.
   v. If defendant created the peril (legal duty of reasonable assistance).
   vi. parental duty to control children.

c. All other parts of the inquiry for the crime are the same. It is just that there is the added thing that there must be a legal duty.

B. **Mens Rea**:

   o In penal statutes, must be *intent of purpose*. Every true crime requires absence of exculpation. **?????ask at review!!!**
      - Ex: Peery case: he had to have intent of purpose (intent to be lewd); Chicago, Milwaukee RR: he had to have intent not to stop.
   o Ct will *read in* a requirement of mens rea in some situations.
   o **Mens Rea**—is crime specific.
   o **Malum prohibitum** crimes generally require no mens rea.

1. **Intent**—either purpose/desire to bring about consequence or knowledge w/ *substantial certainty* that consequences will occur.
   (Always use this definition unless a statute says otherwise.)

2. **Specific Intent**—An intent to do something beyond just the actus reus for that crime.

   a. Crimes that require only *intent to do deed constituting the actus reus*:
      Ex: indecent exposure, RR engineer who didn’t stop, tort prong assault
   b. Crimes requiring intent to do something else (*specific intent*):
      Ex: larceny (intent to steal); forgery (intent to defraud); burlary (intent to commit theft or felony)
   c. Crimes that require only some other mens rea:
      Ex: involuntary homicide; m/s

   d. **Murder** doesn’t fall into these categories.
   e. With **inchoate** crimes, must have intent to do the substantive crime.
      Ex: with Thacker case, drunk guy didn’t intent to kill woman in tent so no attempted murder.
f. Some crimes require intent to do two things: Ex: “assault w/ intent to murder”—requires intent to assault and intent to kill

3. MPC: Doesn’t worry about general/specific intent—just looks at the four categories:

   a. **Purposely**—(p. 700)
   
   b. **Knowingly**—Must be aware or practically certain (p. 700)  
   (See “Knowingly” below)
   
   c. **Recklessly**—Consciously disregards a substantial and unjustifiable risk. (must be a gross deviation)
   
   d. **Negligently**—when s/he should be aware of a substantial and unjustifiable risk. (must be a gross deviation)

   *If culpability isn’t prescribed by law, such element is established if the person acts at least recklessly under the MPC.

3. **Conditional intent**:

   i. Under *common law*, this satisfies specific intent if the conditional statement is *unlawful*. (but still need the mens rea of the crime if more is required) *(Connors)*
   
   (In other words, is the demand a lawful one? If no, there is no negation of the intent necessary for the crime; If yes, then this negatives the intent necessary)

   ii. **MPC** (Conditional Requirement) 2.02(6) (p. 701):
   
   a. “the element is established even if conditional UNLESS”
   
   b. “the condition negatives the harm or evil sought to be prevented by the law defining the statute.”
   
   (In other words, does the purpose of the statute still apply if the condition is met?)

   **EX:** in *Connors* (and in *Hairston*):
   
   a. the intent to kill is established even tho it’s conditional AND
   
   b. the “unless” clause doesn’t kick in b/c the harm or evil to be prevented is the danger of threats or materialization of threats. (threat didn’t disappear b/c the peeps refused to take off overalls)

   **EX:** (where unless clause kicks in) You take book and decide you will bring it back if it isn’t yours—larceny is to prevent *stealing*. 
4. Knowingly:

**Common Law:**
***Normally if a statute says “knowingly” it implies subjective intent test.***

Exception: However, in some statutes where the jurisdictions the question is dealt with differently if it is a crime something like “knowingly receiving stolen property” and then the two views become important:

a. **subjective test** (majority view): If defendant actually knows something, he is held to know.

b. **objective test** (minority view): Would a reasonable person have known?

c. The objective test can be used as a factor to help the jury decide if they believe the defendant in a subjective test jurisdiction.

**MPC:**
MP 2.02(2)(b)(i)—not helpful; MP 2.02(2)(b)(ii)—if you have statute saying you must know conduct will cause a result, then requirement is substantial certainty. (p. 700)

MP 2.02(7)—When knowledge is a matter of fact, you only need be aware of a high probably of its existence. (p. 701)

5. **Strict Liability:** **When will it be read in?** Look at the possible punishment or stigma associated with the crime.

**General Rule:** (UNLESS a statute says otherwise)

a. **mala in se**—requires mens rea.

b. **malum prohibitum**—strict liability (no intent needed)

i. (This comes from Olshefski)

ii. Why? It would be ridiculous to have to prove a mens rea for every malum prohibitum crime (such as parking tickets)

iii. **One exception:** If defendant can prove that compliance would be impossible w/o taking steps which would be unconscionable for the law to ask you to take. (Ex: The guy who was carrying illegal undersized fish, but didn’t know that b/c they were tightly packaged in a way making it too difficult for him to check)

6. **Vicarious Liability:** With some mala prohibita offenses, a person can be held liable for the act of someone else even if s/he doesn’t know about the actor’s conduct. (Ex: some liquor law crimes)
a. **Mens Rea**: Where a malum prohibitum offense didn’t list a mens rea in the statute, and where there is another provision indicating that vicarious liability is intended, then one can be held vicarious liable for a crime w/o the knowledge of the actor’s conduct.

b. **Jail Time?** Sometimes in a vicarious liability situation, a person held vicariously liable can’t be jailed b/c of a due process clause in the Constitution or a state constitution.

c. Some dissent on this, saying people shouldn’t be vicariously liable where they didn’t know the person was doing the crime or that vicarious liability isn’t right all together.

