TABLE OF CONTENTS

I. GENERAL IDEAS AND DEFINITIONS .................................................................................................5
   A. TERMS ...........................................................................................................................................5
   B. INFAMOUS CRIME ........................................................................................................................5
   C. CLASSIFICATION OF CRIMES .....................................................................................................5
      ii. Model Penal Code: three classifications ..............................................................................5
      iii. Main Classifications ............................................................................................................5
   D. THEORIES OF PUNISHMENT .....................................................................................................6
   E. EX POSTO FACTO LAWS ...........................................................................................................6
   F. STATUTORY INTERPRETATION OF CRIMINAL STATUTES ...................................................6
   G. IMPORTANCE OF STARE DECISIS ...........................................................................................7

II. MENS REA ........................................................................................................................................8
   A. GENERAL .......................................................................................................................................8
   B. TERMINOLOGY ............................................................................................................................8
      i. Maliciously .................................................................................................................................8
      ii. Intentionally ............................................................................................................................8
      iii. Negligently ...........................................................................................................................8
      iv. Willfully ...................................................................................................................................8
   C. GENERAL V. SPECIFIC INTENT CRIMES ..................................................................................8
   D. MPC APPROACH § 2.02 ................................................................................................................10
      ii. Purposely ................................................................................................................................10
      iii. Knowingly .............................................................................................................................10
      iv. Recklessly ..............................................................................................................................11
      v. Negligently ............................................................................................................................11
   E. DETERMINING THE MENS REA OF A CRIME .........................................................................11
   F. STRICT LIABILITY .......................................................................................................................12
   G. MALA PROHIBITA V. MALA IN SE ............................................................................................12
   H. RESPONDEAT SUPERIOR ...........................................................................................................13
   I. CASES ..........................................................................................................................................13

III. ACTUS REAS ..................................................................................................................................14
   A. GENERAL ......................................................................................................................................14
   B. POSITIVE ACTS ..........................................................................................................................14
      iii. MPC involuntary acts - §2.01 .................................................................................................14
   C. OMISSIONS ..................................................................................................................................15
   D. CRITICISMS: ...............................................................................................................................15
   E. EXCEPTIONS: ................................................................................................................................15

IV. CONCURRENCE OF MENS REA AND ACTUS REUS ..................................................................16
   A. GENERAL ....................................................................................................................................16
   B. INTENT FORMED AFTER THE ACTUS REUS WAS COMMITTED .............................................16
   C. NO INTENT WHEN THE ACTUS REUS WAS COMMITTED .......................................................16

V. ACCOMPLICE LIABILITY ..................................................................................................................16
   A. GENERAL ....................................................................................................................................16
   B. COMMON LAW DISTINCTIONS ....................................................................................................17
   C. MODERN APPROACH ................................................................................................................17
      ii. Same Punishment for all except accessory after the fact ........................................................18
      iii. Principal need not be convicted ...................................................... ....................................18
      v. Accessory after the fact .......................................................................................................18
   D. USING ANOTHER AS AN INSTRUMENT TO COMMIT A CRIME ...........................................18
   E. REQUIREMENTS FOR ACCOMPLICE LIABILITY ......................................................................18
      i. Mens rea ................................................................................................................................18

1
VIII. ATTEMPT ...............................................................................................................................................................................39
A. GENERAL..................................................................................................................................................................................39
B. REQUIREMENTS FOR ATTEMPT.....................................................................................................................................................39
   i. Mens Rea ...................................................................................................................................................................................39
   c. MPC approach – 5.01(1)(b) – Purpose or belief .................................................................................................................40
   a. Must be a crime that could result in an injury .......................................................................................................................40
   b. Substantial step toward completion of the crime ..................................................................................................................40
3. Common Law Approaches .........................................................................................................................................................41
c. Traditional “Dangerous Proximity” Approach .....................................................................................................................41
4. MPC Approach – 5.01(2) – (414) ..................................................................................................................................................42
C. DEFENSES TO ATTEMPT ............................................................................................................................................................42
   1. The elements of the crime have not been proven (main defense) ..........................................................................................42
   ii. Abandonment/Rebutal .........................................................................................................................................................42
   2. Modern Laws and MPC – 5.01(4), etc. (415, 474) ......................................................................................................................43
   iii. Impossibility ...........................................................................................................................................................................43
   4. Alternative approach to impossibility issue ..........................................................................................................................46
IX. SOLICITATION ................................................................. 48
   A. GENERAL ................................................................. 48
   B. ELEMENTS ............................................................... 48
      i. Actus Reus ................................................................. 48
      ii. Mens Rea ................................................................. 48
   C. INDEPENDENT CRIME .................................................. 48
   D. CONCURRENCE WITH ATTEMPT .................................. 49
   E. DEFENSES ................................................................. 49
      i. Abandonment ............................................................. 49
      ii. Renunciation – MPC 5.02(3) ........................................... 49
      iii. First Amendment ....................................................... 49
   F. MPC – 5.02(1) ............................................................... 49
   G. DIFFERENCES BETWEEN MPC AND COMMON LAW ........... 49

X. IGNORANCE OR MISTAKE OF LAW ...................................... 49
   A. GENERAL ................................................................. 49
   B. EXCEPTIONS ............................................................... 49
      i. Three General Exceptions ............................................ 49
      ii. D Misled by official authority – MPC 2.04(3)(b) ............... 50
      iii. Because of ignorance or mistake of law, D lacks the mens rea for the crime ................................................................. 50
   2. MPC 2.04(1) ................................................................. 50
   4. Mistake need not be reasonable ........................................... 51
   iv. Lack of reasonable notice of the law .................................... 51

XI. IGNORANCE OR MISTAKE OF FACT .................................... 52
   A. GENERAL ................................................................. 52
   B. MPC 2.04(1) ................................................................. 52
   C. APPLICATION OF MISTAKE FACT PRINCIPLES ................. 52
   D. DETERMINING WHICH ELEMENTS ARE MATERIAL ............. 52
      ii. Statutory requirements ............................................... 53
      iii. Common Law offenses ................................................. 53
      iv. MPC – 2.04(2) ............................................................. 54
      v. Summary of Analysis .................................................... 55

XII. CONSPIRACY ................................................................... 55
    A. GENERAL ................................................................. 55
    B. DEFINITION ............................................................... 55
    C. PUNISHMENTS .......................................................... 55
    D. SUBSTANTIVE CONSEQUENCES .................................... 55
       i. Common Law ............................................................ 55
       ii. MPC ................................................................. 55
       iii. Conspiracy punishes preparatory conduct ...................... 55
       iv. Conspirators have co-conspirator liability ....................... 55
    E. DURATION OF A CONSPIRACY .................................... 56
       i. General ................................................................. 56
       ii. Abandonment ............................................................ 56
       iii. Withdrawal / Renunciation ........................................... 56
       3. MPC ................................................................. 56
XIII. INTERNATIONAL CRIMINAL LAW: .................................................................................................................................60

I. GENERAL ............................................................................................................................................................................................................61

ii. Newer Expansions..............................................................................................................................................................................62

iii. Legal Status of International law in the US......................................................................................................................................................................................62

iv. Sources of International Law: (Listed in hierarchical order—except certain norms of customary int’l law trump int’l agreements—an a.k.a. jus cogens) ..........................................................................................................................62

2. Customary International law .........................................................................................................................................................................62

B. INTERNATIONAL TRIALS ........................................................................................................................................................................................................63

i. Nuremberg Tribunal .................................................................................................................................................................................................63

ii. Tokyo Tribunal ........................................................................................................................................................................................................63

iii. Other WWII tribunals: ......................................................................................................................................................................................64

iv. ICTY (1993 by UN Security Council) / ICTR (1994)........................................................................................................................................................................64

vi. ICTR (Rwanda) – p. 29-30.................................................................................................................................................................................................65

C. ICC – THE PROPOSED PERMANENT TRIBUNAL ........................................................................................................................................................................65

i. The need for an ICC........................................................................................................................................................................................................65

ii. The nature of the ICC..................................................................................................................................................................................................65

iii. Applicable........................................................................................................................................................................................................66

3. Articles of the International Criminal Court ........................................................................................................................................66

D. CRIMES: ..............................................................................................................................................................................................................67

i. Main Sources are the Geneva Conventions (now customary int’l law)......................................................................................................................................................67

ii. Determining a crime ..................................................................................................................................................................................................67

E. HAGUE CONVENTIONS (1899 and 1907) PROHIBIT CERTAIN METHODS OF WAR. .........................................................................................................................67

F. CRIMES AGAINST HUMANITY— ..................................................................................................................................................................................................68

G. ICTY: (p. 63)............................................................................................................................................................................................................68

M. GENOCIDE— ........................................................................................................................................................................................................69

DEFINITIONS: ........................................................................................................................................................................................................69
Criminal Law Outline

I. General Ideas and Definitions
   a. Terms
      i. Circumstantial Evidence
         1. Evidence that would cause someone to infer that someone did something
      ii. Direct Evidence
         1. Evidence, like a direct witness, that directly shows someone did something, or smelled someone doing something, or saw someone doing something, heard, etc.
   b. Infamous Crime
      i. Often by the possible punishment and not by actual punishment
      ii. There must be a grand jury indictment in order to punish for an infamous crime
         1. Some states go by possible punishment, some states go by actual punishment, and some states go by the crime to determine infamy
      iii. Most felonies today are infamous crimes
   c. Classification of Crimes
      i. State v. Federal
         1. States are not bound to classify crimes based on federal definitions if they are different from the definition given in the state. [Melton v. Oleson]
         2. Important for procedural reasons because a felony is prosecuted in a state superior court and misdemeanor in a municipal court
      ii. Model Penal Code: three classifications
         1. Felonies, Misdemeanors, and petty misdemeanors
      iii. Main Classifications
         1. Felonies and Misdemeanors
            a. Most states, felonies are punishable by death or imprisonment for more than one year, and misdemeanors are punishable for less that one year imprisonment
         2. Malum in se
            a. An offense in and of itself (murder, etc.)
            b. Involves criminal intent or moral turpitude
         3. Malum Prohibitum
            a. An offense because there is a statute against it
      iv. Cases
         1. Melton v. Oleson
            a. D convicted of 3 violations of federal liquor laws. The offense was a felony by federal standards, b/c it was punishable by 2 years in prison. D suffered many harms b/c the state classified him as a felon.
            b. Held, states are not bound to follow federal classifications of crimes
            c. Rationale:
               i. Federal law classifies felons by possible punishment, state law classifies by punishment given. To hold Montana bound by foreign classifications of crimes would result in glaring injustices in many cases.
         2. US v. Moreland
a. D charged in DC with willful failure to provide support of minor children, punishable by fine not more than $500 or by imprisonment in a workhouse not more than 12 months. 5th Amendment requires that “infamous” crimes be charged by a grand jury indictment, but D was charged by information.

b. Held, a federal crime that can be punished by six months imprisonment must be charged through the grand jury system

c. Rationale:
   i. 5th amendment specifies that infamous crimes must be charged by indictment. “Infamy” is determined by punishment possible, not by the sentence actually imposed.
   ii. Imprisonment at hard labor is an infamous punishment.

d. Dissent:
   i. It is imprisonment in a penitentiary, not a provision for hard labor, which renders a crime infamous. Imprisonment is the modern substitute for death penalty and other infamous crimes when the 5th amendment was adopted.

e. Comment: A criminal action can be instituted by information in a state court.

d. Theories of Punishment
   i. Incarceration/Incapacitation
      1. Can commit no more crimes in jail
   ii. Special Deterrence
      1. Deter this particular criminal
   iii. General Deterrence
      1. Deter criminals in general
   iv. Retribution
      1. To vent societies sense of outrage and need for revenge
   v. Rehabilitation
      1. Mold criminal into a person who, when leaving jail, will fit into society

e. Ex posto facto laws
   i. General
      1. Prohibited by the constitution
   ii. Supreme Court declares ex posto facto law is one that operates retroactively to:
      1. make criminal an act that when done was not criminal
      2. aggravate a crime or increase the punishment therefore
      3. Change the rules of evidence to the detriment of criminal defendants as a class
      4. Alter the law of criminal procedure to deprive criminal defendants of a substantive right

f. Statutory Interpretation of Criminal Statutes
   i. General
      1. Penal laws should be construed strictly, but not so strict that they circumvent the purpose of the legislature
   ii. Plain Meaning Rule
      1. When language is plain and meaning clear, court must give effect to it regardless of whether they think it a good law
2. Advantages
   a. Court is not trying to interpret the legislative intent, but to interpret what
      the statute itself means
   b. It simplifies the role of the court
   c. The law becomes more predictable
3. Disadvantages
   a. Could reach an absurd result inconsistent with reality
   b. Gives the court more flexibility, b/c the court can tailor the legislative
      purpose to the case before it (where the leg. most likely didn’t consider
      this fact)

iii. Golden Rule
   1. Court must give deference to the plain meaning, unless they find it will lead to
      injustice, oppression, or an absurd result

iv. Social Purpose Rule
   1. Attempt to determine the legislative purpose, never eliminating the language of
      the statute
   2. Where to look to find social purpose
      a. Legislative history
      b. The language of the statute itself
      c. The general historical context
      d. Common law precedent
      e. Other statutes to determine what they meant it to cover (more or less)

3. Problems with looking to legislative history
   a. Can be very inaccurate
      i. It is unlikely that the acquiescence of so many men necessarily
         proves that they all meant exactly one thing
   b. Unfairness
      i. The common man, who would want to know what the law is,
         doesn’t have access to it
   c. Gives Broad Interpretive power to judges

v. Ujusdem Generis Rule
   1. When particular words of description are used, followed by general words, the
      latter are to be limited in their meaning so as to embrace only a class of the things
      indicated by the particular words

vi. Express Mention, Implied Exclusion Rule
   1. Expression of one thing means exclusion of another thing

vii. Special Statutes take precedence to General Statutes
    1. A special statute does not supplant a general statute unless ALL the elements of
       the general statute are included in the special statute

viii. Ambiguity
    1. Ambiguous Statutes are construed in favor of Defendant
       a. You want to make sure that we are not putting someone in jail for a crime
          they didn’t do: give all benefits to the Defendant

g. Importance of Stare Decisis
   i. Predictability
      1. Not reinventing the wheel in each case that comes before the court
ii. Limit renegade judges
   1. If the statute was passed by Congress, an elected body, we don’t want judges who are likely unelected forming those laws by subjective judgments

iii. Precedent
   1. Controlling
   2. Or persuasive
      a. Court can overrule itself and disapprove of another court

II. Mens Rea
a. General
   i. Acts alone do not constitute a criminal offense, even if they cause harm
   ii. A vicious will is the mental state required for the crime
   iii. Rationale:
      1. Retribution: This person is more deserving of punishment
      2. Deterrence: The more a person considers the wrongfulness of her actions, the more the risk of punishment can serve to deter the defendant’s act
      3. Rehabilitation: The more they intend to violate the law, the more they need retribution.
      4. Incapacitation: Those that consider their crimes need to be taken off the streets more than others

b. Terminology
   i. Maliciously:
      1. The D realizes the risks her conduct creates and engages in the conduct anyway
      2. MPC Analogy: Recklessness
   ii. Intentionally
      1. The D has the purpose to cause a specific harmful result, or
      2. Some jurisdictions: The D need only be aware that his acts may cause a specific result
   iii. Negligently
      1. Criminal is a greater than Civil negligence
         a. The careless must be a higher degree than tort negligence
         b. Not exercising a standard of care that a reasonable person would under the circumstances
   iv. Willfully
      1. Doing an act with the purpose of violating the law, or sometimes
      2. Intentionally doing an act knowing its likely consequences, or sometimes
      3. D intended his act and that act had harmful or illegal consequences

c. General v. Specific Intent Crimes
   i. General Intent
      1. Crimes that only require that the D intend to commit an act are referred to as “general intent crimes.” The D need not intend the consequences.
      2. MPC Equivalent: Recklessly
      3. It can be inferred from the D’s actions. Lowest level of crime.
      4. E.g. Battery
   ii. Specific Intent
      1. The D must act with either the intent to commit a crime or an intent to commit a specific result.
a. Burglary: The D must enter the building with the intent to commit a felony therein

2. MPC Equivalent: “Purposely”, and sometimes “Knowingly”

3. Statute may use the words “with intent to” or the word “intentionally”

4. Cases

   a. State v. May (Forgery)
      i. D, in an attempt to get a loan, forged his father’s signature as a cosigner on a note. He presented the note and received a check for $4,000. D was tried and convicted of “uttering and passing” and forging the note with intent to defraud. The evidence indicated that D intended to repay the loan, and that he intended to, at a later date, obtain the proper signature of his father. D appeals, claiming he did not have the intent to defraud.
      ii. Held, A person who knowingly forges a note and presents it to obtain a loan has the intent to defraud if he intends to pay back the loan.
          1. Intent to defraud means a purpose to use false writing as if it were a genuine in order to gain an advantage. It does not matter that D intended to repay the loan, or though his father would ratify the forgery. The public interest in the integrity of instruments prohibits such use of false writings.
          2. The jury was properly instructed as to the law that a person who passes a recently forged document is presumed to have forged it or to have the necessary intention to defraud. This presumption is rebuttable, but D did not rebut it here. The conviction was proper.

   b. Dobbs Case (Burglary)
      i. D broke and entered into the stable (dwelling house) of another to injure a race horse. Injuring a horse was a misdemeanor. The horse died, however, and killing a horse was a felony. D was charged with common law burglary.
      ii. Held, a person may not be convicted of burglary if he intended to commit only a misdemeanor.
          1. D did not have the intention to commit a felony when he entered the house, so he did not commit burglary. However, D was later indicted for killing the horse and capitally convicted.
          2. Even though D ended up committing a felony, such was not his specific intent.

   c. State v. Connors (Conditional Threat)
      i. Connors and five other stated men threatened several men from the International Association to “take off their overalls and go down and join the United Association, threatening that unless this demand was met with they would kill the men. P’s contest the instruction on appeal, claiming that b/c intent was coupled with an alternative condition, the requirement was met.
ii. **Held**, a threat of felonious crime and the present ability to commit that crime, coupled with a conditional demand that the D does not have a right to make, satisfies the specific intent needed to convict on assault with intent to commit a felony.

