IF CAN’T PROVE ALL ELEMENTS – TRY FOR ATTEMPT

IF TWO OR MORE PEOPLE – CONSPIRACY AND A/L; causation: acceleration vs. aggravation
(or two acting in concert)

GENERAL PRINCIPLES OF CRIMINAL LAW
1) Criminal Law involves a “formal and solemn pronouncement of moral condemnation of the community” – Henry Hart
   a) Formal = procedure
   b) Solemn = judge/jury
   c) Moral = normative concepts
   d) Condemnation = stigma + punishment
   e) Community = Public Law (as opposed to private law [tort])
2) In order for Criminal Justice System to work successfully, those to be governed by the laws must have:
   a) Notice: of existence, content, and circumstantial manner of law’s operation (Due Process)
   b) Capacity to comply
   c) Motivation/willingness/agency to comply
3) Interests of accused which are at stake:
   a) Punishment (Loss of liberty)
   b) Stigma due to conviction
   c) Also collateral consequences (speaker: Michael Pinard)

FOUNDATIONAL PRINCIPLES OF CRIMINAL LAW

1) PRESUMPTION OF INNOCENCE
   a) BRD (In Re Winship) / INSUFFICIENCY OF EVIDENCE (Owens v. State)
      - The Due Process Clause requires prosecutor to persuade the factfinder BRD of EVERY fact necessary to constitute the crime (In Re Winship). Historical presumption that it is better to let a guilty person go free than to incarcerate an innocent. Need every element proven BRD or else = insufficiency of evidence. BRD = more than a flip of a coin b/t guilt and innocence, need a tiebreaker (Owens)… but who makes the assessment?
   b) THE REASONABLE PERSON: 3 constructions
      - Abstract: sexless, ageless, faceless, nameless person – completely external test (Prosecution)
      - Positioned: person w/ same gender, race, age, but not completely subjectivized
      - Similarly/ Socially Situated: most subjectivized of objective test (Defense-friendly)

2) THEORIES OF PUNISHMENT
   a) Utilitarian: whether form of punishment is desirable depends upon the beneficial consequences to society/community (General deterrence, specific/individual deterrence, incapacitation, reform).
b) **Retributivism**: punishment shouldn’t be imposed to promote another good, but only because that individual committed crime (just desserts).

c) **Shaming? (Gementera)** – 2-step process to see if shaming condition valid under the Senate Reform Act: 1) Permissible purposes for shaming? (more than just pure humiliation - in Gementera judge saw shaming as rehabilitative). 2) Conditions of shaming reasonable related to these purposes?

d) Is it sufficient if D internalizes punishment herself (her own guilty conscience)? *(Du)*

e) 7 Objectives of Punishment *(Du)*: 1)societal protection, 2) punishment of D, 3) specific deterrence, 4) general deterrence, 5) incapacitation, 6) restitution for victim, 7) uniformity of sentencing

3) **CONCURRENCE OF THE ELEMENTS (A/R, M/R, ATT. CIRC at same time) (Her Majesty the Queen v. Williams)**

4) **CAUSATION**

a) **Actual Causation (Cause-in-Fact) (Oxendine)**: The test for actual causation is the traditional **but-for** test: But for D’s act, would the result have occurred BRD? If the act in itself would not have caused result, can still find actual causation if act accelerated result. *Accelerate = causes result sooner / hastens result. This is distinguishable from merely contributing to result or aggravating (making result worse) – it is a temporal requirement / sooner in time. (Oxendine – father abused son but girlfriend’s earlier abuse was underlying cause of death).

- **More than one actor – Acting indep or in concert (Oxendine)**: If two Ds acting independently, need independent but-for or accelerating causation for each. *But if two Ds acting in concert, enough that both aggravated/contributed to result (both considered the actual cause so both criminally culpable). Use acceleration or in concert/aggravation for a/l and consp!*

b) **Proximate Causation (Legal Cause) (Kibbe)**: Issues of proximate cause arise when an intervening force comes between D’s conduct and the resulting injury. This intervening event may be an act of God, a third party, or the victim’s own act. But to call into question proximate causation, the intervening event must usually be an “act” and not an omission b/c “nothing can never trump something.” Must consider whether the intervening event is a:

- **Coincidence / Independent?**: D’s antecedent actions merely put the victim at a certain place at a certain time, making possible for victim to be acted upon by the intervening cause. If coincidence unforeseeable then it breaks the chain of legal causation and constitutes a supervening event which replaces D as legal cause of harm, **but if foreseeable**, then no break in causation and D still criminally culpable as both actual and proximate cause.

- **Response / Dependent?**: Intervening event is a reaction to the conditions created by D’s act. If response is normal/foreseeable, no break in causation and D still criminally culpable. **But if abnormal/unforeseeable**, breaks chain of causation and becomes supervening event.

**STATUTORY INTERPRETATION**

1) **TOOLS FOR STAT INTERPRETATION** *(to det leg intent)*
a) Legislative History (Keeler)
b) Plain meaning (Foster)
c) Statutory Definition (Foster)
d) Common Law Interpretation (Foster)

2) PRINCIPLES
   a. Lenity – construe any ambiguity in favor of D (In Re Banks)
   b. Strict Construction – construe ambiguity against drafter (In Re Banks)
   c. Overbreadth – statute can be void for overbreadth or vagueness so cts narrow construction to avoid this (In Re Banks)
   d. Legality: 3 Principles (Keeler)
      a) No judicial crime creation
      b) No crime without pre-existent law (violates due process notice req)
      c) No punishment without pre-existent law
         a. Even if medical/technological advances change realities, up to legislature not courts to change law (Keeler – is viable fetus a “human”).