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**E. Mistake of Law:**

1. Mistake of law can be a defense where a mistake of law negates the intent needed for the **substantive crime**.

   a. Ex: Specific intent to steal needed for larceny, but by ignorance of property law, one thinks he is taking what is rightfully his. (Cude)

   b. Mistake of law also OK:
      
      Where one is charged with conspiracy to commit a *malum prohibitum* offense, there must be evidence that the defendant knew of the law and was thus *conspiring* to violate it. (Benesch)
      [But still could be guilty of substantive offense!]

   c. Where one has *no reason to know to inquire* that certain conduct might be *malum prohibitum*, then one cannot be convicted. (Lambert v. CA) (very narrow interp of this case!)

   d. Where one engages in lawful conduct but later a statute gets repealed making such conduct unlawful, most defendants are excused for due process.

2. Mistake of the law as to the elements of the substantive crime, however, is NOT a defense!!! (Ignorance of the law is no excuse!)

   a. Usually not a defense to rely on atty’s advice!

3. **MPC**—treats mistake of law and mistake of fact the same (see below).
F. Mistake of Fact:

1. Edwards categories of crimes:
   (1) Those in which a guilty mind are required. (need mens rea)
       * In a statute, there will be an express mens rea required.
   (2) Those in which an act is absolutely prohibited regardless of mental state. (NO need of mens rea)
       * If statute doesn’t say, then use strict liability test to decide.
   (3) Those in which an act done creates a rebuttable presumption of the required mental state. (need mens rea)
       * In a statute, the mens rea required might not be express.

2. To classify a crime:
   a. Does it require mens rea?
      i. if yes, then it is a category (1) crime.
      ii. if no, then go on to next question.
   b. Is it a strict liability when you apply factors?
      i. if yes, then it is a category (2) crime.
   c. If it could be a (1) or (3) crime, who has the burden of proof?
      i. if the prosecution, then it is an (1) crime.
      ii. if the defendant, then it is a (3) crime.

3. Where something is a category (3) crime, then if one can prove mistake of fact to show that the mental element wasn’t there, then he can be vindicated.

4. General rule (at common law): To be a defense, it must be—
   a. reasonable
   b. honestly entertained (sometimes this is enough by itself)
   c. and conduct wld be lawful if facts were as the person thought.

5. MPC 230.1(1)(d)—w/ bigamy/polygamy, the actor only has to reasonably believe that s/he is eligible to remarry. (Vogel) (p. 847)

6. Statutory Rape and reasonable Mistake (of fact) as to a person’s age:
   a. Majority view: This is NOT a defense. (Cash)
      i. This is b/c of the moral implications—idea that such an act is never innocent.
      ii. public policy of protecting females who are vulnerable.
   b. Minority view: Reasonable mistake is a defense. (Hernandez)
   c. At common law, an honest/reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, is a defense. (Remember in Cash, unmarried sex is not an innocent act.) (see nxt page)
d. Hypo: What if he reasonably thinks he’s married to her, but he’s not?
   i. *Cash et wld probably think it was an “innocent act” then.*
   ii. minority view, it would be ok.

e. MPC 213.6(1) (p. 846) (consistent w/ Hernandez)

7. MPC Provisions (p. 828)—mistake provisions *applying to both mistake of fact and mistake of law!*

   a. “Ignorance or mistake as to a matter of act or law is a defense if:
      (a) the ignorance or mistake *negates* the purpose, knowledge, belief, recklessness or negligence required to estab a material element of the offense
      OR   (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.”

   b. See MPC 2.04(2)—one must determine if the defendant had been correct in his belief, would s/he have been convicted of another crime?  
      * If yes, then no defense, but sentence can be mitigated.

II. Homicide: killing of one person by another (common law)

   • *Corpus Delicti:*
     A. Elements:
        (1) death of victim (2) criminal agency of another
     B. Can only be proven by evidence other than a defendant’s out-of-court confession.
     C. Standard of Proof: Competent evidence tending to establish crime. (not beyond a reasonable doubt)
     D. Do not need a body to establish death. (baby in river case)

   • *Fetus* isn’t a “person” for purposes of homicide statute. (Unless there is express language to the contrary.) (There is some discussion on this)

   • *Year and a day rule*—in order to prosecute a homicide, the death has to occur a year and a day after the injury.

   • *Classifications of homicide:* distinguishing feature—state of mind with which crime was committed.

   • *Death* can be determined by either by brain death or by cessation of life (evidenced by cardiac and circulatory arrest)

Different States of Mind:
   a. *Intent to kill or do gbh*
   b. *Depraved Heart*—recklessness w/ extreme indifference to human life
      Ex: guy shooting into the train *(see nxt page)*
c. **Recklessness**—Conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from his conduct…. Its disregard is a gross deviation from the ordinary standard of conduct.

d. **Criminal Negligence**—Where one should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct….Its disregard is a gross deviation from the ordinary standard of conduct.

e. **Ordinary Civil Negligence**

A. **Murder**: homicide with malice aforethought (common law)

**IS IT MURDER?**

1. See p. 152 for **MPC** definition:
   a. Purposefully or Knowingly OR
   b. Recklessness w/ Extreme indifference to human life. (encompasses both b and c of the m/a definition)
   c. Recklessness is presumed if it involves a listed felony (FMR): “the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.”

2. **Malice aforethought** can be express or implied and is:
   a. intent to kill unless j, e, m.
   b. intent to do great bodily harm unless j, e, m.
   c. depraved heart unless j, e, m.
   d. See Felony Murder Rule.