1. P argues that the condition which accompanies the threat negatives the existence of that positive and specific intent which, under the law, is a necessary element in the offense charged.

2. P relies on a case, Hairston v. State, that says that a man had his mules stopped along a public highway, and he told the person stopping them to move or he would shoot. The SC of Mississippi found that there was no specific intent, only a conditional offer to shoot, based upon a demand which the party had a right to make.

3. In this case, the party did not have a right to demand for Bell to take off his overalls and quit work, so this case is distinguished. Therefore, he committed the crime

iii. Unlawfully

1. It simply means that there is no legal excuse for the D’s behavior.

d. MPC Approach § 2.02

i. General

1. Courts can be receptive to the MPC b/c it is difficult to define common law terms

ii. Purposely

1. 2.02(2)(a) – A person acts purposely if it is the D’s goal or aim to engage in particular conduct or achieve particular results

   a. E.g. Burglary: the phrase “intent to” requires the D enter w/a specific purpose in mind

   b. E.g. The D wants to kill someone so he aims the gun and pulls the trigger

iii. Knowingly

1. 2.02(2)(b) – A person acts knowingly if she is virtually or practically certain that her conduct will lead to a particular result.

   a. E.g. D puts a bomb on a plane with the goal to destroy cargo aboard, but is virtually certain the plane’s passengers will be killed as well.


2. State v. Beale

   a. D, an antique shop operator, sold property the day after it had been identified by the purported true owner as being “possibly stolen” and officers had asked his wife not to sell the piece. D was tried for the offense of knowingly concealing stolen property. D claimed he had purchased the items from reliable people and that he had receipts to prove it. The TC denied D’s request for a jury instruction that D would not be guilty if he in truth believed he had lawful possession of the goods, despite the circumstances. D was convicted and appeals.

   b. **Held**, when a statute specifies as an element of the offense that the D conceal property “knowing it to be stolen,” the prosecutoin must prove that the D himself had such knowledge.
i. The jury was instructed that the requirement of guilty knowledge was satisfied if either D believed the goods were stolen or a reasonable person under those circumstances would have believed that they had been stolen. In other words, either an objective or subjective test would satisfy the requirement of knowledge.

ii. Although the states differ on this issue, the majority rule requires the prosecution to meet the subjective test. This is the better rule in criminal cases, because the essence of the criminal offense is the D’s intentional wrongdoing.

iii. D need not have direct knowledge or positive proof that the goods were stolen, so long as he was aware of circumstances which caused him to believe they were stolen. The jury may look to the circumstances to assess D’s personal knowledge, but they may not find D guilty solely on the basis of what a reasonable person believed.

iv. Recklessly
   1. A person acts recklessly if he or she realizes there is a substantial and unjustifiable risk that his or her conduct will cause harm but consciously disregards the risk.
      a. E.g. D drives 60 mph past a schooling zone; although the D doesn’t intend to hit anyone, he realized the risk that he may do so and continues speeding away.
   2. Recklessly v. Knowingly
      a. The difference between “knowingly” and “recklessly” is a matter of degree. If a D is so aware of a risk that he or she is virtually certain it will occur, then the D is acting knowingly. However, if the D is aware of a risk, but not as certain it will occur, the D may be acting recklessly.

v. Negligently
   1. A person acts negligently if he or she is unaware and takes a risk that an ordinary person would not take.
      a. E.g. The D is unaware that his child is suffering from a life-threatening illness and fails to seek medical treatment. An ordinary person clearly would have been aware of the risk, and sought care.
   2. Negligence is judged by an objective standard. The focus is not on the D’s state of mind, but what risks the D should have known he was taking.
   3. Under the MPC, crimes are rarely set at the “negligently” standard – too low.
   4. Chart:

<table>
<thead>
<tr>
<th>Common Law</th>
<th>Model Penal Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maliciously</td>
<td>Recklessness</td>
</tr>
<tr>
<td>Specific Intent</td>
<td>Purpose</td>
</tr>
<tr>
<td>General Intent</td>
<td>Reckless of Knowledge</td>
</tr>
<tr>
<td>Intentionally</td>
<td>Purpose or Knowledge</td>
</tr>
<tr>
<td>With intent to</td>
<td>Purpose</td>
</tr>
<tr>
<td>Willfully</td>
<td>Purpose or Knowledge</td>
</tr>
</tbody>
</table>

v. Determining the Mens Rea of a crime
i. General
   1. Frequently, a statute will describe the mens rea level for a crime.
   2. If not, use traditional rules of statutory construction to determine what mens rea.

f. Strict Liability
   i. Mala Prohibita Offenses
      1. Those not inherently bad that are proscribed by statute
      2. Mens rea does not apply to mala prohibita offenses often
      3. Must consider whether the statute has eliminated the mens rea requirement in a true crime (and what is the effect of that)
   
   ii. Strict liability most often employed:
      1. Food and drug control, traffic regulation, restrictions on pollution and navigation, animal cruelty, regulation of alcohol and liquor, and explosives and hazardous chemicals

   iii. Cases
      1. The Queen v. Stephens
         a. D owned a operated slate quarries near a river. D’s employees stacked rubbish from the quarry near the river bank, from whence it slid into the river. Eventually, navigation in the river was obstructed by the debris, and D was indicted for obstructing the river. D was convicted by the jury, but obtained a ruling for a new trial on the ground that D could not be held liable for the acts of his employees.
         b. Held, a person may be held criminally liable for creating a public nuisance when he had no intention of doing so.
            i. Although this case proceeded in criminal form, in substance it is a civil proceeding. The only reason to proceed under criminal law is that the nuisance affected the public at large rather than one or two isolated individuals. Without recourse to the criminal law, the public interest could not be protected.
            ii. The purpose of the indictment is to prevent recurrence of the nuisance. All that needs to be proved is that the nuisance was caused by the working of D’s quarry. It does not matter whether D knew of the disposition of the rubbish, or even that he instructed his employees to dispose of it another way. The indictment is not intended to punish D, but to stop the nuisance.

   g. Mala Prohibita v. Mala in se
      i. Commonwealth v. Oshevski
         1. D had a trucking business. One of D’s employees picked up a load of coal and had it weighed. He received a slip showing a weight of 15,200 pounds (15,750 was the maximum allowed). The employee left the truck with D, who drove it into town. D was stopped by the police and had his truck weighed at 16,015 pounds. D was charged with violating the vehicle code, and claims as a defense that he did not know the truck was overnight.
         2. Held, a person may be held criminally liable when he believed in good faith that he was not violating the statute.
            a. Common law crimes are mala in se, meaning they are crimes that are bad in and of themselves. Other crimes are acts made criminal by statute, and
are called mala prohibita. This means that the acts are not crimes because they are inherently bad, but rather because the legislative authority makes the act criminal.

b. Crimes which are simply mala prohibita do not require any mental element. One who does an act in violation of the statute is guilty of the crime regardless of his intent of belief. Subject to constitutional limits, the legislature may punish any act that it determines should be punished.

c. The evidence is clear that D had his truck overloaded, and therefore he is guilty as charged. He is sentenced to pay a fine of $25 plus the costs of prosecution, and if he defaults, he must be imprisoned for between one and two days in the county jail.

h. Respondeat Superior

i. There is no respondeat superior doctrine in criminal law with regard to malum in se offenses. The state of mind of an employee, for example, may not be imputed to the employer. Such is not the case in strict liability offense, however. Many of these offenses involve the sale of goods, and employers may be held criminally liable for the acts of their salespersons.

ii. Commonwealth v. Koscwara

1. D was the licensee and operator of a tavern. D’s employees sold liquor to minors out of D’s presence and without his personal knowledge. The Liquor Code prohibited such sales, and D was convicted of the offense. D was sentenced to three months in jail and fined $500. He appeals.

2. Held, a business owner may be criminally liable for illegal sales made by his employees without his personal knowledge.

a. At common law, the respondeat superior doctrine would not apply in a criminal case because criminal liability was personal and individual. However, regulatory provisions in modern times rely on the criminal law for enforcement.

b. Acceptance of a liquor license carries with it a high responsibility, including acceptance of vicarious liability for criminal violations by employees. The Liquor Code does not include a requirement of mens rea; thus, D’s intent is irrelevent.

ii. Common Law

1. Held, a criminal penalty may not be imposed for the failure to do an act required by statute if the actor made all attempts to comply with the statute.

a. The engineer did not have the requisite mens rea when he failed to stop. The object of the statute was to prevent accidents resulting from trains intentionally crossing another train line. The engineer intended to stop
and tried to do so. The legislative intent is not fulfilled by imposing a fine in this case.

ii. **State v. Peery**
   1. Several women claimed they saw D stand unclothed in front of his dormitory window. D admitted that he often changed clothes about this time and may have forgotten to close the shades, but he did not notice any passersby. There was no evidence that he called attention to himself or that he intended to embarrass anyone in any way. D was convicted of indecent exposure.
   2. **Held**, one may not be convicted of indecent exposure when the exposure resulted from inattention rather than an intent to provoke or embarrass
      a. There was no evidence that D had a guilty intention; without such he cannot be convicted of a crime.

III. **Actus Reus**

   a. **General**
      i. All crimes require a D to commit a voluntary criminal act.
      ii. The Actus Reus may be a positive act, such as hitting another or an omission, which is a failure to act when there is a legal duty to do so
      iii. **Purpose:**
           1. This is required so that people are not punished for their bad thoughts. It also limits law enforcement by focusing its efforts on identifiable occurrences and separates those seriously intend to commit harm from those with mere fantasies.
      iv. **Verbal Contact alone**
           1. Verbal conduct may be sufficient to constitute the Actus Reus of a crime such as solicitation, conspiracy, or aiding and abetting.
      v. **State v. Quick**
           1. The evidence indicated that D intended to commit the crime charged, but never did anything.
           2. **Held**, intention to commit a crime is not an offense by itself.
               a. There must be an overt act coupled with an intent to be a crime. The law is not concerned with mere guilty intention.

   b. **Positive Acts**
      i. **Voluntariness**
         1. All physical acts must be voluntary to constitute the actus reus.
         a. Any act that is the result of conscious and volitional movement.
      ii. **Exceptions**
         1. Automaton – reflexive action
         2. Sleepwalking
         3. Movement by another
      iii. **MPC involuntary acts - §2.01**
         1. Voluntary – any act which is not involuntary.
         2. Involuntary:
            a. Reflex or convulsion
            b. Bodily Movement during unconscious or sleep
            c. Hypnosis or under hypnotic suggestion
            d. Bodily movement not otherwise the product of the effort or determination of the actor, either conscious or habitual.
iv. Extending the Period of the Actus Reus
   1. Epileptic Reflexes
      a. People v. Decina
         i. Epileptic was driving, had a seizure, and killed four people.
         ii. Held, knowingly placing oneself in a position which can threaten
             the lives of others, one is criminally liable when such injury
             results.
             1. D consciously and knowingly committed an act in
                disregard of the possible consequences to others. This is
                criminal negligence and D is criminally liable.
   c. Omissions
      i. Generally, there is no legal duty. [Woman raped in public; Woman stabbed in public,
         etc.]
      ii. Rationale:
          1. American Law does not compel active benevolence among people. Rather, it
             only requires that one not cause others harm. Reasons:
             a. The American tradition of individual freedom
             b. The difficulty of knowing how much help one must provide others in life
             c. The fear of diverting attention from the perpetrator of the crime to the
                bystander
             d. The possibility that Good Samaritans may face undue risk of harm
      d. Criticisms:
         i. There is not moral difference between failing to help when one can do so with no peril to
            oneself and actively causing the harm
         ii. The general rule ingrains a callousness and indifference into how members of society
            interact with each other
         iii. The general rule may embolden violators to commit more crimes because they know
             people are not required to assist the prospective victims.
   e. Exceptions:
      i. Statute
      iii. Contractual Agreements
         1. Jones v. United States
            a. Mother of two children, unmarried and living w/her parents, hired D to
               care for her children. One of the children was improperly cared for and
               died. Evidence was in conflict about whether mother’s arrangement with
               D was terminated when the improper care was given. Jury was not
               instructed to decide whether D had a “legal duty” to care for the children.
               D was found guilty of involuntary manslaughter, and mother was
               acquitted. D claims that the element of a “legal duty” was not proved
               beyond a reasonable doubt.
            b. Held, a person must have a legal duty to act in order to be convicted for
               failure to act.
               i. One of the ways a legal duty can be established is through contract.
                  In this case, while it is clear that there was initially a contract
between D and mother, the evidence was conflicting as to whether the contract still existed.

iv. Voluntary assuming care of another

IV. Concurrence of Mens Rea and Actus Reus

a. General

i. The actus reus and mens rea must be concurrent does not mean that they must happen at exactly the same time, in exactly the same location. Often, the courts employ the argument that a mens rea element “continues” until the actus reus is complete.

b. Intent Formed After the Actus reus was committed

i. Commonwealth v. Cali

1. D set fire to a building belonging to a relative, and was tried for setting the fire with the intent to defraud an insurer. D offered evidence indicating that he had set the fire accidentally, and had later refrained from any attempt to put out the fire, although it appeared likely that putting out the fire would have been an easy matter and not one subject to a great degree of risk. Upon conviction, D argued that he didn’t set a fire with the intent to defraud an insurer.

2. Held, an apparent innocent act which results in injury due to the actor’s subsequent “negative acts” may permit criminal liability for the original act.

   a. If D simply neglected to act, he would not be guilty of arson because negligence is not proof of intent. The intent to injure could be formed after the fire started, however.

   b. The jury found that D had criminal intent. This finding is supported by evidence.

ii. Note: Generally, no crime is committed when the actus reus occurs prior to any mens rea element. In this case, however, D’s breach of his legal duty to stop the fire that he started, coupled with his then-formed intent to defraud, provides the necessary concurrence of mens rea and actus reus. The rule set forth in this case is conceptually similar to that of “continuing trespass” in larceny cases.

b. No intent when the Actus reus was committed

i. Jackson v. Commonwealth

1. D and another attempted to kill Bryan by giving her a drug. They then moved her across the state line to Kentucky and decapitated her. The evidence was unclear as to the time of death, and therefore whether she died in Ohio or Kentucky. (At this time, death was required to be tried at the place of death). D argued that if the jury found that he decapitated the girl in Kentucky merely to hinder identification, thinking that she was already dead, they could not convict him of murder because he had no intent to kill in Kentucky.