ELEMENTS OF CRIME
1.) ACTUS REUS: Voluntary, physical conduct (actus) + resulting harm (reus) (+ causal connection). A/r constitutes the physical/external part of crime – something more than just “mere thoughts.”
   a. CONDUCT CRIMES: law punishes unwanted behavior (i.e. drunk driving) vs. RESULT CRIMES: law punishes unwanted outcomes (i.e. murder)
   b. VOLUNTARY ACT/COMMISSION: Consciousness can be an 1) affirmative defense, 2) undermine volitional element of a/r, or 3) undermine specific mental state element of m/r.
      i. Free will: An act must be voluntary to constitute the a/r of a crimes – there must be volition / a mental element regarding the act for a/r (as opposed to the mental element regarding the social harm for m/r) (Martin v. State– where police to drunk D from home to hwy and then arrested for being drunk on public hwy).
   c. OMISSIONS: An omission, or failure to act, is not criminally culpable as a/r unless D had a legal duty (as opposed to merely a moral duty) to act. (Beardsley- D did not rescue drugged mistress and court held no legal duty b/c woman not his wife).
      i. Elements required for omission to be culpable: 1) D must owe legal duty (see Jones categories below); 2) D must know victim to be in peril of life; 3) D must fail to make reas efforts to rescue (reas person/obj test); 4) The omission must be the immediate cause of death.
      ii. Categories of Legal Duties (Jones): 1) D creates risk of harm to victim; 2) statute imposes duty; 3) fiduciary/status relationship to victim (legal relationship of trust – i.e. trustee/beneficiary; parent/child; lawyer/client; doctor/patient**); 4) contractual duty; 5) D voluntarily assumes care and so secludes victim so as to prevent others from rendering aid.
         1. No Legal Duty to report/disclose another’s plans to commit a crime or crime already committed. But active concealment is a felony.
2. Courts may stretch categories of legal duties when policy reasons compel it (recall *Nix* note case where g/f omission of failing to see what noise was in trunk was punished even though no obvious duty owed victim – perhaps “so secluding victim so as to prevent others from rendering aid”).

3. **For doctor-patient relationships, courts may see removing life-support equipment as “omission” (failing to continue treatment) and refuse to punish as a/r b/c no duty to continue treatment once it proves to be ineffective. Perhaps also driven by policy reasons not to hold physicians who act with patient’s best interests in mind criminally culpable.** (*Barber*).

iii. Policy Considerations: Courts reluctant to punish omission because of broad policy considerations, such as the difficulty in determining the motives of a non-actor, difficulty in determining how far to extend liability (if crowd does nothing); concern that sometimes intervening makes matters worse; and concern for individual liberty (criminal law generally prohibits bad behavior and should be cautious about compelling good behavior).

2.) **ATTENDANT CIRCUMSTANCES:** conditions that must be present in conjunction with prohibited conduct or result.

3.) **MENS REA:** a guilty mind/criminal intent. “An act does not make the doer guilty unless the intent be criminal” (*Cordoba-Hincapie*). M/R constitutes the mental element of the crime. For punishment to be effective, D must know what he is being punished for.

a. **SPECIFIC/ELEMENTAL INTENT:** specific mental element required – need to read statute closely to see to which element m/r attaches (conduct, result, or att circ).

i. To determine intent: intent can be inferred from surrounding circumstances (including words, deeds, actions, use of weapons, and force of blow). Also, the law presumes that one intends the natural and probable consequences of his actions. (*Conley*).

ii. C/L Intents:

1. Intent: one acts with intent when it is his conscious objective or purpose to accomplish that result or engage in that conduct (subjective) (*Conley*).

2. Malice: 1) an actual intention to do the particular kind of harm that in fact was done, or 2) recklessness as to whether such harm would occur or not (*Cunningham – bad son-in-law – ct defined malice specifically as stated, as opposed to trad’l meaning of general wickedness*).

3. Knowingly: actual knowledge/conscious awareness (Missouri law = not willful blindness – departure from MPC) that conduct is prohibited or that prohibited result is practically certain. (*Nations*).

   a. Willful blindness: D aware of probable existence of a material fact but does not satisfy himself that it does not in fact exist – included in MPC expanded definition of Knowledge 2.02(7) as to existing facts and att circ (not result).

4. Recklessly: knowing of a risk and proceeding nonetheless

iii. MPC Intents:
1. Purpose: implies an action which is the conscious object of the actor’s conduct. (completely subjective – honest purpose is required)

2. Knowledge: awareness that conduct is prohibited or that prohibited result is practically certain (also completely subjective). 2.02(7) expanded definition allows willful blindness /ostrich maneuver as to existing facts and att circ (NOT result!) as part of knowingly – “knowledge is established if a person is aware of a high probability of fact’s existence, unless D actually believes does not exist.”

3. Recklessness: awareness of substantial and unjustifiable risk (subjective – subst and unjustifi risk was actually foreseen by D or D willfully blind to risk, and D adversely took risk) + continuing with risk represents gross deviation from the standard of care of reas person (objective). MPC includes “high-probability”/willful blindness for any material fact, but not if D actually believes risk does not exist.

4. Negligence: Inadvertant creation of a substantial and unjustifiable risk of which s/he ought to have been aware (objective – lack of awareness but D should have been aware) + failure to perceive risk constitutes gross deviation from standard of care of reas person (objective).