3. Malice doesn’t have to be directed at one person. *(Banks—train case)*

4. **Recklessness** is a gross deviation from the standard of conduct; **Conscious** awareness of an unreasonable risk (one that is substantial and unjustifiable) (for **MPC**)

5. **Felony Murder Rule**:

   *Steps for dealing w/ this question:*
   (1) Is the felony covered?
      a. CA test—“inherently dangerous” (majority of states)
      b. Other states/MPC test—is it on the list? [see statute or MPC 210.2(1)(b)]

   (2) How close was the connection btwn the felony and the death?
      a. CA test—part of one continuous transaction.
      b. PA test—conduct causing the death was in furtherance of the felony *(see next page)*
(3) Is the felony independent? (applies in most jurisdictions)

- Something is not independent if in order to prove defendant killed victim, you also must prove defendant committed the felony (See hypos in notes 2/14/01)
- Mostly the specific case facts are looked at but some jurisdictions look at abstract felony when using this test.
- The purpose test: Was the purpose of the felony to cause death or gbh? (except for rape, which many times is included in FMR, anyway)
  a. if yes, then it is NOT independent
  b. test applies to both 1st degree murder and 2nd degree

(4) If the felony is covered, there is a connection btwn it and the death, and it is independent (where needed), then...

a. in CA, it is murder.
   * depending on what the statute in the state says it is either first or second degree (statutes will list the FMR as a 1st degree if they want it there)
   b. in the MPC, it is a rebuttable presumption of recklessness. (burden on Δ)
   *Can Δ show there was no recklessness w/ extreme indifference to value of human life? (usu not).

6. J, E, M:
   a. Justification: Effect is that one is not guilty. (Example: Self-defense is when one thinks reasonably that one’s life is in danger.)
   b. Excused: Effect is that one is not guilty. (Insanity, e.g.)
   c. Mitigated: (Example: if one unreasonably believes one’s life is in danger. Also, provocation)
     - Words alone cannot be provocation!
     - Provocation should be objectively and subjectively determined. (Ordinary person would have lost self control + subjective loss of control) (heat of passion)
     - Sometimes words of information are provocation (adultery, e.g.); where it is actually discovery of act which incites the passion.
     - Provocation over a period of time is sufficient at times: cumulative passion w/ straw that broke the camels back.

IS IT 1ST DEGREE MURDER OR 2ND DEGREE MURDER?

1. There must be an appreciable space of time either before the intent to kill was formed or btwn the intent to kill and the killing. (To show that consequences were weighed/considered under the Cornett rule)

2. “Willful deliberate, and premeditated” (these three things together for Legomsky mean a “fully formed plan to kill.”) most always means Murder in the 1st!!! (This can occur in a split second—Drum) see nxt pg
3. Some say there must be a weighing and considering of the consequences for **Murder in the 1st**, but this can happen in a matter of seconds. One second, tho, probably isn’t enough. (Cornett)

4. Also **1st degree** are: lying in wait, poison, or torture.

5. Typically, murder statutes say what is in the 1st degree, and everything else is murder in the 2nd.

6. In most states, capital punishment is limited to murder in the 1st.

7. **MPC** doesn’t distinguish btwn 1st/2nd degree murder.

B. **Manslaughter**: unlawful homicide w/o malice aforethought (common law)

**IS IT MANSLAUGHTER?**
1. Murder + mitigation (honest but unreasonable belief life is in danger, e.g.)
2. Manslaughter from the bottom up: recklessness or negligence depending on the jurisdiction.
3. States w/o involuntary (negligent) homicide, criminal negligence can lead to a manslaughter charge.
4. Where a jurisdiction has both M/S and N/H, then recklessness = M/S and negligence = N/H. (This is most states)
5. A very small group of states says civil negligence = M/S

**Misdemeanor manslaughter rule:**
   a. A killing is occurs during the commission a *malum in se* offense that isn’t murder.
   c. Jurisdictions MMR, it gives rise to is *involuntary manslaughter*.
   d. (Rule gets more criticism than FMR)
   e. Ct should give definition of Manslaughter in jury instructions for MMR sua sponte (w/o request by an attorney)

3. Under the **MPC**, a manslaughter is a: (Section 210.3, p. 153)
   a. reckless killing OR
   b. “homicide, otherwise a murder, but which is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.”
   (Reasonableness is viewed from the circumstances as the Δ subjectively believes them to be)

(see next page for Voluntary and Involuntary!!!)
IS IT VOLUNTARY OR INVOLUNTARY:
1. **MPC** doesn’t differentiate btwn diff types of manslaughter
2. **Involuntary manslaughter:**
   a. Majority view—manslaughter not resulting from mitigation. Ex: (MMR, negligence/recklessness)
   b. Minority view—M/S without intent to kill
3. **Voluntary manslaughter:** (at common law)
   a. Majority view—any m/s that results from mitigation.
   b. Minority view—any m/s w/ intent to kill + mitigation.

C. **Negligent Homicide:**

1. **criminal negligence**—involves a high probability of harm. (In other jurisdictions this would be M/S)
2. Some states have “vehicular homicide.”
3. Where there are both M/S and N/H, then recklessness = M/S and negligence = N/H.
4. In a minority of states, civil negligence = N/H.
5. An unreasonable belief of life in danger = negligence in some jurisdiction (craps game case).
6. Under the **MPC**, criminal negligence = N/H.

III. Assault:

**COMMON LAW:**
- Normally if there is a battery, there has been an assault, too, but not always.
- State of mind required = **criminal negligence**. (Others, like **MPC**, say **recklessness** required)
- At common law, assault = attempt to commit a battery
- Tort definition = intent to cause harmful/offensive contact or apprehension of such contact, where an imminent apprehension occurs.