2. Held, a person may not exculpate himself by claiming that he had no intent to commit an act because he thought he had already committed it.

   a. D’s acts were a continuing trespass. He can’t avoid criminal liability by asserting that he only attempted murder in Ohio, then merely mutilated a corpse in Kentucky. D clearly killed the girl.

V. Accomplice Liability

a. General

i. Based on the premise that all people who assist in the commission of the crime should be held accountable, to some degree, for that offense. Whereas the law normally regards a
person’s acts as the products of his or her own choice, accomplice liability is based on the doctrine of complicity. Complicity recognizes that one individual’s actions may influence whether or how another person acts. The involvement of more than one person in the criminal activity means there is more anger and more likelihood of the parties achieving their objectives.

b. Common Law Distinctions
   i. Principal in the 1st degree
      1. This was the actual perpetrator of the crime.
         a. E.g. in a bank robbery, it is the D who enters the bank and demands the money
   ii. Principal in the 2nd degree
      1. This was the person who aided and abetted the principal by being present, or nearby.
         a. E.g. in a bank robbery, the driver of the getaway car
   iii. Accessory before the fact
      1. This was the person who helped prepare for the crime.
         a. E.g. in a bank robbery, the person who cased the bank or purchased the disguises, but did not participate in the actual robbery
   iv. Accessory after the fact
      1. This was the person who, knowing that a felony had been committed, received relieved, comforted, or assisted the felon.
         a. E.g. in a bank robbery, a person who learned that her friend had just committed a robbery but offered to hide the D and her loot until the police called off their search.

2. State v. Williams
   a. D and a number of others helped Hicks, who had shot a man, escape from the police. Among the acts committed were helping Hicks leave the scene of the crime and lying to police officers in an attempt to cover up the crime. The evidence indicated that the deceased did not die until after D and the others had helped Hicks escape. D was convicted as an accessory after the fact of murder. He appeals, claiming that there was not a murder at the time he helped Hicks.
   b. Held, a conviction for accessory after the fact of felony cannot stand if the felony was not complete at the time of D’s act.
      i. In order to be convicted as an accessory after the fact of a felony, the prosecution must prove that
         1. The principal felon committed the crime
         2. The accused knew that a felony was committed by the felon
         3. That the accused offered relief, comfort or assistance to that felon.
      ii. Here, there was no proof that the crime of murder had been committed when D helped Hicks attempt to escape.

   c. Modern Approach
      i. General
1. Most modern statutes have eliminated the first three common law categories and hold that all participants in a crime, apart from the accessory after the fact, are subject to the same punishment.

   ii. Same Punishment for all except accessory after the fact
       1. All will be charged for the substantive crime except the accessory after the fact
       2. Rationale:
          a. The person who plans a crime may be as culpable or more culpable than the less sophisticated individual who puts the plan into action. That person should not be rewarded b/c he or she hid behind the scenes and convinced another to commit the crime. Moreover, when the crime is the collaborative effort of individuals, each contributed to the substantive offense.

      3. Note:
         a. While all are convicted of the same crime, the court may impose difference sentencing for different degrees of participation in the crime.

   iii. Principal need not be convicted
       1. Under modern statutes, the prosecution need only prove that a crime was actually committed and the accomplice participated before or during its commission.
       2. E.g. Three people participate in a bank robbery: the robber, the lookout and the planner. Only the lookout is apprehended. As long as the prosecution proves that the robbery occurred, and that the lookout played a role in the robbery, the lookout can be convicted even if her co-participants are never apprehended.

   iv. Sample Statutes
       1. California Law
          a. “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission... are principals in any crime so committed.”
       2. MPC – 2.06 (509)
          a. “A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.”
          b. 2.06 (509) - Sets forth the conditions under which a person is legally accountable for the conduct of another

   v. Accessory after the fact
       1. General
          a. Under both common law and modern standards, accessories after the fact are treated as less culpable than principals or accessories before the fact

       d. Using another as an instrument to commit a crime
          i. General
             1. If a person unknowingly or unwittingly participates in a crime, that person is not an accomplice but is considered a mere instrument by which the actual perpetrator committed the offense.
                a. Animals and Objects may also be used as instruments

       e. Requirements for accomplice liability
          i. Mens rea
1. General
   a. The mens rea for accomplice liability is the “purpose to have the crime succeed.”
      i. Purpose to help, and
      ii. Purpose to have the crime succeed

2. Mere Presence
   a. As established in Hicks, mere presence at the commission of a crime is ordinarily insufficient to constitute aiding and abetting. However, if a D agrees in advance to be present in order to provide moral support or assistance to the principal, accomplice liability is established
   b. Examples
      i. If someone goes along to enjoy the spectacle of someone dying, they aren’t an accomplice b/c they don’t aid or abet
      ii. If someone shouts “go get him!” then they have aided and abetted because they provided moral support
      iii. A person cannot be guilty if they go along simply resolved to help if needed, b/c although they have the mens rea they have not made an affirmative act of assistance. However, if they told the other person they would be there to help, then they are guilty

3. Purpose v. Knowledge
   a. General
      i. To be guilty as an accomplice, a D must not only know that his acts may assist the commission of a crime, but must also have the specific purpose of having the crime succeed.
   b. Establishing purpose to aid and abet
      i. The purpose of these tests is to draw a line between those who are incidental to the crime and those who assist
      ii. Nexus:
         1. Courts look for a connection or relation between the accomplice and principal that shows that the accomplice had the purpose of aiding the principal’s commission of the crime
         iii. Stake in the venture
            1. Somewhat more helpful is this test. To draw the line between whether the accomplice just knowingly aided, or did so purposefully, courts look to how much of a stake the accomplice has in the principal’s commission of the crime.
   c. MPC Approach – 2.06(3)(a)
      i. The final draft of the MPC now requires that the actor now have “the purpose of promoting or facilitating” the commission of the crime
   d. In a minority of jurisdictions, although purpose is required to convict lesser offenses, knowledge suffices to establish accomplice liability for major crimes.

4. Liability for all reasonably foreseeable offenses
a. Ordinarily, an accomplice is only responsible for those crimes he or she purposefully helps to succeed. However, a majority of jurisdictions now extend accomplice liability to both intended crimes and those criminal harms that are “reasonably foreseeable” or “the natural and probable consequence” of the D’s acts.

b. Criticisms:
   i. The “natural and probable consequences” consequences allows for a conviction even when the D does not have the required mens rea for the crime.

c. If someone engages in a “separate frolic” during the crime, the other should argue this wasn’t foreseeable.

5. Accomplice mens rea for reckless or negligent crimes
   a. It is impossible, by definition, to intend a negligent result. If the D intended the harm, the result would have been purposeful, not negligent. Therefore, accomplice liability for negligent crimes requires that the D (1) had the purpose to assist the principal; and (2) was negligent regarding the results.

   b. MPC
      i. The D need only act with the kind of culpability that is sufficient for commission of the offense.
      ii. i.e. negligence, not purposefulness.

   c. When dealing with Negligent crimes, address two things:
      i. Causation
      ii. Mens rea for complicity in a negligent crime

ii. Actus Reus
   1. General
      a. To be an accomplice, the D must provide an act of assistance. The actus reus for accomplice liability may be either a positive act or an omission when there is a duty to act.

      b. Positive Acts:
         i. There are an infinite number of ways an accomplice may help the principal in the commission of a crime. Bank Robbery: plan the robbery, survey the bank, serve as a lookout, drive the getaway car, or provide encouragement to the principal robber.

      c. Omissions
         i. If a police officer turns the other way in the commission of the crime.

      d. Mere Presence and acts of encouragements
         i. Mere presence is usually not enough to constitute an actus reus for accomplice liability unless the D’s presence is offered as a form of encouragement.

   2. Help need not contribute to criminal result
      a. A person is guilty of aiding and abetting even if the criminal result would have occurred anyway and D’s actions had no actual impact on the outcome.

   3. Principal need not be aware of accomplice’s acts
a. A person can aid and abet a crime even though the principal is unaware of the accomplice’s help.

4. Attempted Complicity
   a. An accomplice’s acts must constitute some type of aid to qualify as aiding and abetting. If the would-be accomplice’s acts cannot actually help, given the circumstances of the case, then under traditional common law there is no accomplice liability.
   b. Compare MPC approach – 2.06(3)
      i. Under the MPC, there is accomplice liability if a person aids, or attempts to aid, another’s commission of a crime. The MPC focuses on the D’s actual blameworthiness, not the fortuity of success.

ii. Relationship between the liability of the parties
   1. General
      a. The general rule is that an accomplice is liable if the principal committed the crime, even if the principal is not convicted
   2. Situations in which the liability of the accomplice and principal do not depend upon each other
      a. General
         i. The general rule is that an accomplice is guilty when he or she helps another commit a crime. The status of an accomplice, however, may excuse that person from liability.
      b. Feigned Accomplice
         i. A person who acts as an accomplice in an effort to apprehend the principal during the commission of a crime is not guilty of aiding and abetting the offense. The person does not act with the purpose of having the crime succeed, but with the purpose of stopping the criminal activity.
   3. Excused Principal
      a. General
         i. Accomplice liability depends on proof that a crime was committed and the D assisted in the commission of the crime. Liability does not depend on the prosecution and conviction of the principal. Principals may be excused from crimes for many reasons:
      b. Public Authority justification
         i. There can be accomplice liability even though the principal cannot be prosecuted b/c he was working for law enforcement
   4. Protected class of persons
      a. If a statute to protect a certain class of persons, those persons may not be charged with aiding and abetting the offense.
         i. Children who contract their services in violation of those laws are not accomplices.
      b. Law v. Commonwealth
         i. Law, almost 12, was convicted as the principle in the 2nd degree for aiding and abetting John Law in committing the crime of rape. At trial, the court refused jury instructions that stated if the jury
believed that Nathaniel Law was under 14, and did not have the
capacity to commit the crime, he must be acquitted, and that if the
jury found John Law only guilty of attempted rape, than Nathaniel
Law must be acquitted.

ii. **Held**, one who aids or assists another, even if a minor, in the
commission of a felony may be guilty of the crime or the attempt
at the crime (if the attempt is a felony) as if he was the principal
actor.

1. The instructions suggest that, b/c Nathaniel Law is under
14, he can’t commit rape, and thus cannot be guilty of
either the principal crime in the first degree or as principal
in the second degree (aiding and assisting another in the
perpetration of the crime).
2. It has long been held in England that a child under 14 can’t
be guilty of rape or of attempting it b/c he’s a bitch. This
hasn’t been recognized wholeheartedly in America.
3. All scholars agree that a boy under 14, who aids and assists
another in the commission of rape is not the less a principle
in the 2nd degree if it appears under all circumstances that
he had a mischievous purpose.
4. It is the rule in this jurisdiction that the attempt at rape is a
felony, and any person who aids or assists another in the
commission of the felony is guilty as if he was the principal
actor himself. Although John Law was only convicted of
attempted rape, Nathaniel Law will be guilty of the attempt
also.

5. **Using another as an instrument**
   a. When the principal is not in control of his or her actions or has no
culpability for his or her acts, it is more appropriate to charge the D with
causing a crime by using another as an instrument rather than to charge
him or her with aiding and abetting an offense

iv. **Abandonment / Withdrawal Defense**

1. **Common Law**
   a. At common law, a majority of jurisdictions did not recognize an
abandonment defense to accomplice liability. Some jurisdictions,
however, have added a statutory defense when a D voluntarily and
completely renounces involvement in a crime and makes substantial
efforts to prevent it.
   b. **The King v. Richardson**
      i. D and S accosted a man as he was walking along the street. After
asking the man how much money he possessed, and learning that it
was a small amount, one of the accused said to the other to let the
man be. However, the other went ahead and took the man’s small
amount of money. The man accosted cannot remember which
accused desisted and which one took his money.
ii. **Held**, if one man renounces his participation in an offense and his companion goes ahead with the offense, the man who renounced is not guilty of the substantive offense.

iii. **Held**, if one of two men is guilty of an offense, they are both innocent if the court cannot determine which is which.

   1. If one of two men, before the commission of the robbery by his companion, repents from the commission of the robbery, he is not guilty while the other man is guilty.
   2. If it is impossible to identify which man is guilty and which man is innocent, the must both be acquitted.

2. MPC
   a. MPC § 2.06
      i. MPC recognizes an abandonment defense if the D terminates his or her complicity prior to the commission of the offense; and either
         1. Wholly deprives it of effectiveness; or
         2. Gives timely warning to law enforcement authorities or otherwise makes proper efforts to prevent the crime

VI. Homicide
   a. General
      i. Definition
         1. “The killing of one person by another”
         2. This is an element of the crime, not the crime itself
      ii. Corpus Delecti
         1. Definition
            a. Death as a result
               i. This can be established w/o the body; insisting on a body incentivizes getting rid of the body.
            b. The criminal agency of another as the means.
               i. It needs not be the criminal agency of the ACCUSED
               ii. You cannot proceed until you know that there was criminal agency, and this was not an accident
      2. Rules
         a. Must be established independent of extrinsic evidence, such as confessions or testimony, that attempt to prove the identity of a criminal agent to a crime
         b. Mere speculation that someone has died is insufficient
         c. Confessions
            i. Can be used to prove this is the criminal agent, but not that there was a crime
      3. Cases
         a. Downey v. People
            i. D and his wife climbing on rugged terrain. D had blood on his shirt, and his wife’s body was laid out very carefully nearby. Evidence of a scuffle. Cause of wife’s death found to be strangulation. D asked if his wife’s tongue was out b/c he had tried
to remove it b/c he thought “she seemed to be strangling.” D appealed saying the corpus dilecti not established.

ii. Held, Corpus Dilecti is proven if the circumstantial evidence is consistent with a theory of accidental death.

iii. Rationale:
   1. CD requires death and criminal agency. Here the evidence was sufficient to establish criminal agency without reliance on D’s statement.
   2. D’s statements can be used to show he was the criminal agent

b. Hicks v. Sheriff, Clark County
   i. P had been seen with a party, whose body was found in the desert. No evidence of criminal agency was every alleged or proven. P was indicted based on an alleged confession to his cellmate while being held pending investigation. P appeals denial of write of habeus corpus (“they have the body”)
   ii. Held, there must be proof of criminal agency before murder charges may be filed.
   iii. Rationale:
      1. Without proof of criminal agency, there is no corpus delicti. Only after the corpus delicti been proven can confessions be considered in establishing that “this is the criminal agent.”
      2. Here, only D’s alleged confessions are not enough to convict him.

   c. Warmke v. Commonwealth
   i. D, the mother of an illegitimate child, borrowed a coat for her child, then returned with the coat and not the child the next day. She did not mention the baby at a relatives house the next day. At trial, D said she accidentally dropped the baby off a bridge, repudiating an earlier statement that she had purposely thrown the baby off the bridge. The baby was never found, but her camp was found by he stream. D claims no corpus delicti.
   ii. Held, the corpus delicti can be proven by inferences drawn from the accused’s in-court statements
   iii. Rationale:
      1. D’s in-court statement that she accidentally dropped the baby, plus the other circumstantial evidence, allow an inference of criminal intent. There is no need for the body.
      2. D’s out of court statement cannot be used to establish the corpus delicti, but her in-court statements can be.
      3. A D who testifies is competent to establish the corpus delicti.

4. Breaking down the Cases – Downey/Hicks/Warmke
   a. Similarities
      i. Homicide Charges
ii. Corpus Dilecti at issue
iii. Confessions are all a part of it

b. Differences
   i. Body(Downey), Body(Hicks), No Body (Warmke)
   ii. CD Dispute / No CD Dispute
      1. No Body needed for CD

iii. Common Law
   1. Crimes against the person
      a. Must be a living person, can’t be a fetus, even if viable [Guthrie]
   2. Death
      a. Common Law: cessation of blood flow and breathing
      b. Brain Death counts these days: A person who has lost all function of the
         brain, including the brain stem, is dead. [State of Arizona v. Fiero]

iv. MPC
   1. Human being means being born and alive
   2. Bodily injury
      a. Pain, illness, or impairment
   3. Serious bodily injury
      a. That which creates a “substantial risk of death”
   4. Deadly Weapon
      a. Any firearm or other weapon that can cause death or great bodily harm

b. Murder
   i. Common Law
      1. Definition
         a. Homicide with Malice Aforethought
      2. Malice Aforethought
         a. Intent to kill - unless justified, excused, or mitigated
         b. Intent to Inflict Great Bodily Injury - unless justified, excused, or
            mitigated
            i. Errington & Others Case
               1. D’s covered a drunk guy with straw and then threw hot
                  cinders on his chest, killing him.
               2. Held, recklessness without intent to kill or seriously injure
                  is not considered malice.
               3. If the jury found that D intended to seriously injure the
                  victim, it was malice and murder. If they jury found he
                  only intended to frighten the victim, it was manslaughter.
         c. Depraved Heart - Reckless Indifference to human life, not justified,
            excused or mitigated
            i. Recklessness
               1. conscious disregard that isn’t justifiable, is substantial, and
                  grossly different than what the ordinary person would do
            ii. Banks v. State
               1. D filed .38 pistol into a moving train for no reason, killing
                  the brakeman.
2. Held, one who evidences a reckless indifference for human life can be said to have malice sufficient for murder.