5. **The only MPC m/r that includes lack awareness is negligence. So, if D genuinely believes no risk of harm, can only get for negligence.

b. GENERAL/CULPABILITY INTENT: If a statute is silent as to m/r but is not one of the strict liability offenses, then all that is required is that prosecutor prove that the a/r of the offense was performed with a morally blameworthy state of mind.

c. STRICT LIABILITY OFFENSES - NO M/R REQUIRED: one exception to need for concurrence of elements / guilty mind = s/l offense→only need a/l But silence as to intent does not necessarily mean Congress intended s/l (Staples). Where silent as to m/r, presume gen intent is rule and s/l is exception because of the principles of lenity (construe in ambiguity in favor of D), overbreadth (don’t want to put innocents at risk), and tradition of requiring a guilty mind (Staples). Principles supporting s/l: level of punishment (if high→m/r, if low→s/l), moral wrong (moral wrong of stat rape deserves punishment no matter m/r); and plain language/legality (assumes silence is intentional - if Congress intended to include m/r, would have done so and if haven’t, cts can’t do so for them - no jud crime creation) (Garnett). 2 types of s/l:

i. PUBLIC WELFARE OFFENSES: Most common exception. Conduct involves minor violations (i.e. liquor laws, antinarcotics traffic regulations, etc). Rule is if punishment high / if punishment outweighs regulatory value, m/r required. But if punishment is low/small, m/r prob not required.

ii. STATUTORY RAPE: Stat rape laws are justified as s/l on theory that the conduct is “morally wrong.” Because no m/r is required – there can be no mistake of fact as defense! This means that even if D was deceived, honestly, or even reasonably believed that the victim was of age, he still has no defense. (Garnett v. State – where mentally retarded D believed/was told victim was not underage but ct said didn’t matter b/c no intent required therefore no mistake of fact for stat rape).

iii. Policy Considerations: S/l disfavored b/c unjust to convict criminally where there is no moral blameworthiness. This defeats the utilitarian and retributivist


goals of punishment because often D unaware of criminal aspects of conduct (see Garnett). Especially in stat rape where punishment can be high (20 yrs in Garnett) – strong evidence that m/r should be required.

1. Stat rape justified by heinousness of a/r (perhaps a policy to protect young people) – nature of act calls for D to assume risk and act at his peril but this implies choice/free will. So in case like Garnett, where D’s capacity to exercise free will is called into question (b/c of mental disability), perhaps we can question whether there is requisite volition to complete the a/r (Utter). Then we don’t need to worry about no mistake of fact / no m/r requirement b/c can’t prove a/r.

DOCTRINES: specific crimes

1.) LARCENY (also ROBBERY [larceny + force] and CARJACKING)

C/L: Caption/Trespassory Taking + Asportation/Carrying Away (A/R) of property of another w/out consent (ATT CIRC) with Intent to Steal (M/R)

MPC: NO Asportation Required! Only “Unlawful Exercise of Control” – no carrying away movement!

1) LARCENY A/R: Caption (trespassory taking) + Asportation (Carrying away)

a. Larceny = trespassory taking & carrying away of property of another, w/o consent (Lee v. State). Larceny is offense against possession. Historically, if D had rightful possession as bailee, even if misused possession –no larceny. (Lee v. State). But cts gradually expanded definition to include misappropriation by person who had consensual physical control of property.

b. Caption: Custody vs. Possession: (Rex v. Chisser) TO can retain constructive possession even if transfer property to someone else. That someone only has physical possession/mere custody. Full possession = physical + constructive possession. Breaking Bulk: Even if D has lawful possession of some container, if he “breaks bulk” and takes contents = larceny. Plus at c/l traditionally employees retain only custody and not possession (not bailee) over employer property. (Mafnas)

c. Asportation: Carrying Away Movement At c/l need some carrying away movement (even slightest inch movement) of property (Cherry’s Case). MPC abandons asportation req in favor of “unlawful exercise of control”

d. Trespass/Without Consent: No Larceny without trespass. If goods delivered into D’s hands – implies consent and therefore no trespass = not all elements met = no larceny. (Topolewski). But, issues of consent, trespass, and intention to steal are interdependent so that an owner’s “consent” to D’s taking of goods depends on whether D intends to steal the goods or whether D has rightly paid for/only intends to borrow the goods (People v. Davis –cashier manifestly does not consent to customer taking shirt with intent to steal)

i. Setting of trap to catch D in act of larceny: must not go so far as to facilitate/consent to D’s taking (Topolewski – meat case). But owner can make it easy for D to steal without actually consenting (Eggington precedent where servant opened the door to house and did not stand in thieves’ way).

ii. Trickery can defeat consent. (Rex v. Pear – renting horse with intent to steal).
e. **Property of Another: Lost Property and Larceny**: At C/L lost property can be subject of larceny if 1) property not abandoned, and 2) finder takes possession with intent to appropriate, 3) despite reasonably believing TO can be found. (*Brooks v. State*)

   i. **Lost Property at MPC**: to constitute larceny, 1) at time finder takes possession, he must know property lost/mislaid, and later 3) he must keep the property with intent to deprive TO of ownership, and 4) he must fail to take reasonable measures to return. **MPC does not require concurrence of elements – intent to deprive comes after taking = sequential.** *Prosecutor-friendly!*

   ii. **Abandonment = Affirmative defense to larceny in both c/l and MPC.** Lost vs. Abandoned: depends on intent of TO. **Objective test: The reason person should ask:** 1) what was the intent of TO and whether TO has continuing interest in prop (if so, no abandonment – *Princess Diana teddy bear case*), and 2) if no abandonment, whether TO can be found?

f. **Intangible Property**: traditionally, at c/l labor and services could not be subject of larceny by false pretenses b/c could not be taken/carried away (*Lund*). But now, both c/l and MPC doctrines of larceny have evolved to include inappropriate conversion of labor and services.

g. **Grand Larceny**: Additionally, grand larceny requires that the property have some value (*Lund*). addresses theft of personal property requirement. This value is measured by market value. (*Lund*)

2) **LARCENY M/R: intent to steal**

   a. **Concurrence of the elements** – D must have intent to steal at time of taking. (*Rex v. Pear – renting horse*). But some juris allow the legal fiction of continuing trespass - allow trespassory taking to continue w/ each moment of time so that at moment D forms intent to steal/take permanently, elements will concur.

   b. **Intent to deprive permanently** – intent to deprive temporarily is merely trespass (*People v. Brown – D took boy’s bike temporarily*). – unless juris allows initial intent to deprive temp. + continuing trespass + later intent switches to perm. But intent to deprive perm need not be taken literally – so long as there is D asserts a right of ownership, the taking creates a risk of perm loss (*Davis* – ct discusses intent to “sell” back or obtain refund for stolen property = asserting a right of ownership = substantial risk of perm loss by TO).