- Criminal assault (3 different views):
  A. (1) attempt at battery OR (2) reasonable apprehension of harm (tort def). [This is the majority view.]
  B. Attempted battery (minority view)
  C. Attempted battery w/ present ability (minority view) (see hypos 2/26/01)

- There can be transferred intent in criminal law (from person to person).
- Cts are hesitant to say “attempted assault.”
- Most unusual approach to assault: Some cts say every battery includes an assault no matter what.

(see next page for MPC stuff here!!)
MPC:

- Assault and battery are both dealt with under assault:
  1. Simple Assault—MPC Section 211.1(1) (p. 173) If...
     (a) he “attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another, OR
     (b) negligently causes bodily injury to another w/ a deadly weapon; OR
     (c) attempts by physical menace to put another in fear of imminent serious bodily injury.
  2. Aggravated Assault—MPC Section 211.1(2) (p. 173) If...
     (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life: OR
     (b) attempts to cause or purposely or knowingly causes bodily injury to another w/ a deadly weapon.
  3. Recklessly Endangering Another Person—MPC Section 211.2, p. 173 Misdemeanor.
     - If he recklessly engages in conduct which places or may place under another person in danger of death or serious bodily injury.
     - Recklessness/danger presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

- Main variables of assault/aggravated assault:
  1. serious bodily injury v. injury.
  2. causing harm v. attempt to cause harm.
  3. 4 states of mind (purposely, knowingly, recklessly, (crim) negligently)
  4. Use of deadly weapon v. no use

- See Hypos from Banks (train shooting) case in notes 2/26/01 and applications to Jacobs (Native American shoots guy who know he’s about to get shot.) case in 2/27/01 notes.

IV. Battery

- **Common law**: unlawful application of force to the person of another.
- **Mens rea**: criminal negligence.
- **MPC**: See “assault” information—it will be under “simple assault” or “aggravated assault.”
V. Inchoate Crimes:

1. *Conspiracy:* (at common law, an agreement for an unlawful purpose)

   a. Purpose:
      Must have a group to be guilty, b/c groups increase danger of crimes and people are less likely to abandon a criminal purpose in groups.

   b. Punish even tho no harm actually occurred, to prevent such conspiracy in the future by the perpetrators or by others.

   c. Changes in conspiracy law brought about by statutes:
      i. Most (or all) statutes require that you *conspire to commit a certain offense.*
      ii. Also most require *some overt act* in done in furtherance of the conspiracy.
         a. an overt act can be committed by any conspirator
         b. ANY overt act counts (doesn’t have to be a major act)

IS THERE A CONSPIRACY?

*Common Law:*
   a. Agreement for an unlawful purpose.
   b. Overt Act

*MPC:*
   a. See definition 5.03(1), p. 473.
      “If, with the purpose of promoting or facilitating its commission he:
      (a) agrees w/ such other person(s) that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime, OR
      (b) agrees to aid such other person(s) in the planning or commission of such crime or of an attempt or solicitation to commit such crime.”
   b. See overt act  5.03(5), p. 474.
      Must have an overt act except “ a felony of the first or second degree.”

*You can be convicted of a crime committed by the conspirators even tho you have renounced the substantive crime in some cases—see renunciation.*
WHEN CAN’T YOU BE GUILTY AS A CONSPIRATOR?

*Common Law:*  

a. *Wharton’s Rule:* Where a substantive crime requires participation of two or more people, then a defendant cannot be found guilty of conspiracy to commit the crime. Ex: dueling, incest, bigamy

   *Now in FEDERAL JURISDICTION, Wharton’s Rule is a rebuttable presumption that legislature meant not to punish conspiracy. *(This is true in some states as well)*

3 exceptions:  

i. When the offense could be committed by one of the conspirator’s alone (this is just the converse of the rule itself).

ii. When concerted action is not logically necessary even tho as a practical matter the offense could not be committed w/o cooperation. *(this isn’t an exception either!!—just a clarification)*  

(Ex: 2 business partners conspire to file fraudulent tax returns, but only one guy was the brain and the other signed it.)

iii. *“third person” exception:* A and B can’t be charged w/ conspiracy to adultery, but if matchmaker, C, is involved, all three can be charged with conspiracy to commit adultery. There is a split of opinion—  

   a. Majority view: Wharton’s Rule is inapplicable if # of persons actually involved is greater than the number required by the statute.
   
   b. Minority view: Third person exception is limited to where some defendant plays a logically unnecessary role (not required by the statute). *(then all three can be convicted of conspiracy in the adultery hypo)*

b. *Gebardi rule:* No conspiracy including a particular person if:  

   i. the substantive offense frequently involves consent of the particular person, and
   
   ii. the person is not guilty of the substantive offense.

   
c. Where a person sells an item thinking such will be used in a criminal venture:  

   i. *Backun rule:* more serious target crime, you can be guilty *(such as selling a gun to someone you know will kill another with it.)*
   
   ii. *Falcone rule:* less serious target crime, you must have a stake in the criminal venture to be guilty of conspiracy.

   *(see next page for more on Conspiracy!!)*
d. Conspirators who do not participate in the doing of the substantive crime:
   i. Federal view and Minority state view:
      Every conspirator will be guilty of every substantive crime committed in furtherance of the conspiracy and which is foreseeable—regardless of his/her actual participation in the doing of the substantive crime. (Pinkerton)
   ii. Majority state view (and MPC):
      Can’t be guilty of the substantive crime just b/c it was foreseeable and committed in furtherance of the conspiracy. (It must be part of the conspiracy itself)

MPC:
   a. Rejects Wharton’s Rule.
   b. Under the MPC, can’t be convicted of conspiracy and the substantive crime.
   c. Agrees w/ the majority state view on conspirators who don’t participate in the target crime.