3. A man who shoots coolly into a moving train is worse than the man who weighs the killing in his head and kills his personal enemy.

d. Felony Murder Rule

3. Malice Cases
   a. Commonwealth v. McGlaughlin
      i. D killed two people walking near the road. Evidence showed that D had hit the breaks, and that he went back and helped them. Evidence conflicted on whether he was drunk and his lights were on.
      ii. Held, Malice must be proven beyond a reasonable doubt
          1. Malice can’t be found unless D intended to strike the victims or was conscious of the peril to human life, or his conduct was wanton and reckless. D’s attempt to help the victims shows his concern for them
          2. Their must be a “wanton and willful disregard of unreasonable human risk
             a. Wanton – extreme indifference to the value of human life.

4. Malice Aforethought definitions
   a. Justification – Self-Defense: innocence
   b. Excused – Special circumstances, such as insanity
   c. Mitigated – Something reduces the punishment

5. Crime must be committed in “one continuous transaction” – Look at Hokeson, below
   a. California Test
      i. Homicide is committed if the killing
   ii. MPC – 210.1 – Criminal Homicide
      1. Criminal Homicide that is either committed
         a. Purposely or Knowingly, or
         b. Recklessly under circumstances creating extreme indifference to human life.
            i. This recklessness is presumed if:
               1. Done during the commission of, in accomplice of, or in flight from:
                  a. Robbery, Rape, Deviate Sexual Intercourse by force or threat, Arson, Burglary, Kidnapping, or Felonious rape
            ii. Recklessness
               1. Looked at as consciously or gross deviation from standard of conduct. There must be an extreme indifference to human life.
                  a. Subjective Test: Conscious awareness of the risk.
                  b. Objective Test: Degree of risk, gross deviation
iii. MPC allows mitigation through the level of recklessness

2. Cases
   a. *State v. Hokeson*
      i. D, armed with a knife and a bomb, was apprehended while attempting to rob a drugstore. After D was handcuffed, the bomb blew up and killed a Cop.
      ii. **Held,** person is guilty if person commits homicide manifesting an extreme indifference to human life.
          1. D’s actions manifested reckless indifference
          2. A person is liable for the “natural and probable” consequences of his unlawful acts as well as unlawful forces set in motion during the commission of an unlawful act.

iii. Felony Murder Rule
   1. General
      a. Death results from the commission of a felony that is inherently dangerous to human life
         i. Do NOT need to find the requisite mens rea necessary for murder. The intent to commit the felony substitutes for the intent to commit the grievous bodily harm.
         ii. Prosecutor’s favor the Felony Murder Rule because it relieves them from having to prove the most difficult element – mens rea.
      b. The felony must be inherently dangerous and independent from the killing
      c. The Death must occur in furtherance and during the course of the felony.
   2. Modern Limitations on the Felony Murder Doctrine
      a. Inherently Dangerous felony limitation
         i. Only an underlying felony that is “inherently dangerous to human life” will trigger the felony murder rule. This ensures that the court will apply the doctrine only when the D has already caused a substantial risk to human life in the felony.
         ii. Whether it is inherently dangerous:
             1. Dangerous in the abstract
                a. A felony that can frequently be committed without creating a risk to human life is not “inherently dangerous.”
             2. Dangerous as committed
                a. Few courts will examine the circumstances in which the felony was committed to determine whether it was “inherently dangerous.”
      iii. *People v. Phillips*
         1. Chiropractor faced murder charge after he defrauded a child’s parents into paying him for her treatment instead of opting for potentially life saving surgery.
         2. **Held,** this is not applicable under the felony murder rule because grand theft is not a felony “inherently dangerous to human life.”
b. Independent Felony limitation
   i. If the underlying felony is an “integral part” of the homicide itself, the felony murder doctrine does not apply
      1. If the underlying felony is merely a step toward causing death, it merges with the resulting homicide.
      2. To use the Felony Murder Rule, there must be a separate purpose for punishing the underlying felony.
   ii. Determining independent purpose of felony
      1. If the aim of a felony is other than killing or gravely harming the victim, it is an independent felony and qualifies for the federal murder Doctrine
         a. E.g. Most jurisdictions: robbery, burglary, kidnapping, rape, arson, and lewd conduct.
         b. Burglary with attempt to assault is does not qualify for Felony Murder Rule in California.
   iii. People v. Wilson
      1. D broke into his ex-wife’s apartment with intent to scare her and lover. He shot and killed his ex-wife and her lover and wounded another in the apartment. Jury was told that if D entered the apartment to commit assault with a deadly weapon, it was burglary, and if death resulted he was guilty of murder b/c of the Felony Murder Rule
      2. Held, the felony murder rule cannot apply when the homicide resulted from the actual felony committed.
         a. When a person enters a building with the intent to assault his victim with a deadly weapon, he is not deterred by the felony murder rule. The felony must be independent of the homicide
         b. Merger is the concept that felonies which are an integral part of the homicide are merged with the homicide.
   c. Killings during the course of the felony
      i. Some courts limit the scope of the felony murder doctrine by limiting which killings precipitated by the felon qualify for application of the rule:
         1. Agency:
            a. Majority of courts find that only deaths directly cause by the D or a Co-Felon qualify for prosecution under the Felony Murder Rule.
            b. Some courts allow any death that “proximately results from the unlawful activity.
         2. Timing:
            a. Typically a felony commences when the D begins preparation for the crim and doesn’t end until the D’s are in custody or have reached “temporary safety.
3. Furthering the felony:
   a. Typically, acts committed by a co-felon not in furtherance of the felony may not be charged under Felony Murder Rule
d. California approach
   i. If the felony is one that is inherently dangerous and a murder occurs during the commission of the crime, then he is guilty
e. Pennsylvania Test
   i. Look to the design of the felony, and determine what the purpose of the conduct was and what resulted
3. MPC approach – p. 152 – 210.2(1)(b)
a. The MPC creates a rebuttable presumption that a D has acted with the recklessness necessary for murder if the death occurs while the actor is engaged or is an accomplice in the commission of, or attempt to commit, or flight after committing or attempting to commit certain felonies:
   i. Robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape
b. Also, it creates a rebuttable presumption of extreme indifference to human life when a death occurs during the felony - §1.12(5)
4. Rationale for Felony Murder Rule
   a. Deterring Felons from killing, even accidentally, during their crimes (Deterrence)
   b. Vindicating society’s loss when a felony results in death (retribution)
   c. Easing the prosecutorial burden in cases where the D may have killed intentionally but claims the deaths were accidental (incapacitation)
5. Criticisms of the Felony Murder Rule
   a. A person cannot, by definition, be deterred from committing an accidental act
   b. A harsher punishment levied against a D who accidentally causes a death is capricious and an unfair imposition of increased liability on the unlucky felon
   c. The felony murder rule does not reflect the D’s actual culpability since the D had no intent to cause the death
d. Prosecutors do not need assistance in homicide prosecutions, especially since statistical evidence shows that homicides occur in felonies at a much lower rate than expected and, when a death occurs, there is usually evidence of a D’s reckless intent.
iv. First Degree Murder
   1. Definition
      a. Murder which is willful, deliberate, or premeditated
         i. Willful
            1. There must be an intention to kill
         ii. Deliberate
            1. The mind must be fully conscious of its own purpose
         iii. Premeditated
1. Sufficient time must have been available for the mind to fully frame the design to kill, and to select the instrument or form the plan to carry the design into execution
   a. In many jurisdictions, premeditation requires no specific amount of time. It can be formed in a matter of seconds.

2. “Cool, Deliberate Thought”: D must kill with cool, deliberate thought
   a. Rationale
      i. D’s who are cold-blooded are more dangerous than others b/c they considered their actions and chose to do them
      ii. Empirically, this assumption may not be true
   b. There must be reflection prior to the act of killing in order to determine whether the D premeditated the murder

3. Defenses
   a. Because it requires the highest level of intent, you could argue:
      i. Intoxication (so much that you couldn’t form intent) or Diminished Capacity (Insanity, etc.)
   b. Felony Murder Rule

2. At common law, there was no distinction between first and second degree murders.

3. MPC Approach
   a. Does not differentiate between first and second degree; all intentional killings are murder (MPC § 210.2).
   b. The facts underlying the killing are used as aggravating and mitigating circumstances for sentencing (MPC § 210.6)

v. Second Degree Murder
1. All other murder beside first degree murder

vi. Affirmative Defenses
1. Justification
   a. Self-Defense: You really did nothing wrong

2. Excuse
   a. You did something you shouldn’t have done, but there is special circumstances present that will relieve your fault
   b. E.g. Insanity

3. Mitigation
   a. Under certain circumstances you acted wrongfully, but we will reduce the severity of the crime; reducing murder down to manslaughter

c. Manslaughter
   i. Definition
      1. General: Homicide without malice aforethought
      2. Two Types:
a. Voluntary and Involuntary
b. Some Jurisdictions: Vehicular Manslaughter

ii. Voluntary Manslaughter

1. General
   a. Even if someone acted with an intent to kill, voluntary manslaughter will apply if there was sufficient provocation.
   b. Today’s jurisdictions apply voluntary manslaughter when:
      i. Provocation
      ii. Extreme Emotional Distress
      iii. Imperfect Self-Defense

   c. Rationale
      i. The concept of “malice” assumes a depraved or wanton heart (no concern for human life). However, a D who is provoked or acts under extreme emotional distress has his reason obscured. The law is willing to mitigate punishment because the law recognizes “the frailty of human nature” – Glanville Williams

2. Mitigation by Provocation
   a. Definition
      i. D was sufficiently provoked by conduct which aroused anger, rage, fear, sudden resentment, terror or some other extreme emotion, and the provocation was such that an ordinary person of average disposition would have lost self control and not yet cooled, the D is guilty of manslaughter

   b. Three elements at Common Law
      i. Actual Heat of Passion
         1. Must have arose a sudden and intense passion in the mind of an ordinary person such as to cause him to lose his self-control.
         2. D must have the sudden and intense passion
      ii. Adequate Provocation
         1. Traditional Common Law
            a. Categorical Approach
               i. Extreme Assault of Battery upon the D
               ii. Mutual Combat
               iii. D’s illegal arrest
               iv. Injury or serious abuse of a close relative
               v. Sudden discovery of a spouse’s adultery
         2. Modern Objective Standard
            a. A general objective standard is used, so the jury can determine whether the provocation might inflame a reasonable person, and whether D was inflamed
            b. This measures the D by societal norms
      3. Sufficient
         a. Assault insufficient to provide provocation may be sufficient if combined with words
         b. Ongoing provocation – (Guys wife seeing a pimp)
c. Not all of the events have to occur in a short period of time before the killing, but a final substantial event may be enough to incite passion.

4. Insufficient
   a. Words on their face alone will not furnish adequate provocation
      i. However, if they are informing you about something that would cause adequate provocation, this would be sufficient.

5. MPC Approach – 210.3(1)(b)
   a. The MPC provides the most subjective test for provocation.
   b. The jury must judge the reasonableness of a person under the circumstances as the D believes them to be.

6. Mistake Concerning Provocation (Honest but Unreasonable Belief)
   a. A D may be entitled to the provocation defense even if he or she is mistaken as to the provocation if a reasonable person in D’s situation would have believed adequate provocation existed.
   b. If the D has an honest but unreasonable belief that someone will kill him or cause him great bodily harm, whether he formed that belief hastily or not, their can be a mitigation of the crime.

7. People v. Farris
   a. D shot wife in family home; couple had been married for 20 years, but had fight about wife’s current boyfriend. D’s wife poked him in the chest and told him to leave her alone (and boyfriend). D claims he lost his head.
   b. Held, the poking of D in the chest and calling him names is insufficient provocation to get manslaughter.
   c. This is not sufficient to produce “anger, fear, rage, sudden resentment, or some other extreme emotion in the ordinary person of average disposition.
   d. Words alone are never enough.

8. State v. Grugin
   a. D’s son-in-law had ravished D’s daughter. D approached him, and son-in-law said “I’ll do as I damn well please.” D killed him.
   b. Held, words alone may be sufficient if they are informative of adequate provocation.
c. Typically, words are not enough. However, if for instance husband hears his wife is committing adultery, this may mitigate down to manslaughter.
d. Texas: manslaughter if insulting your female relatives.

9. People v. Borchers
   a. D loved Dottie; Dottie cheated on D and provoked him by telling him he was a chicken if he didn’t shoot her.
   b. Held, passion doesn’t have to be rage or anger it can be intense or enthusiastic emotion.
   c. If the trial judge concludes there was no malice aforethought, then no murder

iii. Absence of Cooling time
   1. General
      a. There must have not been a sufficient time between the provocation and the killing for the passions of a reasonable person to cool.
      b. D must have in fact not cooled off between provocation and the killing
   2. The prevailing view today is that the jury must determine whether sufficient cooling time has elapsed, making the D’s reaction not an immediate response to the provocation:
      a. Long-Smoldering reaction:
         i. Even if considerable time has elapsed since the provoking act, the defendant may still be entitled to a manslaughter instruction if the head of passion has been building up since the provocation.
      b. Rekindling doctrine
         i. Reminders of the provocation may rekindle the D’s passion, thereby justifying a reaction even after substantial time has passed.

iii. MPC approach to Manslaughter – 210.3(1)(b)
   1. General
      a. A killing which would otherwise be murder is reduced to manslaughter if it is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.
   2. Five Key Differences between MPC and Common Law Provocation
      a. No Specific Act required
         i. The MPC doesn’t require a specific act of provocation. It is sufficient if the D was acting under extreme emotional or mental distress. This involves more than just the emotion of rage.
      b. More subjective Viewpoint
         i. An act of provocation is viewed from the point of view of a reasonable person acting in the D’s situation.
c. No Cooling Time limitation
   i. The cooling time doctrine doesn’t technically apply under the
      MPC because the focus is not on the D’s reaction to a specific
      provocation, but on whether the D was under the influence of
      extreme emotional or mental disturbances at the time of the killing

d. Words alone may be sufficient
   i. The MPC approach appears to allow words alone, under certain
      circumstances, to form the basis of legal provocation.