3) **DEFENSES TO LARCENY**

   a. **Failure of Proof/Insuff of Evidence** – not all elements proven

   b. **Abandonment**: “taking to litter/ throwing away” (*Princess Diana teddy bear case*).

   c. **Claim of Right** – D takes honestly believing property is his (defeats m/r) so no larceny no matter how unreasonable this belief is. But there may be policy reasons to now allow this defense in cases where D claims right because of debt collection (want to discourage self-help, esp if by force/robbery).

4) **ROBBERY = LARCENY + USE OR THREAT OF FORCE IN CONNECTION** – Note: Force defeats consent – consent by force is not consent.

5) **CARJACKING = Taking of car in possession of another by force - NO ASPORTATION REQUIRED IN C/L OR MPC!**
2. **ASSAULT**

a. **SIMPLE ASSAULT**: attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another (*Boutin*). M/R = specific/elemental *not* general. A/R = attempted battery – what is required depends on juris:

i. **Trad’l C/L**: general attempt law (more than a preparatory step) toward battery (unwanted touching).

ii. **More common C/L (typical legislation)**: greater proximity required than trad’l c/l – D must reach far enough toward accomplishment of desired result to amount to *commencement of the consummation* of the offense. (*Boutin* – D standing 10 ft away from victim w/ bottle raised over head and ct said *not* enough for greater proximity even though would be for trad’l c/l so no assault). *Note*: nature of the weapon used, how easy to complete the offense, and presence of any accompanying threats may play role to determine greater proximity.

b. **AGGRAVATED ASSAULT**: Simple assault + force.

i. **Intentional Exposure to HIV/Disease**: when a/r so severe it endangers life/risk of D/SBH, no longer simple assault but aggravated assault. (*Majesty the Queen v. Williams* – a/r was exposure to high risk of HIV infection → endangering life → aggravated assault). In *Williams*, charge was aggravated assault b/c a/r was endangering another’s life (here, through exposure to high risk of HIV infection), and m/r was intentionally or recklessly endangering life. Problem was no concurrence of the elements. When D was exposing girlfriend to high risk of infection (a/r), he did not intend nor was he reckless as to endangerment b/c was not aware he was infected (no m/r), but then by the time D found out he was infected and continued to have sex so he intended or at least was reckless (m/r), he was no longer exposing girlfriend to high risk b/c girlfriend was likely already infected (no a/r). This was distinguishable from the *Cuerrier* precedent where D knew from beginning of relationship that he was infected so intended or recklessly endangering girlfriend’s life (m/r + a/r) *even though* girlfriend in that case never actually became infected and in *William’s* girlfriend did. *Note*: Crown could have pursued a re-infection theory to say that after D found out he was infected, he was exposing girlfriend to high risk of re-infection of different strain of HIV.

3) **HOMICIDE**: Traditionally at c/l, death must have occurred one year and a day from D’s act to make D liable for murder. But with life-sustaining advances in medicine, almost half of states have rejected this rule in their statutes (notes after *Eulo*).

a. **MURDER**: unlawful killing of another human with *malice* (intent to do harm or recklessness as to whether harm would occur result – *Cunningham*) aforesought.

i. **1st M**: depends on statutory definition but usually something like “intentional and unlawful killing of human with malice and w/ premeditation and deliberation”

1. **M/R: Premeditation and Deliberation (P&D)**: C/L requires that P&D occur in more than just a “twinkling of an eye” – i.e. that interval of time between the formation of intent to kill and the execution of that intent, sufficient for D to be fully conscious of what he intended (*Guthrie* overturning *Schrader*) Instantaneous intent – which occurs simultaneously with the execution – is insufficient to establish P&D (however, can be enough for 2nd M by heat of passion). Premeditation
should be deliberate and measured / cool, calm, and collected – this is the opposite of hot-blooded passion which may characterize 2nd. The interval of time b/t the formation of intent and the execution should be long enough to afford time for a “second look” (Morrin note case). This is MPC purposeful and knowingly murder.

a. P&D usually proved by circumstantial evidence: to decide b/t 1st and 2nd M: Forrest factors:
   i. absence of provocation by victim (court in Forrest didn’t count father’s gurgling sounds)
   ii. conduct and statements of D
   iii. threats and declarations of D (in Forrest D said he was “putting Dad out of misery” and “promised wouldn’t let dad suffer”)
   iv. ill-will or previous difficulty b/t parties
   v. dealing of lethal blows after victim rendered helpless (but couldn’t this also show frenzy/passion/no P&D),
   vi. brutality of killing (again, couldn’t this also show rage/passion/no P&D).

b. Thematic: moral culpability and punishment in Midgett child abuser vs. Forrest loving son: Seems like Midgett child abuser more morally culpable than Forrest, and punishment better suited in both retributivist (child abuser deserves more punishment than loving son), and utilitarian (need more specific deterrence, incapacitation, and societal punishment for child abuser but maybe gen deterrence – want to send msg that not okay to kill, even if think putting someone out of misery?)