2. Attempt:
   a. attempt requires:
      i. intent to commit a crime.
      ii. substantial step toward its commission. (dangerous proximity of success)
   b. With a trivial crimes, you’re less likely to turn back so not as meticulous about requiring dangerous proximity. (like the barber)
   c. Most courts say “lying in wait” is enough to constitute dangerous proximity, but just gathering the tools together to commit it is not enough.
   d. Must be so near accomplishment that in all reasonable probability the crime itself would have been committed but for the timely interference of something else.
   e. Impossibility (assuming s/he has gone far enough for an attempt):
      i. Depends how defendant’s “intent” is framed in common law (do both common law AND MPC on the EXAM)
      ii. If defendant accomplished everything s/he intended to do, would s/he be guilty of substantive crime?
         1. if yes, then NO impossibility defense.
         2. if no, then there IS an impossibility defense.
Mitchell example (guy shoots into bedroom)
i. If intent is framed as intent to hit the object at which he shot, then no impossibility defense.
ii. If intent is framed as intent to kill X, then impossibility defense can be allowed b/c killing X was impossible as he wasn’t in the room.

Rojas example (“stolen property” in police custody)
i. If intent is framed as intent to receive stolen property, then no impossibility defense.
ii. If intent is framed as intent to receive THIS property, and so they did and still not guilty of the crime, then impossibility defense.
(under the MPC, he can be guilty)

Oviedo example (white powder sold as “heroine”)
i. If intent is framed as intent to sell heroine, then no impossibility defense b/c he did all intended to do and still would be guilty of crime.
ii. If intent is framed as intent to sell the substance, he succeeded and still wouldn’t be guilty of the crime, so he has an impossibility defense.

Preddy example (impotent old man case)
i. If he had accomplished his intent of penetration, he would have been guilty of rape so NO impossibility defense.
ii. Contrasts w/ Boy under 14 who legally can’t commit a rape even w/ penetration. (so impossibility defense)

g. MPC p. 414-5 for attempt:
i. 5.01(1) general attempt + impossibility:
   (a) “purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believed them to be OR” [Oviedo, Rojas, NO on Wilson forgery case]
   (b) “when causing a particular result is an element of the crime, does or omits to do anything w/ the purpose of causing or w/ the belief that it will cause such result w/o further conduct on his part, OR” [Mitchell bed shooter, Y puts poison in X’s coffee but X never shows up]
   (c) “purposely does or omits to do anything, which under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.” [Preddy, NO on boy under 14 law]
(Impossibility—not as broad as in common law—it is easier to establish under the MPC)
(Under the MPC, what matters is how you believe the circumstances to be)

**ii. 5.01(2) substantial step (must strongly corroborate the intent)**
   a. broad interpretation of substantial step in the MPC
   b. MPC lists several fact situations, and if the facts are as listed and it strongly corroborates the intent, then it won’t be held insufficient as a matter of law (so jury can determine).

**iii. See chart in 3/29/01 notes.**

**h. Attempted Assault?** Look at law’s definition of assault:
   i. If a law defines assault as an attempted battery w/ present ability, then an attempted assault is an attempted battery w/o present ability.
   ii. If a law defines assault as an attempted battery, then there can be no attempted assault.
   iii. If a law defines assault as either an attempted battery or the tort definition, then most places would say no attempted assault (even under the tort definition).

**3. Solicitation:**

**Common law:**
(1) One requests or encourages another to commit a criminal act—It doesn’t matter if the latter agrees.
   a. in some jurisdictions, any crime counts.
   b. in other jurisdictions, only some crimes count.
(2) intent for the person to do the crime.

a. In order to be convicted of solicitation, the offense DOES NOT have to be carried out, NOR substantial steps taken toward its commission.

b. Problems:
   i. What if a statute punishes a prostitute but not the client, and the guy actually propositions the prostitute? Still he’s not guilty b/c the legislature didn’t intend to make him guilty as evidenced by the statute. [Like w/ Gebardi]
   ii. Bribery statute which punishes a public official receiving a bribe or the person who bribes a public official: then the briber can be guilty of solicitation even if the official says no, b/c legislature intended both to be possibly guilty.

*(see next page for more on Solicitation!!)*
c. If one solicits a crime and the other commits the crime, both are guilty of the substantive crime and the former is also guilty of solicitation.

d. If X solicits another to do an action which the other does not know it is a crime, then X is not guilty of solicitation. (But probably would be guilty himself of an attempted crime.)

MPC: See Section 5.02 (p. 415)

4. Abandonment:

a. Attempt: When one forms the intent to commit a crime and then takes a substantial step toward its commission, he is guilty of an attempt even if he abandoned the commission before its completion.

b. Substantive crime: A person is not guilty of the substantive crime when s/he withdraws before it occurs.

c. Solicitation: Abandonment is usually not a defense.

d. Under common law, once you’ve gone far enough to commit the substantive or inchoate crime, renunciation is no defense.

e. Under MPC 5.01(4): Renunciation must be complete and voluntary.

i. It is NOT complete if it is motivated by a decision…

a. to postpone the criminal conduct until a more advantageous time

OR

b. to transfer the criminal effort to another but similar objective or victim.

ii. It is NOT voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor’s course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose.

f. MPC: Renunciation is a defense to all three of the inchoate crimes.

i. for renunciation of conspiracy is 5.03(6) p. 474

ii. for renunciation of solicitation is 5.02(3) p. 415.