e. Diminished Capacity Not considered
   i. Diminished Capacity simply could provide the basis for the
      extreme emotional disturbance

iv. Involuntary Manslaughter
   1. General
      a. Unintentional Homicides, if committed without due caution and
         circumspection, constitute involuntary manslaughter.
      b. Courts will often call this “gross negligence,” “criminal negligence,” or
         even “recklessness.”
      c. Typically is regarded as acting with a gross deviation from the standard of
         care that a reasonable person would act with.
         i. Most often this is “gross negligence.”
   2. Gross Negligence
      a. Definition
         i. If a reasonable person would not pose the same risk to human life,
            the D has acted negligently. Negligence rises to the level of gross
            negligence when there is either a high likelihood of harm or risk of
            severe harm, or little or no social utility to the D’s risky actions.
      b. Determining: Two points
         i. The D was not aware of the risk taken (Negligence)
            1. If he was, possible malice for murder if extreme
         ii. The risk taken greatly outweighed the social utility of the conduct.
            (Gross Negligence / Involuntary Manslaughter)
      c. Factors often considered:
         i. How serious was the risk D’s conduct Posed?
         ii. What was the foreseeability of harm?
         iii. Why was the D involved in the high-risk activity?
         iv. Are there other reasons D’s negligent conduct should not be
            punished such as the social utility of his conduct
   v. Misdemeanor-Manslaughter Charge
      1. Killing in the course of the commission of a misdemeanor is manslaughter
         a. Usually must be Malum in Se,
         b. If Malum Prohibitum
            i. The act must be one which has knowable and apparent
               potentialities, actual or imputed, resulting in death.
   vi. Jurisdictional Rules regarding Manslaughter
      1. Majority View of manslaughter
         a. Manslaughter is voluntary if there was an intent to kill
2. **Minority View of manslaughter**
   a. Manslaughter is voluntary if it was mitigated down; anything else would be involuntary

vii. **Second Degree Murder v. Involuntary Manslaughter**
   1. **Second Degree Murder**
      a. Malice / Wanton Disregard, and
      b. Gross Recklessness
         i. Weigh the risk against social utility of the conduct
   2. **Involuntary Manslaughter**
      a. No Malice
      b. Gross Negligence or Mere Recklessness

d. **Negligent Homicide - MPC (210.4)**
   i. **Definition**
      1. The intentional killing of another either in the commission of an unlawfully inherently dangerous act, or in the commission of a lawful act in a criminally negligent manner

   ii. **Criminal Negligence**
      1. A gross deviation from the standard of care that a reasonable person would observe under like circumstances (“recklessness”)
      2. You must disregard a known risk or a risk which you should be aware
      3. The result must be clearly foreseeable
      4. Negligence is not determined by the result alone
      5. Woman who left her kids at home

   iii. **Unreasonable but good faith belief of justification**
      1. One’s reasonable belief that their life is in danger or in danger of great bodily harm is a form of mitigation down to negligent homicide
      2. D must reasonably and honestly believe in the necessity of responding with deadly force
      3. Recklessness distinguishes itself from the other elements of negligence b/c it shows a subjective, conscious disregard for the risks involved in one’s actions
      4. **People v. Watkins**
         a. D and decedent argued at the bar. Decedent left, then came back to get D. D believed he was being attacked and so shot and killed the guy.
         b. **Held**, when there is evidence, however improbable, unreasonable, or slight that tends to mitigate the homicide to a lesser grade, the D is entitled to an instruction.
         c. **Rationale**
            i. A jury might not believe that a reasonable man would be in fear of his life under the circumstances, but they might believed that D had a good-faith belief that he feared for his life. Such a belief would entitle D to criminally negligent homicide rather than 2\textsuperscript{nd} degree murder.

   iv. **Cases**
      1. **State v. Bier**
         a. D waved officers down when they responded to a call about a possible suicide. Wife was bleeding from a neck wound inflicted from a .357
magnum. Wife had picked up the gun and put it to her head. D tried to smack it away but was unable to do so and it went off killing his wife. D convicted of negligent homicide following a trial.
b. Held, a gross deviation from a reasonable standard of care which results in death may suffice to uphold a conviction of negligent homicide.
c. Criminal homicide committed negligently is negligent homicide. The risk must be so great that to disregard it is a gross deviation from a reasonable standard of conduct, greater than mere lack of ordinary care.
d. D’s act was such a gross deviation.

VII. Assault and Battery
a. General
   i. Statutory Offenses
      1. Where a criminal statute gives notice to the type of unlawful behavior and sets ascertainable standards for adjudication, as well as being interpreted in a statutory setting, the statute is constitutional and not invalid from being vague [State v. Foster]

b. Battery
   i. General
      1. Battery is the unlawful application of force to the person of another

c. Assault
   i. General
      1. Definition
         a. Assault is an attempt to commit battery, or an intentional placing of another in apprehension of receiving an immediate battery.
      2. Rules
         a. Threat of violence, or a conditional threat, is not an assault.
         b. The threat must be of an immediate battery.
            i. Words alone may be sufficient as long as the threat is immediate.
         c. D must have the present ability to commit the battery, and the most courts hold that if the D has the apparent ability to commit the battery, even without actual ability, an assault is committed.
   ii. Tort Definitions
      a. Assault:
         i. An act with intent to commit a harmful or offensive contact or imminent apprehension of a harmful or offensive contact, and apprehension of a harmful or offensive contact results.
            [Apprehension Must be Imminent]
   iii. Majority View of Assault
      1. Either an attempted batter, or the tort definition of assault
   iv. Minority View
      1. Need an attempted battery with present ability
      2. Attempted Battery
      3. Chart

<table>
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<th>Def’s of Criminal Assault</th>
<th>D knows Not Loaded</th>
<th>V thinks Loaded</th>
<th>D thinks Loaded</th>
<th>V knows Not Loaded</th>
<th>Both Know that Gun Not Loaded</th>
<th>Both think Loaded</th>
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</thead>
<tbody>
<tr>
<td>Attempted Battery</td>
<td>No (No intent to cause Contact)</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Attempted Batter w/ Actual Present Ability</td>
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<td>No</td>
<td>No</td>
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<tr>
<td>Attempted Battery OR Tort Definition</td>
<td>Yes (Under Tort Prong)</td>
<td>Yes (Under Attempted Battery)</td>
<td>No</td>
<td>Yes (Under Both!)</td>
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</tr>
</tbody>
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v. Cases
1. **State v. Foster**
   a. D became friends with two sisters b/c they were neighbors. Sister dated both D and Colvin, never telling Colvin about D. Colvin knocked D down one evening and assaulted him with a butcher knife. D returned w/a shotgun and said he would kill Colvin. Another time at Terry’s apartment, Colvin held D down and struck him with a close fist, then knocked his head against a wall; D was taken away for treatment. After the beating, D learned falsely that Colvin had access to a gun, and a friend of D said that she had seen Colvin carry a gun in a shoulder holster. It is disputed whether D started carrying a gun before or after he learned that Colvin might have a gun. When Colvin was coming up the stairs of the apartment complex, he pushed Terry aside and reached inside his coat. D panicked, and wildly fired two shots at Colvin that both wounded him, but he survived. Judge instructed jury with instructions that included that for second degree assault. Jury found D guilty of 2nd degree assault (10 years w/mandatory minimum sentence of 7.5 years). D contends that the statute upon which the jury was instructed was unconstitutional.
   b. **Held**, the statute is not unconstitutionally vague, and D is guilty of Second Degree Assault
      i. State v. Carter test for vagueness
      ii. Washington Assault Statute
         1. (1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he (e) with criminal negligence, shall cause physical injury to another person by means of a weapon or other instrument or thing likely to produce bodily harm

2. **US v. Bell**
   a. Bell was convicted in a bench trial of assault with intent to commit rape. He was in a detoxification ward for alcohol and drug addictions when he raped a patient suffering from a mental disease which made her incapable to understand what was going on. D says the victim must have a reasonable apprehension of bodily harm to satisfy the offense of assault.
   b. **Held**, it is not necessary in an assault charge that the victim have a reasonable apprehension of bodily harm.
i. There are two concepts of assault in criminal law. (1) an attempt to commit a battery, and (2) an act putting another in reasonable apprehension of bodily harm.

ii. “There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger.”

3. **US v. Jacobs**
   a. D intended to evict Bodoh and blocked Bodoh’s driveway. When Bodoh came home, he drove around his obstacle and entered the house. Before he entered, he was shot in the arm. D followed Bodoh into the house and struck him with his gun; he insisted it went off accidentally. D convicted of assault resulting in serious bodily injury. D appeals, b/c he asserts that because Bodoh didn’t see him before the gunshot, it couldn’t be apprehension for assault.
   b. **Held**, the victim of a completed battery does not need to apprehend the battery for the offender to be guilty of assault.
      i. Any apprehension that Bodoh felt related to a subsequent bodily injury, not the one resulting in “serious bodily injury.” The idea that the post-injury apprehension makes the first shooting an assault is unfounded.
      ii. However, whenever actual battery is committed, it includes an assault. Because D committed a battery, the conviction for the included offense of assault is legally supported.
      iii. The inconsistent verdict is permissible. The jury could have found that D intended to frighten Bodoh but not to injure him.

vi. **MPC Approach – 211.1**
   1. **Simple Assault**
      a. 211.1 - (1)(a), (b), (c)
      b. (1)(a) - Attempt to purposefully, knowingly, or recklessly cause bodily injury to another
      c. 1(b) – Negligently Causes bodily injury to another with a deadly weapon
      d. 1(c) – Attempt by physical menace to put another in fear of imminent serious bodily injury
      e. Simple Assault is a Misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is petty misdemeanor
   2. Aggravated Assault – 211.1 – (2)(a), (b), (c)
      a. 2(a) - Attempt 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. 2(b) - Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon
      c. Aggrevated Assault under paragraph (a) is a felony of the second degree; Aggrevated Assault under paragraph (b) is a felony of the third degree.
   3. **Recklessly Endangering Another Person**
      a. 211.2
i. Misdemeanor – if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

ii. Recklessness and danger are presumed where a person knowingly points to a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

VIII. Attempt
   a. General
      i. Punishment of a D who tries to commit an offense but never completes it.
      ii. The prosecution must establish that the D had the mens rea and actus reus requirements.
      iii. The Key Issues:
          1. Did the D have sufficient intent to commit the crime?
          2. Did the D take enough steps to justify punishment?
   b. Requirements for Attempt
      i. Mens Rea
         1. Majority approach
            a. General
               i. Purposeful or specific intent
               ii. Thacker v. Commonwealth
                  1. D and two others got drunk at a church gathering and on the way home saw a light in a tent and wanted to shoot it out. D and the other approached the tent and requested lodging. When they were rejected, they left, but D again wanted to shoot out the light in the tent. In fact, D shot at the light three times, narrowly missing the head of a woman and her child. D was convicted of attempted murder and appeals.
                  2. Held, a person may not be convicted of attempting a crime which he didn’t intend to commit.
                     a. An attempt requires the intent to commit a crime plus direct, ineffectual act towards its commission. An act prompted by general malevolence, or by specific design to do something else, is not an attempt to commit a crime not intended.
                     b. D did not intend to murder the person in the tent, therefore he did not attempt murder.
                     c. D’s act was done towards commission of murder, but it was not done with the necessary specific intent to constitute attempt. D might have been properly convicted of malicious mischief or some other offense, however.
            b. Knowledge v. Purpose
               i. In most jurisdictions, knowledge of the likely consequences of one’s act is insufficient to prove the mens rea for attempt. The D must act with the purpose to cause the harmful result
ii. Even in jurisdictions requiring purpose as the mens rea for attempt, a D’s knowledge of the likely consequences of his act may be used to prove purpose.

c. MPC approach – 5.01(1)(b) – Purpose or belief
   i. Under MPC, a D who acts “with the purpose of causing or with the belief that his conduct will cause” the prohibited result satisfies the required mens rea for attempt.
   ii. More flexible than the common law standard

2. Minority Approach
   a. A few jurisdictions uphold convictions even in the absence of an intent to achieve the prohibited result. These jurisdictions mandate that the D only have the same mens rea required for the specific attempt

ii. Actus Reus
   1. General
      a. Must be a crime that could result in an injury
         i. Wilson v. State
            1. D altered a check which read $2.50 to make it read $12.50. He did not alter the written-out amount. The check had printing on it which started “$10 or less.” When D attempted to negotiate the check, he was arrested. Later he was convicted of attempted forgery and D appeals.
            2. Held, there can be attempted forgery if the alteration made is done so that no injury could result from it
               a. There must be intent to commit a crime and an act sufficient so that injury can result. The alteration of the note was such that no injury could result and the forged note was clearly void on its face.
               b. D’s act was not sufficiently close to consummation of a forgery to be considered an attempt.

      b. Substantial step toward completion of the crime
         i. People v. Paluch
            1. D was charged with attempting to practice barbering without a certificate of registration. Undercover agent entered the barbershop which was unlocked by D, was told to sit in a chair while D put on an apron and got his tools to start barbering
            2. Held, an act which is a substantial step towards the commission occurs when there is a “dangerous proximity of success.”

   c. Rationale:
      i. Thoughts alone do not punish someone. A D’s conduct must justify using law enforcement resources for deterrence and prevention.
      ii. Accordingly, D must engage in more than “mere preparation” to commit a crime. However, no firm line separates how much conduct is needed.
2. Tests for analysis
   a. First Step
   b. Last Step
   c. Dangerous Proximity Approach
   d. Indispensable Element Test
   e. Abnormal Step Test
   f. Probable Distance Test
   g. MPC – Substantial Step strongly corroborative of intent

3. Common Law Approaches
   a. First Step Test
      i. A D’s first step toward commission of a crime is insufficient to
         establish an attempt. Rather, such acts constitute mere preparation.
         1. E.g. D plans to rob a bank, and calls the bank to find out
            when its open.
      ii. Exception: The first administration of poison will be sufficient.
   b. Last Step Test
      i. Under early common law, a D was not guilty unless he had done
         all he could do to commit a crime and external forces prevented
         him from causing a harmful result
      ii. Criticism: Delays law enforcement until long after manifestations
         of the D’s intent and ability to harm, thus putting victims at undue
         risk.
   c. Traditional “Dangerous Proximity” Approach
      i. Addresses how close the D has physically come to completing the
         criminal act. The test focuses both on how much D has done to
         complete the crim and how much is left to be completed.
      ii. It is vague, but it requires the D to go beyond the first act, and not
          as far as the last act, to be punished.
      iii. Criticism: Gives too little guidance to when someone has
           committed an attempt.
      iv. People v. Rizzo
         1. D and others, with the intent to rob a payroll, armed
            themselves and went in search of Rao or whoever had the
            payroll that day. They went to the bank and to various
            other locations but were unable to find Rao. At one place
            they were arrested when they got out of their car. Rao was
            nowhere near where they were arrested.
         2. Held, an accused must have been caught within the
            physical proximity of the place where he intended to
            commit the crime in order to be convicted of attempt
               a. There must be a “dangerous proximity to success”
                  in order to convict of attempt. In this case, D and
                  the others had not found Rao, nor was there any
                  indication that the payroll had even been withdrawn
                  from the bank when D’s were arrested. D’s were
                  seeking an opportunity for robbery but the
opportunity never came. This evidence is insufficient to support the conviction.

4. MPC Approach – 5.01(2) – (414)
   a. General
      i. More than half the courts use it
   b. Test
      i. The D must take a “substantial step strongly corroborative of the actor’s criminal purpose.”
      ii. Also, listing of certain acts that per se satisfy attempt’s actus reus requirements:
         1. Lying in wait, searching for or following the contemplated victim of the crime
         2. Enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission
         3. Reconnoitering the place contemplated for the commission of the crime
         4. Unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed.
         5. Possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances
         6. Possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances
         7. Soliciting an innocent agent to engage in conduct constituting an element of the crime
   c. Criticisms: The MPC standard can still lead to arbitrary decisions and allows a D’s intent to establish both the mens rea and actus rea for the attempt.
   d. MPC v. Common Law: MPC attaches liability earlier in the sequence of events than most common law approaches, but mitigates its harshness through the abandonment defense

   c. Defenses to Attempt
      i. General
         1. The elements of the crime have not been proven (main defense)
      ii. Abandonment/Renunciation
         1. General
            a. A D who repents and deserts efforts to commit a crime may try to raise the defense of abandonment
               i. Common Law didn’t recognize abandonment. This was b/c at common law a D was not guilty of an offense until he had almost completed the crime, and therefore by that time it was unlikely he would undergo a change of heart.
2. Modern Laws and MPC – 5.01(4), etc. (415, 474)
   a. Must have “a complete and voluntary renunciation of the D’s criminal purpose.”
      i. Complete
         1. D must not be motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another prospective victim.
      ii. Voluntary
         1. A fear of getting caught cannot, in whole or in part, motivate the D. It is also no voluntary renunciation if someone else prevents the D from completing the crime.
         2. To be voluntary, D must have had a complete change of heart

3. Stewart v. State
   a. D entered a service station and began armed robbery by demanding money from the service station operator. Shortly thereafter D saw several policemen enter the station. D abandoned his plan for robbery and began looking as if he were purchasing oil. D was convicted of attempted robbery.
   b. Held, once an attempt has been accomplished, an offender may not abandon the crime
      i. Once the attempt has already begun, attempted robbery is a completed crime. Had D abandoned the plan prior to entering the station, he would probably have been acquitted; however, once overt acts constituting attempt to commit a crime have been committed, no amount of abandonment is exculpatory, particularly in light of the fact the police officers are nearby.