ii. 2nd M: still involves malice (3 types):
1. distinguishable from 1st M b/c simultaneous intent to kill and execution of that intent – express intent / malice but too instantaneous to be P&D/deliberate and measured/cool, calm, and collected. (consider Forrest factors to decide b/t 1st and 2nd M).
2. distinguishable from vol. mansl b/c killing in the heat of passion but w/out adequate provocation (Guthrie) – have malice (unlike vol mansl) and unreasonably or inadequately provoked so more culpable than vol mansl. Note: Intent to further abuse, or intent to kill developed in a drunken, heated rage during such abuse is insufficient to constitute P&D but still has malice and unrea/inadequately provoked so still murder not vol mansl (Midgett – child abuser case).
3. Unjustified risk-taking but distinguishable from invol mansl b/c unintentional - considered to be implied malice 2nd M b/c D acted recklessly (D actually aware of risk – unlike in invol mansl where D merely negligent/unaware of risk) – in MPC this is reckless murder
   a. Elements of Implied Malice 2nd M (Nieto Benitez)
      i. High probability D’s conduct will result in death
ii. D subjectively aware of this risk

iii. D deliberately performs act with a base/antisocial purpose or w/ conscious disregard for life.

iv. Causation

b. MANSLAUGHTER: requires an absence of malice (malice = dividing line b/t murder and mansl).

i. VOL. MANSL: upon sudden heat of passion – Adequate provocation (or extreme emotional disturbance in MPC) acts as a mitigatory (not exculpatory) defense which reduces murder to manslaughter – seems like provocation is a partial justification (b/c of the focus on the conduct of the victim / justifying D’s act b/c of the social undesirability of the provoker’s act) – as opposed to a partial excuse (b/c of the partial moral blameworthiness of the provoked D).

Note: if don’t meet elements of c/l mitigatory prov or mpc eed = 2nd M! This is just Mansl in MPC – invol mansl is called neg homicide in MPC).

1. C/L ELEMENTS OF MITIGATORY PROV (Girouard):

a. ADEQUATE PROVOCATION: calculated to inflame the passion of a reasonable man (see objective) and tending to cause him to act from passion rather than reason – essentially saying passion takes over so not exercising free will – no malice! (see categories below and consider on case-by-case – depending on juris, words alone may not be enough). Not in MPC

i. Trad’l c/l categories of adequate prov: 1) inflegante delectico (sudden sight of spousal adultery), 2) mutual combat, 3) assault and battery, 4) 3rd party protection (sight of injury + abuse to D’s close relative), 5) illegal arrest, 6) sight of sodomy of son (not of daughter traditionally). Words alone may not be enough (compare Girouard where wife’s taunting words insuff for adeq prov – need words + conduct - w/ Hawaii case where judge said the “n” word, because of its history, may be enough alone for adeq prov)

b. SUBJECTIVE: D actually provoked, so that killing was in heat of passion – all circumstances relevant to see if D was in-fact agitated.

c. OBJECTIVE: Reasonable person in D’s position would have been provoked – peculiar frailties of D’s mind are not considered (this is a check on pugnacious people). More subjectivized in MPC. C/l policy of preventing D from relying on own idiosyncrasies so reasonableness determined by:

i. Gravity of Provocation: focus on victim’s provoking act – and think of the reasonable man as sharing such of D’s characteristics as would affect the gravity of the provocation to him / all the factors which would affect the gravity of the taunts and insults when applied to D. This necessarily has a nexus to D’s identify so characteristics of D may be considered
ii. **D’s Ability to Self Control:** consider only ordinary person of D’s sex and age (*Holley*) but not much more subjectivized (definitely not all circumstances which are used to determine subjective provocation – evidence of intoxication or peculiar frailties of D’s mind are not considered to determine self-control b/c c/l separates diminished responsibility unlike MPC where it overlaps with subjective provocation).

d. **NO COOLING OFF PERIOD:** D reacts before a reas opportunity for passion to cool – requires immediacy of response to provocation. **Not in MPC.**

e. **CAUSATION (NO MISDIRECTED RAGE):** rage must be appropriately caused by victim (*victim* was the original provoker – no mitigation for misdirected rage to 3rd party) – and there must be a connection b/t provocation – passion – killing. **Not in MPC.**

2. **MPC ELEMENTS OF EXTREME EMOTIONAL DISTURBANCE** (*Cassassa*): broader than c/l heat of passion – MPC intended to move away from rigid c/l categories of adequate provocation and make a much more subjectivized mitigatory defense to lower murder to mansl. **Even seemingly ridiculous “provocation” will prob go to jury to decide whether EED b/c no requirement for adequate provocation.**

   a. **SUBJECTIVE:** D in-fact acted under EED – don’t need to look at adequacy of provocation as long as D in fact under EED, prov can even come from w/in D himself (b/c he is drunk, mentally disturbed, etc)!

   b. **SUBJECTIVIZED OBJECTIVE:** there is a reasonable explanation or excuse for EED from the viewpoint of the D under the circumstances as D believed them to be (however inaccurate!) – jury must see D’s EED (not act of killing) from D’s perspective to determine reasonableness. (but in *Cassassa*, even viewing from D’s perspective, court found malice – even in D’s deluded world, D not completely overcome with passion and still intended result so can’t get mansl which requires lack of malice)

   c. **Provocation can build over time** (unlike c/l which requires no cooling off period) – no immediacy required / EED can result from D seething over time / long-term abuse.

   d. **No Causation requirement:** no express requirement that victim be the provoker (or that there be any provoker at all b/c D can work up himself!) – leaves open possibility for misdirected rage.

ii. **INVOL MANSL:** Unjustified risk-taking and unintentional like 2nd M but no implied malice b/c D acted only negligently (not recklessly like Implied Malice 2nd M) – D unaware of risk – **this is MPC negligent homicide.**