iii. for renunciation of substantive crime is 2.06(6)(c)—you must actually succeed in thwarting the crime.
5. Merging of Crimes:

a. Merger:
   i. in some jurisdictions, this means you can’t be convicted of both crimes.
   ii. in other jurisdictions, this means you can’t be convicted of both crimes OR A alone. (only charge is B). (Ex: Attempt must be a failure to do the substantive crime.)

b. Common law approach:
   i. solicitation merges into everything (attempt, conspiracy, subst crime)
   ii. attempt does NOT merge into conspiracy (can be convicted of both)
   iii. attempt merges into the substantive crime. (Can’t be convicted of both)
   iv. conspiracy does NOT merge into substantive crime (can be convicted of both).
   v. conspiracy never merges.

c. MPC approach:  5.05(3) p. 416; NOTHING MERGES.
   i. can’t be convicted of more than one inchoate crime in connection w/ the target crime.
   ii. can’t be convicted of both the inchoate crime and the target offense.

6. Aiding/Abetting:

a. You are guilty of a crime if you perpetrated the crime yourself or if you helped/encouraged someone else to do it. Aiding/Abetting = substantive crime (even if you’re aiding in an attempt).

b. Accessory after the fact is treated differently: Not a party to the substantive crime, you’re guilty of obstructing justice, or the like.

c. Can’t be accessory after the fact to a misdemeanor in some states (other states and the MPC hold the opposite way).

d. Can’t be guilty of accessory after the fact, where the defendant aids the perpetrator of the crime and stops aiding before the crime is completed.

e. Three elements of accessory after the fact:
   i. principal felon committed the murder.
   ii. the accused knew that such a felony had been committed by the principal. (see next page for third requirement and more!!!)
iii. the accused received, relieved, comforted, or assisted the principal felon in some way to help him escape, or to hinder his arrest, trial or punishment.

f. Even if someone is incapable of committing the substantive crime himself, he is still guilty if he aids or abets someone who commits the crime.

g. MPC 2.06(5) p. 509. and 2.06(6)(c) LOOK AT! (p. 509) To terminate your complicity, you must terminate it prior to the commission of the offense AND:
   i. negate effects of your complicity
   OR ii. calling the authorities OR make proper effort to prevent the crime.

See MPC Section 242.3 (p. 510) for Hindering Apprehension/Prosecution

h. Under the MPC if you aid/abet someone wrongly accused, you still are guilty b/c you hindered the prosecution of the individual.
Definitions:

*Indictment*—accusation by a grand jury (at prosecutor’s request)

*Presentment*—grand jury comes up w/ charge on its own (used rarely today)

*Capital Crime*—punishable by death

*Infamous Crime*—Possible punishment is the test. (Hard labor is infamous.)

*Stare Decisis*—

*Reverse*—appellate court does to decision in same case.

*Overrule*—Ct overrules another case from its own ct.

*Disapprove*—Ct overrules a case from another court.

*Malum in se*—wrong in an of itself.

*Malum prohibitum*—wrong which is prohibited (licensing statutes, e.g.)

*Writ of Habeas Corpus*—Person alleges unlawfully deprived of liberty.

*Sua Sponte*—on one’s own.

*Res Gestae*—facts that occurred and surrounding facts.

*Criminal Negligence*—gross deviation from the ordinary standard of care—requires more than ordinary civil negligence.

*Recklessness*—differs from criminal negligence b/c it is a conscious disregard of a risk.

*Reductio Ad Absurdum*—If you say A, then B. B is absurd. Therefore, you should reject A.

*“A foriori” argument*—A is true, A > B, therefore B is true. (Used to show why a different case s/ different facts and issues makes your argument even stronger.)

*Plain Error*—so import to fundamentals of justice that to let it go just because an atty didn’t do his/her job wouldn’t be right. Usually things that are extremely obvious.

*Mens Rea*—Crime specific

*General Mens Rea*—The intent to do a deed constituting the actus reus—cuts across the whole spectrum of activity (that element needed for all crimes)
Statutory Interpretation:

*Literal plain meaning*—if language is clear, follow it literally. (not big today b/c it’s not very realistic.)

*Golden Rule*—same as literal plain meaning, except only follow if it’s not absurd.

*Social purpose*—Identify purpose of statute and interpret accordingly.

When using social purpose approach, this is the order in which to best discover the purpose:
(1) Statute Itself (title, placement amongst others, and some state the purpose)
(2) Legislative History (esp. committee reports) (problems: legislators have different purposes)

Also:
(a) Where there is a list and then a general term, ct will assume general term is similar to listed items.
(b) Penal statutes should be strictly construed.
(c) Express mention, implied exclusion rule
(d) Special statutes take precedence over general statutes.
(e) Words take meaning from their whole context.
(f) Terms of Art have their technical meanings (“substantially certain” in torts, e.g.)