4. State v. Peterson
   a. D urged Anderson to burn her house for her for insurance money. Before Anderson burned the house, D asked him not to burn it after all. Anderson burned it anyway. D was tried and convicted of Arson.
   b. Held, a solicitor may avoid criminal liability by trying to dissuade the actual perpetrator from committing the offense before he commits it.
      i. While anyone who solicits another to do a crime is guilty of that crime if the other person commits it, the solicitor may exculpate herself from the crime by effective and timely communication of the desire that the other not commit the crime. Here, D communicated to Anderson her desire that he not pursue the crime. Anderson thereafter acted on his own.

iii. Impossibility
    1. General
       a. D has done everything possible to commit a crime, but unexpected factual or legal circumstances prevent the crime from occurring
    2. Factual Impossibility
a. Even though most cases can be categorized as either factual or legal impossibility, typically the following situations are treated as factual impossibility:
   i. Pickpocket trying to pick an empty pocket
   ii. Shooting a weapon that is defective and incapable of firing
   iii. Trying to infect another with a disease even though it turns out the D is not infected
   iv. Shooting at a victim’s home when the victim isn’t present
   v. Having sexual intercourse with a woman who, unbeknownst to the D, is already deceased

b. In these cases, the court asks the question “Had the circumstances been as D believed them to be, would there have been a crime?”
   i. If the answer is yes, D is guilty of attempt and impossibility is NOT a defense

c. **State v. Mitchell**
   i. D armed himself, went to the house, and shot through the window into Warren’s bed where he believed Warren was sleeping. In fact, Warren was upstairs.
   ii. Held, can a conviction of attempted murder be sustained if the victim was not where the accused thought he was when the attempt was made.
      1. D had the intent to kill, the capacity to kill, and committed an overt act. Had the facts been as he supposed, he would have successfully completed the crime of murder. Therefore, he is guilty of attempted murder

d. **Preddy v Commonwealth**
   i. D, an old man, attempted to rape a woman. Because of his age, D was impotent and was unable to complete the crime (an element of rape is penetration). At D’s trial, the judge instructed the jury that impotence was no defense to the charge, and D appealed conviction.
   ii. **Held**, even if a person is physically incapable of committing a crime, he may still be guilty of attempting to commit that crime.
      1. If one has the apparent capability of committing a crime, he can be guilty of attempt. The only incapacity recognized as a defense is juridical incapacity, such as infancy. A boy under 14 years old is legally incapable of committing rape, so he could not be guilty of attempt. This case presents a question of alleged physical incapacity. There are no presumption than at an adult cannot commit rape.
      2. Impotence is a defense to the completed crime, but not to the attempt.

3. **Legal Impossibility**
   a. General
      i. In situations where the court does not want to impose criminal liability, it may label the situation as “legal impossibility.”
b. True legal impossibility
   i. General
      1. When D consciously tries to violate the law but there is no law prohibiting his behavior; and
   ii. Situations:
      1. General
         a. Few legal impossibility situations exist
         b. This is a FULL DEFENSE because even if D wanted to do something bad, there is not law against it
      2. Defendant performs an abortion she believes to be unlawful. In fact, it is legal in that jurisdiction.
      3. D tries to smoke marijuana believing it is illegal to do so. In fact, there is no law against smoking marijuana.
      4. D takes a tax deduction that she believes is illegal. However, it’s legal.
      5. D has sex with a minor believing it is statutory rape. However, there is not law against it in this jurisdiction.
   c. Hybrid Legal Impossibility
      i. D’s conduct might otherwise violate the law, but he makes a mistake as to the legal status of some aspect of his conduct
      ii. Situations:
         1. General
            a. In this situation, the “fact” that the D gets wrong is the legal status of some of the circumstances related to his conduct.
            b. This is a FULL DEFENSE
         2. Situations:
            a. Receiving unstolen property the D mistakenly believes is stolen.
            b. Shooting at a corpse D mistakenly believes to be alive. In order for there to be the crime of murder, there must have been a live human being who was killed. D’s mistake as to the legal status of his victim makes it impossible for him to complete the crime.
            c. Trying to hunt a deer out of season but mistakenly shooting a stuffed deer. It is out of season but shooting a dead deer does not fall under the prohibition of the law
      iii. People v. Rojas
         1. Hall had stolen electrical conduit and arranged to sell it to D’s, who knew it was stolen. Hall was arrested but the police allowed him to leave the goods in a truck for D’s to pick up. One D drove the truck away and was arrested the next day when he was unlading the truck. D’s were
convicted of receiving stolen property, and they now appeal.

2. Held, a person who receives property he believes to be stolen may be convicted of attempt to receive stolen property, when the property is actually under police control.
   a. If the police have possession of the property, it clearly is not stolen. Therefore, the elements of the offense cannot be proved, and D’s were improperly convicted of receiving stolen property.
   b. In People v. Jaffe, the court held that there could be no attempt to receive stolen property if the property had first been recovered by the police. That case has been criticized and will not be followed in this state. The criminality of D’s conduct is not destroyed by the fact that the police recovered the property before D’s received it believing it was stolen. The fortunate detection by the police should not wipe out D’s culpability.
   c. D’s appeal is disposed of by modifying the finding that D’s are guilty as charged to a determination that they are guilty of attempt to receive stolen property.
   d. Confusion in applying factual impossibility and legal impossibility labels.
      i. For all of the above situations, courts use the label of “legal impossibility” because D’s behavior is not dangerous enough to punish. However, in theory these situations could as easily be labeled as “factual impossibility” and the D’s could be convicted of attempt

4. Alternative approach to impossibility issue
   a. Dangerous proximity test
      i. Some courts have abandoned the legal/factual impossibility test, and simply ask whether the defendant came dangerously close to doing harm. If a D shoots at the victim’s window, even if the victim isn’t home, D has come within dangerous proximity of causing substantial harm.
   b. Inherent Impossibility test
      i. If it is “inherently impossible” for the D to commit the crime, courts are more apt to recognize an impossibility defense. If a D attempts to kill someone through voodoo, and voodoo isn’t dangerous, so impossibility would be a defense.

5. MPC Approach
   a. MPC – 5.01 (414) – impossibility isn’t a defense
   b. Exception
      i. 5.05: in situations where an attempt is “so inherently unlikely to result or culminate in the commission of a crime that neither such
conduct nor the actor presents a public danger,” the court has the discretion to mitigate the level of the crime or dismiss the prosecution.

ii. Also, the MPC recognizes that a D should not be punished unless the result he desires or intends constitutes a crime.

d. Punishment

i. Historically, attempt was only a misdemeanor, whereas today it may be a felony

1. However, most jurisdictions punish it less than the actual crime.

ii. Majority Approach

1. Attempt carries less than the completed crime.

2. Rationale:

   a. D’s offense caused less harm to society than the completed offense, there is less demand for retribution. If deterrence is the goal, one must be wary of punishing differently for successful and unsuccessful efforts; the punishment would therefore eliminate any chance for the D to abandon the act prior to doing it.

iii. Minority / MPC – 5.05(1)

1. Attempt is punishable exactly the same as the completed crime, except for crimes punishable by death or life imprisonment.

2. Rationale:

   a. Retribution focuses on the D’s intent, not on the success of the D’s effort. The D who attempts a crime intends the same amount of harm as one who is successful in his or her efforts and should receive equal punishments. A D’s punishment should not depend on good or bad luck. The D who attempts a crime must be deterred also; because they pose a danger to society.

iv. Policy Considerations

1. Police Intervention

   a. If an attempt is not completed until the crime is nearly completed, it may be too late for the police to prevent harm.

   b. However, if an attempt is completed as soon as a D takes a step toward committing a crime, innocent people engaged in equivocal behavior may face punishment

2. Not Punishing Bad Thoughts

   a. Attempt law must require sufficient acts to prevent from punishing bad thoughts

3. Chance for Abandonment

   a. Punishment for conduct at too early a stage may leave little reason for a D to change his conduct

4. Certainty the D was going to commit the crime

   a. Problems of Proof support setting the mens rea requirement for attempt at a high level to ensure that Punishment is merited.

e. Merger

   i. If the Attempt is successful, it merges with the substantive crime. CANT be guilty of both.

f. Attempted Assault
i. General
   1. There is no uniform rule on whether a person may attempt to commit an assault. Many states hold that there is no such crime as attempted assault, on the theory that an attempt to attempt cannot be punished.

ii. State v. Wilson
   1. D threatened his wife then went to get a gun. Upon his return, his wife was safely behind doors. D was convicted of attempted assault. D appeals, claiming that because assault is attempted battery, attempted assault is an attempt to attempt, which can’t be a crime.
   2. Held, attempted assault is a recognized offense.
      a. The crime of assault with a dangerous weapon is specifically defined by statute. No statute deals with an attempt to commit assault with a dangerous weapon, but there is a general attempt statute which makes an attempt to commit a crime punishable.
      b. An assault precedes a battery. If the offender has the present ability to inflict corporal injury, an assault is committed. If present ability is lacking, yet the conduct has exceeded mere preparation, it should be characterized as attempt. D here proceeded far beyond preparation.
      c. Although other courts and the commentators have rejected the offense of attempted assault, the Oregon legislature has permitted the courts to treat conduct which is short of statutory crimes as a crime. This includes attempt to commit an assault.

IX. Solicitation
   a. General
      i. Solicitation is a separate crime from attempt.
      ii. Solicitation consists of recruiting, encouraging, directing, counseling, or inducing another person to commit a crime.
      iii. Even if no further steps are taken toward the commission of the crime, purposely promoting the commission of the crime is enough to constitute solicitation.
   b. Elements
      i. Actus Reus
         1. The actus reus of solicitation may be purely verbal. It includes any command, request, or encouragement to another to commit a crime.
      ii. Mens Rea
         1. Solicitation is a specific intent crime. The D must have the purpose to promote or facilitate the commission of a crime.
   c. Independent Crime
      i. State v. Blechman
         1. D counseled another to set fire to a building with the intent to defraud the insurer. D was tried and convicted of solicitation. D claims that b/c the building was never burned, no crime was committed.
         2. Held, a person may be convicted for solicitation even when the crime solicited was never committed.
            a. The act of solicitation is a crime in itself. No overt act, attempt, or any further step toward commission of the solicited offense is necessary to complete the crime.
d. Concurrence with Attempt
   i. Solicitation can constitute a punishable attempt if it represents a “substantial step” toward the commission of the crime
e. Defenses
   i. Abandonment
      1. Because solicitation is completed after the D makes initial contact, the defense of abandonment is generally not available.
   ii. Renunciation – MPC 5.02(3)
      1. The MPC recognizes an affirmative defense that the D, after soliciting another person to commit a crime, persuades that person to abort the plan or otherwise prevents the commission of the crime.
   iii. First Amendment
      1. Public Advocacy of violent acts may be constitutionally protected when the advocacy is not intended or likely to produce imminent lawless action.
f. MPC – 5.02(1)
   i. Mens Rea: The actor’s purpose is to promote or facilitate the commission of the substantive offense
   ii. With such purpose, the D commands, encourages, or requests another person to engage in conduct that would constitute the crime, an attempt to commit it, or would establish the other person’s complicity in its commission or attempted commission
g. Differences between MPC and Common Law
   i. The MPC applies the crime of solicitation to all crimes, not just specified felonies and serious misdemeanors
   ii. The MPC recognizes as solicitation a request that another commit an attempt
      1. Asking another to shoot at the victim even though the D knew the gun to be unloaded
   iii. The MPC applies the crime of solicitation to D’s who ask others to help them commit a crime, even though the soliciting D still plans to be the actual perpetrator of the offense.
   iv. The MPC recognizes as solicitation uncommunicated requests for assistance with a crime
      1. Writing to the other person, but not having the request delivered.
X. Ignorance or Mistake of Law
   a. General
      i. Mistake or ignorance of the law is generally NOT a defense. The law presumes that everyone knows its requirements because the laws themselves are based upon the community standards of moral conduct
      ii. Rationale:
         1. Laws are based on society’s common consensus as to what is proper behavior. Thus, simply by living in society, a person has notice of what conduct is expected of him or her. To allow a defendant to claim a mistake of law defense would put a premium on ignorance of the law.
   b. Exceptions
      i. Three General Exceptions
         1. The D has been officially misled as to the law
         2. The D does not have the necessary mens rea for the crime because of her ignorance or mistake as to legal requirements
         3. The D has not received requisite knowledge of the law
ii. D Misled by official authority – MPC 2.04(3)(b)
   1. Reliance on an invalid statute
      a. If the D relies on a statute that the courts later strike down, mistake of law
         is a defense. – MPC 2.04(3)(b)(i)
         i. Misreading a statute is NOT a defense
   2. Reliance on judicial decision
      a. If the state’s highest court had interpreted the law as permitting D’s
         conduct, the D may rely upon that decision even if that court, or the SC,
         later changes its interpretation – MPC 2.04(3)(b)(ii)
   3. Reliance on Administrative Order
      a. If the D acts in accordance with an order of a controlling administrative
         agency, there is no criminal liability even if that order later turns out to be
         incorrect under the law. MPC 2.04(b)(3)(iii)
   4. Reliance on official interpretation
      a. If a controlling authority issues an interpretation of the law permitting the
         D’s conduct, mistake of law may be a defense – MPC 2.04(b)(3)(iv)
         i. Not all jurisdictions accept this exception.
         ii. Reliance on the advice of your counsel is not sufficient

iii. Because of ignorance or mistake of law, D lacks the mens rea for the crime.
   1. General
      a. Some crimes require that a D know that his or her actions are in violation
         of the law or are “without authority of law.” If a D doesn’t know that he is
         acting without such authority b/c he has made a mistake of law, then the
         mens rea requirement of the crime has not been satisfied and mistake or
         ignorance of the law is a defense.
   2. MPC 2.04(1)
      a. “Ignorance or mistake as to a matter of fact or law is a defense if:
         i. The ignorance or mistake negatives the purpose, knowledge,
            belief, recklessness, or negligence required to establish a material
            element of the offense. . .”
   3. Mere disagreement with law insufficient
      a. If a D knows what the law requires but simply disagrees with that law,
         there is no mistake of law defense
      b. To prove that a D knew a law, but willfully failed to comply with it
         because he disagreed with it, the prosecution may rely upon the D’s prior
         compliance with the law.
      c. Commonwealth v. Benesch
         i. D’s were charged with conspiracy to sell securities under an
            installment plan w/o approval by the Public Utilities Commission.
            D himself was the head of the business. The other D’s were
            salesmen and employees.
         ii. Held, the courts may infer that a person who engages in business
             knows the important requirements of law governing that business.
             1. This is not a malum in se crime. However, D must have
                had knowledge of the existence of the law and knowledge
of its actual or intended violation in order to be convicted of conspiracy.

2. Actual knowledge cannot be predicated solely on the maxim that every person is presumed to know the law.

3. However, when there are important legal requirements governing a particular type of business, a person who heads that business should know them; or it will be inferred that they do.

4. Mistake need not be reasonable
   a. An honest, good-faith mistake of law is sufficient to negate a D’s mens rea, just as it is in mistake of fact situations. Of course, the more unreasonable a D’s mistake, the less likely that the jury will believe that it was sincerely made.

5. Mistaken belief that violates a different law
   a. If a D believes that he is violating one law, and it turns out he is violating another, he is still guilty unless the offense with which he is charged requires that he “knowingly” act in violation of that law.
      i. MPC approach – 2.04(2) – Ignorance or mistake of law defense is not available if the D would be guilty of another offense had the situation been as the D supposed. In such cases, however, D’s crime is reduced to the degree of the offense he thought he had committed.