   1. **Elements of Invol Mansl** (*Hernandez*)
a. D fails to be aware of substantial and unjustifiable risk (even if as in Hernandez he fails to be aware b/c drunk)
   i. But note that prosecutor could have used drinking bumper stickers to say D knew of risks of drinking/driving could have tried for Implied Malice 2nd M and say aware of risk = recklessness but problem was evidence was highly prejudicial

b. Such failure is a gross deviation from standard of care of a reas person in D’s situation
   i. Note: normally criminal standard for invol mansl is gross neg, but some jurisdictions allow for lower standard of simple negligence/absence of ordinary care (Williams –where Native American parents didn’t take sick kid to doctor where ct found c/l duty for parents to provide for medical care and ordinary person in their situation would have recognized need for medical care = omission was absence of ordinary care and convicted of invol mansl – harsh rule).

c. Causation
c. FELONY MURDER: Felony + death = FM (1st or 2nd M depending on statute). D is guilty of murder if death results from conduct during attempt, comm’n, or fleeing of felony. FM imposes s/l for deaths committed in course of enumerated felonies, without need for any m/r or malice as to killing (this is why FM heavily criticized – especially b/c of wide range of statutory felonies, D can be punished for murder for committing relatively minor misconduct as long as death ensues) (Fuller – ct applied FM but indicated strong distaste for doctrine). Note: FM depends on list of felonies enumerated in statute – for felonies unlisted, even if they require same m/r as listed felony – no FM (in Fuller 1st FM statute listed burglary but not larceny so if car was unlocked, then only larceny and could not get for 1st M for death – maybe Implied Malice 2nd M at best b/c unintentional even though larceny and burglary require same m/r).

   d. FM and Causation: In classical formulation of FM, courts not looking for trad’l Oxendine actual causation, just whether in the space of a felony, death ensues. Death can be accidental, unintentional, unplanned, or completely unforeseeable. (Stamp note case where D committing robbery (larceny + force), and person in building had a heart attack – D convicted of 1st M). No automatic insulation for FM for “break in causation” – time, distance, and causal relationship b/t felony and killing are merely factors to be considered in determining whether killing occurred in comm’n of felony (Sophophone). But some juris adopt agency approach to say only if killing caused by accomplice can D be held liable by FM – if caused by some other non-felon / 3rd party not seeking to further felony so not in agency – no FM (Sophophone majority said no FM for police officer’s lawful killing of D’s co-felon). Note: MO and IL adopt the proximate cause approach to say that as long as D sets in motion the events leading to death, FM applies, even if death carried out by non-felon/3rd party (Sophophone dissent would have held D liable for police officer’s lawful killing of D’s co-felon b/c D set in motion events).

   i. Limits to FM: B/c of criticism and constitutional questions of s/l for murder, FM rule is not to be construed expansively, and there are several limits.
1. **Inherently Dangerous Underlying Felony (Howard):** No FM unless elements of underlying felony *in the abstract* (not focusing on actual facts of case) and are “inherently dangerous” to human life. Ask: Is it possible to commit this felony in an undangerous manner, even if particular D did it dangerously? (Howard – high speed police chase found not to be inherently dangerous b/c at least at least one section of statute involved only dmg to property). (Burroughs - the “healer” case ct found practicing medicine w/out a license under risk of creating BH is *not* inherently dangerous – could be performed safely). *Note:* even if no FM, could get invol mansl if gross neg or maybe 2nd implied malice murder if can find reckless/aware of risk).

2. **Merger Doctrine (Robertson):** FM not applicable to predicate felonies that are an integral part of and included in fact within homicide. This is because the primary purpose of the FM rule is deterrence – this is only served when it is applied to a felony independent of the homicide. So no FM when underlying felony is invol/vol mansl, assault w/ deadly weapon (*Ireland* precedent), discharging firearm in neg manner, etc.

   a. **Exception to Merger Rule: Independent/Collateral Felonious Purpose Rule (Robertson):** Even if predicate felony is integral part of / included w/in homicide, if can prove D had some independent, collateral purpose, FM still applies b/c then deterrence is served. (*Robertson* – where underlying felony of discharging firearm neg was integral part of homicide *but* ct found underlying purpose of felony was to scare away thieves so FM applied and D convicted of murder).

   b. **Thematic:** The irony w/ FM is that “worse” purpose to kill lets D avoid FM by Merger Rule and “better” purpose to only scare puts D in worse position b/c of FM by independent felonious purpose rule. Thus, to get FM, prosecutors will have to argue D intended only to scare and defense attys will have to argue that D intended to kill – all backwards.

   e. **MISDEMEANOR MANSL:** misdemeanor + death = MM (Usually invol mansl – and again, s/l applies as to the invol mansl so no need for gross neg). (same criticism as Fm, but even more criticism b/c underlying misdemeanor is seen as benign (i.e. speeding, failing to yield) – *note:* MM can apply to transmission of STD. Some states limit application to dangerous misdemeanors (like FM limitation).

**INCHOATE OFFENSES AND ACCOMPILCE LIABILITY:** Order of operations for inchoate offenses = Solicitation → Conspiracy → Attempt → [Crime].