Further:
(1) When changing an established rule, courts generally want clear evidence of legislative intent to do so.
International Criminal Law:

I. **International law**—Law that determines how states must act to resolve conflicts between and among other states. (legal effect varies depending on if you are in the int’l plane or the domestic plane)

   A. Newer Expansions:
      i. disputes between a state and a group of states
      ii. now recognizes duties (rights) created to individuals (not just states)

   B. Legal Status of International law in the US:
      i. If brought in a US court, must look at US domestic law to see which law is to be applied.
         1. if it specifies US law, then it will be used.
         2. if it specifies Int’l law, then it will be applied.
         3. if it says French law, then it will be applied. (adjust as needed)

   C. **Sources of International Law:** (Listed in hierarchical order—except certain norms of customary int’l law trump int’l agreements—a.k.a. *jus cogens*)
      i. International Agreements—agreement between/among states or associations of states. To become legally enforceable, must be signed and ratified by each country.
         a. Supreme CT has held that a US Treaty is on the same plane as a US Statute and later law in time trumps earlier treaties/statutes.
         b. bi-national treaty has 2 states; multi-national has several states
         c. *convention*—lots of states.
         d. *protocol*—treaty to amend an existing treaty
         e. *Treaty Under US law*—President must enter into it and 2/3 of the Senate must agree also (as mandated by the Constitution).
         f. How to interpret treaties: *Vienna Convention on the Law of Treaties* (1969)—almost all countries signed except the US (but by customary law most are bound now on this):
            i. if the meaning of something in a treaty is contested—go by the ordinary meaning of terms in their context and in light of the treaty’s object and purpose.
            ii. *Working papers* (travaux preparatoires)—like a legislative history—allowed to use such papers ONLY for:
               1. confirming the language of the text
               2. to resolve ambiguous/obscure terms,
               3. to avoid results that are manifestly absurd or unreasonable.
ii. Customary International law—even if not agreed upon explicitly, b/c of implicit agreement of norm:
   a. must be general/consistent practice of states following a norm AND
   b. they are following it out of a sense of legal obligation.


II. Nuremberg Tribunal:

A. Historical Background:
   i. after WWI, major allied effort to detain and try German war criminals, but it ended up letting Germany itself try the criminals. Only 12 went to trial, only 6 convicted and they had VERY light sentences.
   ii. after WWII, allies could have let each ally try criminals in their own courts, but they set up a multi-national tribunal at Nuremberg.
      a. pros: all tried by same law, sends a message, speedy/efficient, more credibility.
      b. cons: complications of setting this up

B. Purpose:
   i. deterrence (general deterrence)
   ii. retribution
   iii. making a statement

C. Scope of the IMT (Nuremberg):
   i. Article 6: can only try war criminals of the Axis powers.

D. What gives the allied powers the right to set up the tribunal?
   i. the US alone could do it, so why not int’l…
   ii. the US alone could do it b/c the crimes of which the criminals were accused were INT’L crimes. (“universal jurisdiction”)

E. These were not new crimes, but Ct says there were existing crimes. Anyway, the are crimes which humans know are wrong (like mala in se crimes)

G. They are punished even if following orders, but this gave mitigation.

H. UN Resolution 95—codified the rules of law of Nuremberg.

I. Criticisms of Nuremberg:
   i. Victor’s Justice

III. Tokyo Tribunal:
A. US Govt told MacArthur to try the criminals in 1946 (and other allies joined in)
B. Japan accepted this as part of its surrender—all 25 were convicted (more accomplished than w/ Nuremberg)

IV. Other WWII tribunals:
   A. Allied Control Council—governed post-war Germany
   B. “Law 10”—authorized each commander to set up judicial tribunals (the US had 12 trials and was the most successful)

   (next serious int’l tribunals after Nuremberg):
   A. Goals of ICTY: General Deterrence, punishment, compensation and rehabilitation, restoration of the public order, reinvigoration of the international and national rule of law, preservation of collective memory, National reconciliation.
   B. It is not realistic to expect the same result of “no peace w/o justice” (from Nuremberg) w/ ICTY. Yugoslavia wasn’t decisive like WWII.
   C. Problems of absence of a military victory:
      i. compensation/rehabilitation is a problematic goal b/c
         a. witness are afraid of retaliation and won’t testify
         b. no documentation of the crimes so need witnesses.
   D. Only getting “small fry” criminals, but this isn’t a problem b/c these “small fry” people would be mass murderers/rapists in the US!
   E. Deterrence is an important symbolic goal being served. (but it is better served by the individual smaller tribunals in states)
   F. Yes, it is selective—there are time constraints of ct’s jurisdiction, but at least we are getting some people.
   G. The adversarial procedure in the court ends up tearing people apart again instead of reconciling them.
   H. First final case—Tadic—There were constitutional type arguments brought up at trial like “what gives you the right to try him?” but he was found guilty and sentenced to 20 years.
   I. ICTR—located in Tanzania. Has jurisdiction over not only stuff in Rwanda but stuff committed by Rwandans in neighboring states. (unlike with ICTY)
      i. jurisdictional limitation of time: calendar year 1994.
ii. 125,000 suspects—this is problematic—many being tried in tiny Rwandan courts in mass trials which is rough and ready justice.

VI. Proposed permanent tribunal: ICC
   A. US has signed on but has NOT ratified.
   B. Requires 60 countries which should be possible within the year.
   C. Would have generic jurisdiction all over the world.
   D. What crimes are covered? See H-O 2, pp. 36-40. Note the differences depending on whether the conflict is int’l or is a civil war.

VII. Crimes:
* Remember: There is a difference btwn defining crimes and defining a tribunal’s jurisdiction.
   A. Main Sources are the Geneva Conventions (now customary intl law):
      1. 1864—dealt w/ humane tx of sick/wounded soldiers on land.
      2. 1906—dealt w/ humane tx of sick/wounded soldiers at sea.
      3. 1929—dealt w/ prisoners of war.
      4. 1949—dealt w/ civilian population:
         a. Step 1: Does Art 2 or Art 3 apply? (p. 49)
            i. Art 2: deals w/ armed conflicts or war in occupied territories. If Art 2 applies, the WHOLE convention applies.
            ii. Art 3: deals w/ civil war. If Art 3 applies, then only some provisions of the convention apply.
         b. Step 2: Are the persons protected by the Convention?
            See Article 4 (H-O 2, p. 50)
         c. Step 3: Look at what happened to see if violations occurred.
         d. look at p. 58 at Article 147 for what constitutes a “grave breach”
      5. 1977—two protocols extended the convention. (US didn’t sign these):
         a. one amends int’l conflicts by expanding the definition of “intl conflict” (colonial groups considered int’l groups) and expands conduct prohibited (forced starvation and no indiscriminate attacks on civilian population, e.g.)
         b. the other amends non-int’l conflicts and expands conduct prohibited as in the first one and adds no apartheid.