6. Interpreting statutes to determine whether the D need know the requirement of the law
   a. Read the statute
   b. Evaluate its legislative history
   c. Determine whether public policy requires that the D know he is engaging in illegal conduct

7. State v. Cude
   a. D left a car at a garage to be fixed. When it was ready, he couldn’t pay the bill. He went to the garage and drove it away with a duplicate key. He claimed he didn’t know it was illegal to take his own property from the possession of a bailee, and also that he took the car to sell it, so that he could pay the repair bill. He was convicted of grand larceny
   b. Held, if due to a mistake of law, an owner did not have a fraudulent intent to deprive a bailee of the bailee’s rights to the owner’s property, the owner may not be convicted of larceny
      i. A basic element of larceny is the intent to steal the property or another. If there is any reasonable evidentiary basis that D thought he had the right to take possession of his car, the jury should have considered that evidence under appropriate instructions. The fact that D claims ignorance of the principle of property law involved could have raised a reasonable doubt of D’s intent.

iv. Lack of reasonable notice of the law
   1. Due Process requires requires that the D have sufficient notice as to what acts constitute a violation of the law
a. **Lambert v. California**
   i. L.A. had a law that all felons who remained in the city for more than five days had to register with the police, and specified that failure to register was a continuing offense. D had been a resident of LA for over seven years. During that time, she was convicted of forgery, a felony, but never registered. She was arrested for another offense, then charged under the registration law.
   ii. **Held**, a person cannot be presumed to have knowledge of a criminal offense which proscribes passive conduct that ordinarily is not punishable.
      1. The ordinance contains no element of willfulness. The court refused D’s evidence that she had no actual knowledge of the registration requirement, and the prosecution made no showing that she had such knowledge.
      2. Conduct alone, w/o regard to the intent of the doer, is often sufficient to constitute an offense. But this case involved wholly passive conduct; there was nothing to alert D that her action, or inaction, was illegal. Due process requires some notice to the citizen.

b. **MPC 2.04(3)(a)** – The MPC would expand the *Lambert* exception to any case where a law-abiding and prudent person would not have learned of the law’s existence.

XI. **Ignorance or mistake of fact**
   a. **General**
      i. Ignorance or mistake of fact precludes criminal liability if the mistake means the D lacks a mental state essential to the crime charged.
      ii. **Rationale:**
         1. Although often referred to as a “defense,” mistake or ignorance of fact is essentially a claim that the D did not have the mens rea for all of the material elements of the crime.
   b. **MPC 2.04(1)**
      i. “Ignorance or mistake is a defense when it negatives the existence of a state of mind that is essential to the commission of an offense. . .”
   c. **Application of Mistake Fact Principles**
      i. One must determine what facts the D needed to know to be guilty of the crime (i.e. the material elements of the offense). If the D is ignorant or mistaken as to a material element that does not require mens rea, then the defense will not apply.
         1. E.g. It is a crime to knowingly receive stolen goods. D buys goods that are stolen, but he is unaware of it at the time. Defendant’s mistake or ignorance of the facts precludes him from having the necessary mens rea.
         2. E.g. It is a crime to knowingly employ an illegal alien.
   d. **Determining which elements are material**
      i. **General**
         1. Because the mistake of fact defense depends on whether the D has made a mistake as to a material fact, it is crucial to determine what elements of a crime are material; i.e. what must the D know to be guilty of the crime.
ii. Statutory requirements
   1. 1st place to look to determine what elements are material is the language of the statute. If a statute affixes a mens rea requirement to a particular fact, then the D must meet that mens rea requirement to be guilty of the crime. In other words, if a D needs to know something to be guilty of a crime, but he does not know it, he is not guilty.
      a. i.e. anything that says “knowingly”

iii. Common Law offenses
   1. Many offenses, especially those at common law, did not use specific mens rea language that made clear what elements of the crime were material. Some crimes contained elements that the D did not need to know b/c defendant’s conduct was still considered morally wrong regardless of his mistake as to one of the elements of the crime. These additional elements were present to limit the number of moral wrongs the criminal courts would address.
      a. I.e. D was convicted of abandoning his pregnant wife
      b. I.e. D was convicted of possessing crack cocaine, and the court found it irrelevant that the D didn’t know it was of the crack variety
   2. Often, some courts allow mistake or ignorance of fact defense only for specific intent crimes
   3. The King v. Ewart (honest but good faith belief)
      a. D sold a newspaper which contained obscene matter. D was a newspaper vendor and claimed that he honestly did not know that the obscene matter was in the paper. D was convicted of selling obscene matter and now appears.
      b. Held, an inference of a guilty mind can be rebutted by evidence of honest ignorance.
         i. Some statutes specifically require a guilty mind, others prohibit certain acts regardless of intent, and some statutes simply omit any reference to “knowingly” or “willingly.” The offense D was convicted of falls within the latter class; the commission of the act in itself prima facie imports an offense, but proof of the lack of a guilty mind is a defense.
         ii. Since D committed the forbidden act, he must show he did it unwittingly and without a guilty mind. This question is for the jury to resolve.
   4. People v. Vogel (morality law) – MPC 230.1(846)
      a. D alleged that he mistakenly believed his first wife had obtained a divorce from him when he remarried, but the trial court refused to admit evidence relevant to the reasonableness of such belief.
      b. Held, the mistake of fact as to a prior divorce, by negating an evil intent, may excuse D from being guilty of bigamy
         i. The element of intent was not excluded from the statute either expressly or by necessary implication; therefore, there had to be a union of the act and the wrongful intent, and a mistake of fact could negate the required intent.
ii. Bigamy is a crime involving moral turpitude. It is unlikely that the legislature meant to hold the morally innocent guilty. D should have been allowed to show that his first wife had told him she was going to get a divorce and thereafter married someone else. This evidence supported D’s defense of having a good faith belief that he was entitled to remarry.

iv. MPC – 2.04(2)

1. Model Penal Code acknowledges the moral-wrong approach by including a provision that holds that ignorance or mistake is not a defense when a D would be guilty of another offense had the situation been as he supposed. However, ignorance or mistake of fact can reduce the grade of the offense.

2. People v. Olsen
   a. Mistake of Age is generally not a defense - & MPC 213.6(1) (846)
      i. Most jurisdictions do not allow a mistake of age defense to statutory rape, even if the D’s mistake is reasonable.
         1. People v. Cash (Statutory Rape – Majority view)
            a. D, 30 years old, picked up a runaway girl who was 15 years old, and had sex w/ her. She told D she was 17. D sought instruction that honest mistake as to the girl’s age was a defense.
            b. Held, a reasonable and good faith, although mistaken, belief that the female was over 16 is not a defense to statutory rape.
               i. Legislature intended to admit the reasonable belief to age defense
               ii. The legislature may define crimes w/o the element of criminal intent
               iii. The Constitution doesn’t require a defense of honest mistake.
               iv. Public Policy supports a definition of the offense that does not include an element of specific intent b/c statutory rape protects those too innocent and immature to understand the consequences of their actions.

ii. However, a substantial minority of states will allow a “reasonable” mistake of fact defense

   1. People v. Hernandez (Statutory Rape - Minority View)
      a. D performed sexual intercourse with a girl, who was 17 years and 9 months old, with her consent. At trial for statutory rape, D was denied the opportunity to offer evidence that he reasonably believed her to be 18 years old.
      b. Held, a reasonable mistake of fact regarding age will exculpate one from the crime of statutory rape.
i. W/o specific legislative direction to the contrary, a general mens rea is necessary for the crime. As such, a reasonable mistake of fact as to age is a proper defense, and should have been admitted into evidence.

v. Summary of Analysis
   1. First, find out what the material elements of the offense are
      a. What facts does D need to know to be guilty of the offense
   2. What is the mens rea for the crime?
   3. If the D does not know something, does it negate the mens rea for the crime?

XII. Conspiracy
   a. General
      i. It is a separate crime carrying its own penalties
      ii. It allows the apprehension of potential criminal conduct at an earlier stage than attempt
      iii. Members of a conspiracy are vicariously liable for the criminal acts of their co-conspirators, even without proof of accomplice liability
      iv. Conspiracy allows the apprehension of large groups of individuals
      v. Conspiracy is a continuing offense which gives a longer time period for prosecutors to file charges
      vi. Venue for conspiracy charges may be brought in any jurisdiction in which an act of the conspiracy occurs
      vii. Hearsay exceptions allow admission of co-conspirators statements
   b. Definition
      i. A conspiracy is an agreement by two or more persons to commit a crime
      ii. The objective of the conspiracy “must be to commit a crime”
         1. It is not a conspiracy to offend public morals
   c. Punishments
      i. In some jurisdiction the level of punishment depends on the seriousness of the crime D conspired to commit
      ii. MPC – 5.05(1)
         1. The punishment for a conspiracy is the same as provided for the most serious offense which the parties conspired to commit.
   d. Substantive Consequences
      i. Common Law
         1. If two or more persons agree to commit a crime and then commit the crime, each person is guilty of at least two crimes
      ii. MPC
         1. The crime of conspiracy merges with the completed target offense unless the prosecution proves the conspiracy involved the commission of additional offenses not yet committed or attempted.
      iii. Conspiracy punishes preparatory conduct
         1. The mere act of agreeing to commit a crime is sufficient for the conspiracy even if there is not substantial step toward completing that crime.
      iv. Conspirators have co-conspirator liability
1. Once a D joins a conspiracy, he or she is responsible for all acts of the co-conspirators done within the scope of the conspiracy, even if there is no evidence of accomplice liability
   a. E.g. A and B agree to rob a bank. Unbeknownst to B, A steals a car to use in the robbery. Because he is a co-conspirator, B is automatically guilty of the car theft.

c. Duration of a Conspiracy
   i. General
      1. A conspiracy remains in effect until it has been abandoned or until its objectives have been achieved
   ii. Abandonment
      1. A conspiracy is generally considered to be abandoned when none of the conspirators is engaging in any action to further the conspiratorial objectives
   iii. Withdrawal / Renunciation
      1. General
         a. A single conspirator can limit his criminal liability to some degree by renouncing his involvement and withdrawing from the group. There are two basic approaches: Common Law and MPC
      2. Common Law
         a. A co-conspirator can end his responsibility for later acts and statements of his co-conspirators by withdrawing from the conspiracy. However, the D is still guilty for the initial act of conspiracy.
         b. Once committed, a conspiracy could not be “uncommitted.” To withdraw from a conspiracy, a D must take “affirmative action” to announce his withdrawal to all the other conspirators.
         c. In some jurisdictions, the D must also notify law enforcement or otherwise thwart the plot.
      3. MPC
         a. Withdrawal – 5.03(7)(c)
            i. Under MPC, an individual can either inform his co-conspirators or notify the authorities that he is terminating his association with the conspiracy. Once this is done, the D is no longer a member of the conspiracy and is not responsible for his co-conspirators acts.
         b. Renunciation – 5.03(6)
            i. MPC recognizes an affirmative defense to the crime of conspiracy if the D successfully thwarts the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. If a D actually thwarts the criminal acts of the conspiracy, he can avoid liability for even the initial conspiracy he joined.
   iv. Conspiracy as a form of accessorial liability
      1. General
         a. A Conspirator is responsible for all acts of his or her co-conspirators during the course of and in furtherance of the conspiracy, even if the conspirator is unaware that these acts are being committed.
      2. Pinkerton v. United States
a. Two brothers conspired to evade the tax laws. One of the brothers did nothing beyond the planning stage, while the other committed actual overt acts toward tax evasion. Both were convicted of conspiracy to evade taxes. D appeals, claiming no participation in the tax evasion. There was no evidence indicating that D attempted to withdraw from the scheme.

b. Held, the acts of one co-conspirator can be imputed to another who has committed no overt criminal act
   i. The basis of conspiracy law is that the acts of one conspirator are imputed to all other conspirators, as long as there has been no withdrawal from the scheme. Conspiracy in itself is a separate crime for which one may be convicted without further acts.

3. “Outside the Scope”
   a. If the acts of one of the conspirators falls completely outside of the conspiratorial plan, other conspirators cannot be found guilty of the acts which are not in furtherance of the conspiracy. This exculpation applies only when the acts of a conspirator are not within the “foreseeable scope” of the crime which is the subject of the conspiracy.

4. “In Furtherance of Conspiracy”
   a. Crimes “in furtherance of the conspiracy” include more than those crimes the co-conspirator contemplated when he entered into the unlawful agreement. They also include any crimes that are “reasonably foreseeable as the necessary or natural consequences of the conspiracy.

5. Pinkerton Liability is not retroactive
   a. A conspirator is NOT responsible for substantive offenses committed prior to his joining the conspiracy, but acts by the D’s co-conspirators before he joined the conspiracy can be used as evidence for general conspiracy charges.

6. Co-conspirator liability v. Accomplice Liability
   a. Co-Conspirator liability is broader than accomplice liability. Accomplice liability requires purpose to assist in a particular crime and an act of assistance. Co-conspirator liability occurs when a co-conspirator commits a crime that is reasonably foreseeable given the nature of the conspiracy.

7. Criticisms of Pinkerton Liability
   a. Generally, criminal law requires that the D be personally culpable. Pinkerton liability is imposed even when the D is not personally responsible for the substantive crime.

8. MPC
   a. MPC has rejected the Pinkerton doctrine. A conspirator is only guilty of the substantive crime of a co-conspirator if there is evidence of accomplice liability

v. Elements of Conspiracy
   1. Actus Reus
      a. General
         i. Actus Reus is an “Agreement”
      b. Express or implied Agreement
An agreement to commit a crime may be expressed or implied. It is relatively rare for conspirators to openly agree to commit a crime. Accordingly, one must look to the circumstantial evidence to determine whether there has been such an agreement.

c. Concerted Action
   i. In order to establish agreement, one can draw inferences from the course of conduct of the alleged conspirators. If conspirators act in a concerted manner to achieve a common object, an agreement may be inferred.

d. Parallel actions v. common design
   i. Two D’s coincidentally engaged in parallel action to commit a crime are not guilty of conspiracy. The evidence must indicate a tacit agreement between them.

e. Agreement with unknown Parties
   i. It is not necessary that all parties know each other or even have contact with one another. It is sufficient if the D knows he is agreeing with others to commit a crime.

f. Presence at crime scene
   i. Mere presence at a crime scene is not enough to establish agreement to participate in a crime. However, given the unlikeliness that conspirators would invite an innocent party to witness their acts, presence at a crime scene provides some evidence of an illegal agreement, especially if coupled with any acts by D to help the crime occur.

g. Joining ongoing Conspiracy
   i. Not all conspirators must join the conspiracy at the same time. When a D joins an ongoing criminal conspiracy, prosecutors may use actions by co-conspirators prior to D’s joining as evidence for a conspiracy charge against him.

2. Overt Act Requirement
   a. General
      i. Most modern conspiracy statutes now have added a general overt act requirement, but do not require it for conspiracies to commit the most serious offenses. This is the same as the MPC – 5.03(5)

   b. Definition
      i. An overt act is any legal or illegal act done by any of the conspirators to set the conspiracy into motion.
         1. E.g. A and B decide to rob a bank; A calls to see what time the bank opens. This is enough for conspiracy

   c. Only one conspirator needs commit the overt act
      i. When one conspirator commits an overt act, all members of the conspiracy are guilty.

   d. Innocuous Acts
      i. Overt acts may be innocent in and of themselves and need not be a substantial step toward committing a crime. The sole purpose of an overt act is to show “that the conspiracy is at work.”
e. Rationale for Overt Act
   i. An overt act requirement shows that the conspiracy has moved from the mere idea stage to action. Even though the overt act requirement may be satisfied by an otherwise innocuous act, the mens rea requirement for conspiracy ensures that innocent persons won’t be convicted.

3. Mens Rea of Conspiracy
   a. Three main elements
      i. Intent to agree
      ii. Intent to join the conspiracy, and
      iii. With the purpose to commit a crime **
   b. Intent to agree
      i. It is essential that the D know he is agreeing to join a conspiracy.
         1. E.g. If a person nods to another as a greeting, they aren’t joining a conspiracy
   c. Purpose to commit the crime
      i. This is the mens rea requirement in most jurisdictions
      ii. Knowledge v. Purpose
         1. When purpose is required, knowledge alone is insufficient to establish the mens rea for conspiracy.
      iii. Rationale:
         1. The distinction between purpose and knowledge safeguards against conspiracy charges being used as dragnets to charge all those who have been associated with illegal activities to any slight degree. For example, condom manufacturers, mattress salesmen, and negligee outfits know that some of their customers are prostitutes, but many would view it as unjust to charge these businesses with conspiracy to commit prostitution.
   d. Knowledge sufficient for more serious crimes
      i. In some jurisdictions, knowledge that one’s goods or services will be used for criminal purposes may be enough to establish the mens rea for conspiracy, when the crime involved is a serious one and the substances being provided are themselves dangerous.

vi. Parties
   1. General
      a. A conspiracy requires an agreement between a minimum of two qualified parties. Depending on jurisdiction, certain individuals may not qualify as parties to a conspiracy
   2. Gebardi Rule
      a. A person that a particular law is intended to protect cannot be a party to a conspiracy to violate the law.
         i. Gebardi v. United States
            1. The Mann Act prohibited interstate transportation of women for immoral purposes. D and his future wife crossed state lines and engaged in sex. The Mann Act
expressly prevented the conviction of a woman involved in the offense regardless of her willingness to participate.