  1) **ATTEMPT:** Attempt focuses on m/r - intent to commit substantive offense (compare to s/l which focuses on a/r) - if there is criminal intent and some act beyond a preparatory step=D liable for the lesser included offense of attempt (*Rex. v. Scofield*). **Rule of Merger** operates – D *cannot* be convicted of both completed offense and attempt to complete same offense. **Purpose of attempt doctrine** = a policy choice to empower law enforcement to intervene before crime completed. **Two types of attempt:** 1) **Complete** (all acts completed but result somehow thrown off – i.e. shoot and miss); or 2) **Incomplete** (some acts completed but intervened before completion).

  a. **Elements:**

     i. **Dual M/R (Gentry):**
1. Specific Intent to do act which constitutes substantial step toward completion (specific intent to commit an act of attempt)

2. Specific Intent to achieve substantive offense (need specific intent/highest order m/r to kill, rape, etc regardless of whether intent required for substantive offense is lower than specific)
   a. Cannot have attempt of unintentional crime (i.e. FM, S/L stat rape/public welfare, invol mansl, implied malice 2nd M) – attempt is a specific intent crime and one cannot intend unintended consequences! (Bruce v. State – since in FM no intent to kill, can’t have attempted FM; and Cox – since invol mansl = no intent to kill = no attempted invol mansl).

ii. A/R: Some act beyond a preparatory step toward completion – Tests to determine whether D has moved beyond zone of preparation (Mandujano): Note: treatment of a/r and choice of test probably depends on nature of social harm to be prevented and policy choices.

1. Dangerous Proximity Test (Peaslee and Rizzo): D is dangerously close to success – focus on degree of proximity and criminalize only those attempts where social harm/completion of crime is immediately near (none or hardly any further steps required) – no bright line rule, depends on degree and circumstances. Defense-friendly b/c requires very close to completion. In Rizzo no dangerous proximity for planned robbery even though several steps completed b/c victim was not actually anywhere around / D got location wrong.

2. Probable Desistance Test (Henthorn): in the ordinary and natural course of events, w/out interruption, conduct will result in crime. In Henthorn changing prescription from 1 to 11 codeine refills not evidence of probable non-desistance b/c not clear whether D would return to pick up 2nd, 3rd, etc refills.

3. Res Ipsi Loquitur /Unequivocality Test (Miller): conduct unequivocally / obviously manifests intent to achieve social harm. D’s act must speak for itself (res ipsa loquitur) – w/out regard to prior threats. Even this test presupposes some direct act or movement in execution of the object offense, however slight.

4. Abnormal Step Test: D goes beyond point where normal citizen would think better of his conduct and desist.

5. Physical Proximity Test: an overt act amounting to the commencement of the consummation (directly tending toward completion).

6. Indispensable Element Test: like proximity but emphasizes any indispensable aspect of the criminal endeavor over which actor has not yet acquired control.

7. Version of MPC Substantial Step Test (Reeves – schoolgirls rat poison teacher): possession of materials to be used in crime at or near scene w/no other lawful purpose enough to allow but not require jury to find substantial step toward completion of offense (focus on early prevention/intervention by law enforcement).
2) SOLICITATION: Requesting seriously another person to commit an offense, w/ no need for solicited person to agree → crime complete upon request.

3) CONSPIRACY (Pinkerton): an unlawful agreement. Conspiracy is a mutual agreement or understanding b/t 2 or more persons to commit a criminal act or accomplish a legal act by unlawful means (Carter). Conspiracy is heavily weighted toward m/r. Note: **Merger rule does not apply in C/L b/c conspiracy and substantive crime are distinct offenses – can be convicted of both conspiracy and substantive offense!** (Carter) – in MPC merger rule does apply w/ exception. Purposes – enable early police intervention and assumption that collective action toward social harm involves greater risk than individual action. Moreover **complicity doctrine applies** to conspiracy – if one conspirator guilty of substantive offense, **all conspirators are guilty for both consp and substantive offense(s) no matter the level of participation in the conspiracy or the substantive offense (Pinkerton).**

   a. **C/L Elements (Carter):** Note: if you can find conspiracy, can sometimes find acc liability – using prearrangement to infer dual m/r and encouragement (a/r) of acc liability (Pinkerton) [and anyway conspiracy + presence = a/r for accomplice liability by Hicks].

      i. **Dual M/R:**

         1. Specific Intent to conspire/agree
         2. Specific Intent to accomplish illegal objective

            a. Like attempt, conspiracy is a specific intent offense – **no conspiracy for unintentional offenses** (i.e. no conspiracy to commit FM, s/l stat rape/public welfare, 2nd implied malice/reckless M, or invol mansl) b/c **cannot intend unintentional acts. So if you want to get D on conspiracy, need a specific intent target offense (Swain).**

      ii. **A/R:**

         1. Agreement – essence of conspiracy is the mutual agreement/common understanding that a particular criminal objective was to be achieved. Agreement **need not be express – can be inferred from circumstances / tacit agreement (Azim). Note: an agreement can exist even if every party doesn’t know about or agree to every aspect of the agreement. Enough if each person agrees to commit / facilitate some aspect of the crime (Bank Robbery Hypo after Pinkerton – n. 2).

            a. **Is mere knowledge of criminal activity enough?** – For suppliers of goods/servs, may depend on if selling inherently criminal / susceptible to illegality products such as drugs (Direc Sales) or if supplying innocuous goods/servs (Falcone) – if innocuous, **knowledge alone is insufficient** – need knowledge of unlawful use and intent to further that use (Lauria) – to make leap from mere knowledge to intent to further criminal objective, use circumstantial evidence, including (Lauria factors):

               i. Special interest/stake in illegal venture
               ii. No legitimate use for goods/servs (inherently criminal goods/services)
               iii. Volume of illegal activity disp prop to total business
iv. Felonious nature of subst crime itself – if serious offense, maybe knowledge alone enough but no w/ misdemeanor

b. **Ask:** Does target offense appear choreographed/organized? To **prove prior agreement, use Azim factors:**
   i. Association/relationship w/ co-consp
   ii. Knowledge of comm’n of crime
   iii. Presence at scene of crime
   iv. Participation in crime

c. **But note: must be prior agreement** – prior to target offense. Proof of conspiracy may rest entirely on circ evidence, but this must be more than conjecture or guesswork – **accomplice liability does not necessarily prove conspiracy** (consp thought to be clandestine/secret and not spontaneous) so so harder to prove when Ds aren’t secretive or the crime appears spontaneous (Cook).