B. Hague Conventions (1899 and 1907) prohibit certain methods of war. (now part of customary int’l law)

C. War Crimes—any violation of laws or customs of war (any conventions or customary intl legal norms).
   1. hostage taking—taken and kept alive (to deter future acts and to keep other citizens in good behavior)
      a. Ct in List says this is OK provided some conditions are met.
2. **reprisal**—killed in retaliation for killing of soldiers by someone else.
   a. Issue in List: conditions for taking innocent civilians of occupied territory as a guaranty against attacks by *unlawful* resistance forces and then to execute these innocent citizens. **(List handed down before 4th Geneva Convention!!)**
   Ct holds:
   i. if time, get permission from a ct marshal beforehand.
   ii. last resort condition (see p. 44, H-O 2 for other options)
   iii. population generally has to be actively or passively involved.
      a. what is the population? Nationality and geographic proximity can be enough according to the ct.
      b. what is it that they have to do??
   iv. must give a warning to the population
   v. # of innocents can’t be excessive in relation to the offense.
   vi. must hold a trial unless there is not enough time.
   vii. motive must be military necessity.

3. **Look at Geneva Convention 4 and at the ICC statute.**

4. **US legislation:** *War Crimes Act* (p. 59)—makes war crimes punishable under US domestic law.
   a. must be a “grave breach” of the Geneva Convention
   b. victim or person committing must be a US national or member of the US armed forces.

D. **Crimes Against Humanity**—

1. **Nuremberg Charter** (p. 60) 2 prongs:
   a. committed *against any civilian population*, before or during the war,
   b. or persecutions on political, racial or religious grounds in execution of or in connection w/ any crime within the jurisdiction of the tribunal.
   c. The tribunal took a restrictive view of the prongs that “in execution of…” modified the whole statement. ????
   d. wanted to get just the “big fish” so take restrictive view

2. **Control Council Law, No. 10** (p. 60): “war” not even mentioned so it dispenses w/ that requirement. (broader individual jurisdiction but smaller territorial jurisdiction).

3. **International Law Commission (ILC—UN Think Tank):** Codified the Nuremberg idea of crimes against humanity. The statute was passed by the Security Council.
4. **ICTY**: (p. 63)
   a. requires an “armed conflict” (so more restrictive than Nuremberg’s “before or during the war.”)
   b. must be “directed against”—so you must intentionally target to be held guilty (more restrictive than Nuremberg)

5. **ICTR**—didn’t contain “armed conflict” language, but almost all of the killing did occur during armed conflict.

6. **ICC’s definition**: (p. 34-6)
   a. no war required.
   b. requires widespread/systematic
   c. persecution prong, Art 7(1)(h): doesn’t include armed conflict.

7. **Customary Int’l law** doesn’t require armed conflict. (says an ICTY in dictum)

8. gender: most persecution definitions do not include it.

9. **No US statute** makes crimes against humanity a crime in US domestic law.

**E. Genocide**

1. Some see this as a side category of crimes against humanity (but this can only be the case if you believe that CAH can happen both in war AND in peace)

2. **1948 Genocide Convention** (p. 70):
   a. requires actus reas (multi-prong in p. 70-1)—doesn’t require killing.
   b. requires mens rea: “intent to destroy, in whole or in part,…”
   c. four groups covered: nat’l, ethnic, racial, and religious.
   d. those NOT protected: gender, social, and political.
   e. Article 5: Not a self-executing treaty—requires states to pass legislation to provide for prosecution or extradition, etc.
   f. Once US makes a statute, the cause of action is then one brought under its domestic law.

3. It isn’t a defense to say you were a part of the group being targeted.

4. Doesn’t matter whether or not the targeted group is a minority.

5. **The US and the Genocide Convention**:
   a. After 38 yrs, it was ratified in 1986, but
b. so much was added as to nullify its effect. (see p. 73).
c. US apprehensive about US soldiers being brought up on charges and also about giving up any sovereignty!
d. US doesn’t like the provision that disputes btwn contracting parties go before the ICJ. (so US says that it must “consent” before it will go)

6. US stipulations on the convention:
   a. Reservations:
      i. ICJ jurisdiction (must consent)
      ii. Way in which int’l law reacts w/ Con law.
   b. Understandings:
      i. interprets “intent” to be “specific intent to destroy in whole or in substantial part”!
      ii. mental harm means “permanent mental impairment.”

7. Actual implementing legislation: (p. 74)
   a. defines “substantial part” numerically!
   b. jurisdiction: must have been committed on US soil or be committed by a US national! (This violates the treaty, which requires us to punish [by prosecution or extradition] any genocide offender within its borders)
   c. § 1092 (p. 75):  state and local laws on genocide? depends on what “proscribed by this chapter” is interpreted to mean.

8. ICC Statute (p. 34)!!!

Definitions:

*International crime*—created by international law

*Transnational crime*—created by domestic law but int’l actors (drug trafficking)

*Universal Jurisdiction*—every state has jurisdiction to try a person for an international crime.

*Reservation*—an express exception.

*Understanding*—purports to be an interpretation (but there is a fine line btwn reservations and understandings in reality)