2. Held, a person whose acts are legal cannot be convicted of conspiracy
   a. While the man is clearly guilty of violation of the Mann Act, no conspiracy conviction can lie. A conspiracy conviction cannot be sustained against a person involved in an offense if she cannot be convicted of the substantive offense. Because the woman couldn’t be convicted of conspiracy, the man may not either.

3. Seller of Goods
   a. A conspiracy requires two guilty minds. When one of the persons does not know, or have reason to know, that the other is planning a crime, he cannot be convicted of conspiracy. For example, a person who sells a gun to another when the other tells him that he will be using it for hunting purposes may not be convicted of murder if the buyer subsequently murders someone with the gun
      i. Misdemeanor
         1. A seller is generally not guilty of conspiracy even if he knows that what he sells will be used to commit a crime, if the crime is a misdemeanor. This rule is generally reconciled by a finding by the court that the seller is really doing nothing to promote the illegal activity in any way, and has no intent to be involved in the crime.
      ii. Felony
         1. Most states permit conviction of a seller who knows that the goods he sells will be used to commit a felony. Although the seller may not be promoting the crime, and may have no specific intent that a crime be committed, social policy dictates restraint on the part of sellers in assisting felons in any way.
   b. US v. Falcone
      i. D and others sold various items to distillers whom they knew would use them to manufacture liquor illegally. They were convicted of conspiracy to manufacture liquor illegally, although the items were legal to sell
      ii. Held, the sale of goods which are otherwise legal to sell does not involve the seller in conspiracy when he knows the goods will be used for an illegal purpose.
         1. The mere sale of otherwise lawful goods is not a combination for an unlawful purpose. If the seller in no other way promotes the illegal activity, there is no specific intent to be involved in an illegal act and conspiracy can’t lie.

4. Wharton rule
a. If it is impossible to commit the substantive offense without cooperative action, the preliminary agreement between the parties to commit the offense is not an indictable conspiracy. Whaton’s Rule prohibits “double-counting” the conspiracy and substantive offense.
b. Exception:
   i. If legislative intent clearly intends to allow both a conspiracy charge and a substantive charge for a particular group activity, conspiracy, conspiracy may be charged.
c. Caution:
   i. If commission of a crime requires at least two people, but not more than two are involved, the Wharton Rule does not prohibit a conspiracy charge. The Wharton Rule only applies when the only two people involved are the two necessary to commit the substantive crime.
d. MPC:
   i. MPC does not recognize the Wharton Rule
e. US v. Figueredo
   i. D and seven others were charged with conducting an illegal gambling operation, and with conspiracy to do so. The statute required the concerted action of at least five people to constitute the offense itself.
   ii. Held, under the Wharton’s rule, defendants may not be convicted of conspiracy when the offense they conspire to commit requires the participation of more than one person.
      1. At common law, where the crime charged is of such a nature as to require the participation of two or more persons, the agreement to commit the crime can’t be prosecuted.
      2. This does not apply:
         a. Crimes that could be committed by one conspirator alone
         b. Crimes which do not logically require concerted action, even though in practicality cooperation would be necessary.
         c. Crimes in which the essential participants are the only conspirators: where one assists two others to commit adultery, then all three can be held for conspiracy commit adultery.

   5. MPC – 5.04(1)
      a. If the D believes he is conspiring with another to commit a crime, he is guilty of conspiracy regardless of whether the other person can be convicted.

XIII. International Criminal Law:
   a. International law
      i. General
1. 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)

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

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

iv. 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)
   1. International Agreements
      a. General
      b. agreement between/among states or associations of states. To become legally enforceable, must be signed and ratified by each country.
      c. Importance
         i. 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.
         ii. bi-national treaty has 2 states; multi-national has several states
         iii. convention
            1. lots of states.
         iv. protocol
            1. treaty to amend an existing treaty
      d. Treaty Under US law
         i. President must enter into it and 2/3 of the Senate must agree also (as mandated by the Constitution).
      e. How to interpret treaties
         i. almost all countries signed except the US (but by customary law most are bound now by this):
            1. 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.
            2. Working papers (travaux preparatoires)
               a. like a legislative history—allowed to use such papers ONLY for:
                  i. confirming the language of the text
                  ii. to resolve ambiguous/obscure terms,
                  iii. to avoid results that are manifestly absurd or unreasonable.

2. Customary International law
   a. even if not agreed upon explicitly, b/c of implicit agreement of norm:
i. must be general/consistent practice of states following a norm AND
ii. they are following it out of a sense of legal obligation.

b. General Principles of Law
   i. rules starting in domestic law
   ii. like res judicata.

b. International Trials
   i. Nuremberg Tribunal:
      1. Historical Background:
         a. 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.
         b. After WWII, allies could have let each ally try criminals in their own courts, but they set up a multi-national tribunal at Nuremberg.
            i. Pros
               1. All tried by same law, sends a message, speedy/efficient, more credibility.
            ii. Cons:
               1. Complications of setting this up
      2. Purpose:
         a. deterrence (general deterrence)
         b. retribution
         c. making a statement
      3. Scope of the IMT (Nuremberg):
         a. Article 6: can only try war criminals of the Axis powers.
      4. Crimes that can be punished
         a. Crimes against peace
            i. Namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
         b. War Crimes
            i. Namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity
         c. Crimes against humanity:
            i. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
5. What gives the allied powers the right to set up the tribunal?
   a. The US alone could do it, so why not int’l…
   b. the US alone could do it b/c the crimes of which the criminals were
      accused were INT’L crimes. (“universal jurisdiction”)
   c. 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)

6. Punishment
   a. They are punished even if following orders, but this gave mitigation.

7. Codifying the rules of law of Nuremberg.
   a. UN Resolution

8. Criticisms of Nuremberg:
   a. Victor’s Justice
ii. Tokyo Tribunal:
   1. US Government told MacArthur to try the criminals in 1946 (and other allies
      joined in)
   2. Japan accepted this as part of its surrender—all 25 were convicted (more
      accomplished than w/ Nuremberg)
iii. Other WWII tribunals:
   1. Allied Control Council—governed post-war Germany
   2. “Law 10”—authorized each commander to set up judicial tribunals (the US had
      12 trials and was the most successful)
   1. Jurisdiction
      a. This “independent” international tribunal, with jurisdiction to prosecute
         persons responsible for grave violations of international humanitarian law
         in the territory of the former Yugoslavia since 1991, and then this was
         followed by one for recent atrocities in Rwanda.
   2. Goals of ICTY:
      a. General Deterrence
      b. Punishment
      c. Ccompensation and rehabilitation
      d. Rrestoration of the public order
      e. Reinvigoration of the international and national rule of law
      f. Preservation of collective memory
      g. National reconciliation.
v. Problems of absence of a military victory:
   1. 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.
   2. 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!
   3. Deterrence is an important symbolic goal being served. (but it is better served by
      the individual smaller tribunals in states)
   4. Yes, it is selective—there are time constraints of ct’s jurisdiction, but at least we
      are getting some people.
5. The adversarial procedure in the court ends up tearing people apart again instead of reconciling them.

6. First final case
   a. **Tadic**
      i. 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.

vi. **ICTR (Rwanda) – p. 29-30**
   1. General
      a. Located in Tanzania.
      b. Has jurisdiction over not only stuff in Rwanda but stuff committed by Rwandans in neighboring states. (unlike with ICTY)
      c. Jurisdictional limitation of time:
         i. 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.

2. **ICT for Rwanda (UNSC Res 955, Nov. 8, 1994)**
   c. **ICC – the proposed permanent tribunal**
      i. The need for an ICC
         1. Large amount of international crimes continue to exist
         2. Governments have remained, for the most part passive
         3. Perpetrators of these crimes have benefited, and not been held accountable
         4. There is an emergence over the years of the need for accountability and justice, and the ad hoc tribunals need to give way to a more permanent tribunal
      ii. The nature of the ICC
         1. Permanent international institution established by treaty for the purpose of investigating and prosecuting individuals who commit serious crimes:
            a. Genocide (Article 6)
            b. Crimes against humanity (Article 7)
            c. War crimes (Article 8)
         2. Binding only those states that have signed
         3. It is not a substitute for national criminal jurisdiction and does not supplant national criminal justice systems, but is complimentary to them (Article 1, 17)
      iii. Applicable
         1. Article 10
            a. Contains the overarching principle with respect to the applicable law, and it requires the application of international law whose four sources are listed in Article 38 of the International court of justice:
               i. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states
               ii. International Custom, as evidenced by a general practice accepted as law;
               iii. The general principles of law recognized by civilized nations;
               iv. Judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law
1. Treaty must be interpreted in accordance with the 1969 Vienna Convention on the Law of Treaties

2. How to interpret the provisions of the statute
   a. Issues 11, p. 33
   b. Issues 12, p. 33

3. Articles of the International Criminal Court
   a. Article 5 – Crimes within the jurisdiction of the court
      i. Genocide
      ii. Crimes against humanity
      iii. War Crimes
      iv. The crime of aggression
   b. Article 6 – Genocide - 34
      i. General
         1. Any act committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
      ii. Elements
         1. Killing members of the group
         2. Causing serious bodily or mental harm to members of the group
         3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
         4. Imposing measures intended to prevent births within the group
         5. Forcibly transferring children of the group to another group
   c. Article 7 – Crimes against Humanity - 35
      i. General
         1. This means any of the following when committed as part of a widespread or systematic attack directed against any civilian population:
            a. Murder, Extermination, Enslavement, Deportation or forcible transfer of population, Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of Int’l law
            b. Torture, Rape, etc., Enforced disappearance of persons
            c. The crime of apartheid, and other inhumane acts
      ii. Definitions - 35
         1. “attack against a civilian population” means a course of conduct . . . in furtherance of a State or Organizational policy to commit such attack.”
   d. Article 8 – War Crimes
      i. General
         1. 2(a) – “Grave breaches of the Geneva Convention of 12 August 1949, namely, any of the following acts against
persons or property protected under the provisions of the relevant Geneva Conventions: . . .

2. 2(b) – “Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely: . . .”

3. 2(c) – “In the case of an armed conflict not of an international character, serious violations of Article III common of the four Geneva Conventions of August 12, 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:”

d. Crimes:
   i. Main Sources are the Geneva Conventions (now customary intl law):
      1. 1864: The treatment of sick and wounded soldiers on land
      2. 1905: The treatment of sick and wounded at sea
      3. 1929: The humane treatment of Prisoners of War
      4. 1949: The protection of civilian population in the time of war
   
   ii. Determining a crime
      1. Step 1: Does Art 2 or Art 3 apply? (p. 49)
         a. Art 2
            i. Deals w/ armed conflicts or war in occupied territories.
               1. If Art 2 applies, the WHOLE convention applies.
         b. Art 3
            i. Deals w/ civil war.
               1. If Art 3 applies, then only some provisions of the convention apply.
      2. Step 2: Are the persons protected by the Convention?
         a. See Article 4 (H-O 2, p. 50)
      3. Step 3: Look at what happened to see if violations occurred.
         a. Look at p. 58 at Article 147 for what constitutes a “grave breach”
   
   iii. 1977—two protocols extended the convention. (US didn’t sign these):
      1. 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.)
      2. The other amends non-int’l conflicts and expands conduct prohibited as in the first one and adds no apartheid.

   e. Hague Conventions (1899 and 1907) prohibit certain methods of war.
      i. Now part of customary int’l law
   
   ii. War Crimes
      1. Any violation of laws or customs of war (any conventions or customary intl legal norms).
      2. 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.
iii. Reprisals—killed in retaliation for killing of soldiers by someone else.
iv. 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!!)**
v. Ct holds:
   1. if time, get permission from a ct marshal beforehand.
   2. last resort condition (see p. 44, H-O 2 for other options)
      a. population generally has to be actively or passively involved.
      b. what is the population? Nationality and geographic proximity can be enough according to the ct.
      c. what is it that they have to do??
      d. ust give a warning to the population
      e. # of innocents can’t be excessive in relation to the offense.
      f. ust hold a trial unless there is not enough time.
      g.otive must be military necessity.
vi. Look at Geneva Convention 4 and at the ICC statute.
   2. Must be a “grave breach” of the Geneva Convention
   3.ictim or person committing must be a US national or member of the US armed forces.
   f. Crimes Against Humanity—
      i. Nuremberg Charter (p. 60) 2 prongs:
         1. committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection w/ any crime within the jurisdiction of the tribunal.
         2. The tribunal took a restrictive view of the prongs that “in execution of…” modified the whole statement.
         3. anted to get just the “big fish” so take restrictive view
      ii. Control Council Law, No. 10 (p. 60): “war” not even mentioned so it dispenses w/ that requirement. (broader individual jurisdiction but smaller territorial jurisdiction).
      iii. International Law Commission (ILC—UN Think Tank): Codified the Nuremberg idea of crimes against humanity. The statute was passed by the Security Council.
g. ICTY: (p. 63)
   i. Requires an “armed conflict” (so more restrictive than Nuremberg’s “before or during the war.
ii. must be “directed against”—so you must intentionally target to be held guilty (more restrictive than Nuremberg)
h. ICTR—didn’t contain “armed conflict” language, but almost all of the killing did occur during armed conflict.
i. ICC’s definition: (p. 34-6)
   i. no war required.
   ii. requires widespread/systematic
   iii. persecution prong, Art 7(1)(h): doesn’t include armed conflict.
j. Customary Int’l law doesn’t require armed conflict. (says an ICTY in dictum)
k. Gender: most persecution definitions do not include it.
1. No US statute makes crimes against humanity a crime in US domestic law
   m. Genocide—
      i. 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)
      ii. 1948 Genocide Convention (p. 70):
          1. requires actus reas (multi-prong in p. 70-1)—doesn’t require killing.
          2. requires mens rea: “intent to destroy, in whole or in part,…”
          3. four groups covered: nat’l, ethnic, racial, and religious.
          4. those NOT protected: gender, social, and political.
          5. Article 5: Not a self-executing treaty—requires states to pass legislation to provide for prosecution or extradition, etc.
          6. Once US makes a statute, the cause of action is then one brought under its domestic law.
      iii. It isn’t a defense to say you were a part of the group being targeted.
      iv. Doesn’t matter whether or not the targeted group is a minority.
      v. The US and the Genocide Convention:
          1. After 38 yrs, it was ratified in 1986, but
          2. so much was added as to nullify its effect. (see p. 73).
          3. US apprehensive about US soldiers being brought up on charges and also about giving up any sovereignty!
          4. 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)
      vi. US stipulations on the convention:
          1. Reservations:
             a. ICJ jurisdiction (must consent)
             b. Way in which int’l law reacts w/ Con law.
          2. Understandings:
             a. Interprets “intent” to be “specific intent to destroy in whole or in substantial part”!
             b. Mental harm means “permanent mental impairment.”
          3. 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)
          4. § 1092 (p. 75): state and local laws on genocide? depends on what “proscribed by this chapter” is interpreted to mean.
     vii. 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 between reservations and understandings in reality)
Analyzing Impossibility Situations

1) Determine whether the elements of attempt have been met?
   a. Did the D have the purpose to commit a crime?
   b. Did the D take a substantial step toward committing the crime

2) Were there facts that were “unbeknownst” to the D that made it impossible for the D to complete the crime?
   a. If the facts were as D reasonably believed them to be, would defendant have been guilty of a crime?
      i. If no law exists prohibiting D’s behavior, D may be excused under the doctrine of “true legal impossibility.”
      ii. If D made a mistake as to the legal status of some of his conduct, but without such a mistake D would be violating the law, D’s “legal impossibility” defense should be treated more like factual impossibility and NO DEFENSE SHOULD EXIST. D is guilty of attempt
      iii. MPC
         1. Impossibility is not generally a defense
         2. D’s case may be mitigated if D’s actions are not dangerous on their face and don’t need to be punished – 5.05

MAJOR:
- Do not confuse mistake of fact and mistake of law with factual and legal impossibility