2. **By 2 or more people**

3. **To carry out unlawful object or means**

4. Some juris say agreement alone enough for a/r but **some juris require require an overt act, however trivial or preparatory**, in furtherance of agreement.

   iii. **Complicity (Pinkerton):** an overt act of one conspirator = the act of all w/out any new agreement specifically directed to that act as long as offense committed in furtherance of the initial conspiracy – no matter level of participation in conspiracy or act, no matter if D not even present at crime. *(Pinkerton).* This is based on the idea of a **continuing conspiracy** – so long as no affirmative action to withdraw, if act is 1) a reasonably foreseeable part of the agreement (objective test), and 2) a natural consequence of the agreement (rather than just a ramification of plan) = all conspirators are liable for both conspiracy and substantive offense(s).

iv. **No merger rule:** can be convicted of both conspiracy and substantive offense

b. **MPC and Merger Rule: 1.07(1)(b):** in MPC juris, D **cannot** be convicted of both consp and substantive offense (merger rule applies) **but** when conspiracy is larger than substantive offense (i.e. conspiracy involves robbery of several banks), and D caught after just first part of it (i.e. after first robbery), D can be convicted of substantive offense for the first part and conspiracy for the rest – b/c residual dangerousness of conspirators prevents merger rule.

4) **ACCOMPlice LIABILITY:** An accomplice (princ 2nd or accessory before the fact) is a person who w/ requisite intent (dual m/r) assists (a/r) the princ 1st in committing crime. Unlike conspiracy, A/L is **not a distinct crime** (accomplices not guilty of “aiding/abetting” but only of substantive offense. But like conspiracy, **complicity doctrine applies** (accomplices guilty of acts of princ 1st). **Accomplices are punishable as Princ 1st.**

a. **Types of Accomplices in Trad’l C/L (Ward):**
i. **Princ 2nd** = present at crime = **not derivative** so can be convicted **independently** of princ 1st.

ii. **Accessory before the Fact** = not physically present at scene of crime= **classic derivative** liability so can **only** be convicted if princ 1st also convicted (**not** if princ 1st is acquitted, dies, or conviction reversed).

1. **Modern C/L abolishes distinction** b/t princ 2nd and accessory before so accessories before may also be punished w/out regard to princ 1st’s prosecution. **Note**: accessory after the fact are criminal protectors who w/ knowledge of felon’s guilt render assistance to felon in effort to hinder his detention – these are not considered accomplices and may be punished only for sep and lesser offense.

b. **C/L Elements**: **Note**: if you can find conspiracy, whether D present at crime (princ 2nd) or not (accessory before), can infer accomplice liability b/c prearrangement satisfies dual m/r (intention to aid and intent to achieve target offense) + a/r “encouragement” (even w/out physical participation, can argue D had psychological influence (**Pinkerton**) [and anyway conspiracy + presence = a/r for accomplice liability by **Hicks**].

i. **Dual M/R**: can find both intent to aid and intent achieve success by circumstances such as association w/ accomplices, participation, (**Hoselton**), stake in venture (**Wilcox**), verbalization of support (**note case w/ wife “I won’t stand in your way” for husband’s plan to kill mom**).

1. **Specific Intent to aid princ 1st**

2. **Intent to achieve substantive offense** – cts split as to what kind intent required based on juris:

   a. **Trad’l C/L (**Echols**): Requires **specific intent** for both prongs of m/r – cannot be accomplice for an unintentional crime (such as FM, invol mansl, 2nd implied malice M) – substantive offense must be specific intent offense b/c can’t intent unintentional consequences (tracks Bruce attempt and **Swain** consp).

   b. **Modern C/L (**Linscott**): Don’t need specific intent as long as offense was **natural and probable consequence of primary crime**: Steps: 1) D intended to achieve primary crime (in **Linscott** burglary- larceny + force), 2) D aided in primary crime, 3) princ 1st committed secondary crime (no need that D aided in secondary crime – enough if aided in first), 4) secondary crime was reasonably foreseeable consequence of primary crime (death is reas foreseeable result of burglary – consider 3 reas constructs).

   c. **MPC (**Riley**): 2.06(3)-(4): D need only have requisite m/r for substantive offense (even if reckless, negligent, etc) as opposed to proving specific intent to achieve forbidden result – **can be an accomplice to an unintentional act**, including FM, 2nd implied malice M, and invol mansl (cf Bruce attempt and **Swain** conspiracy). In **Riley** couldn’t tell who princ 1st was b/c both shooting but could punish both as princ 1st using a/l even though crime was reckless.
ii. **A/R: “Assistance” – 3 types** (how much “active” support required may depend on nature of substantive offense and policy decisions as to

1. **Physical Participation: “Aiders”**: assists, physically supports, or supplements the efforts of another - easy case. **Lookout** (*Hoselton*): one who by prearrangement keeps watch to avoid interception or to provide warning during comm’n of crime is thereby participating in offense (and since present = princ 2nd punishable as princ 1st w/out regard to princ 1st’s own prosecution).

2. **Psychological influence “Abetters”**: instigates, advises, psychologically supports or **encourages** comm’n of crime - harder case but if can find 2nd m/r that D seeking success of target offense – can also infer encouragement – see presence + ____ below. (*Hoselton*).

3. **Omission if D has legal duty** (*Beardsley/Jones*):
   a. Mere presence + knowledge of crime, w/out more, is insuff to constitute “assistance” (*Vaillancourt*) unless have legal duty to intevene – need presence + knowledge + lookout conduct (*Hoselton*); presence + knowledge + stake in venture (*Wilcox*); presence + knowledge + cheering or other verbalization of support (*bar rape hypo* cheering customers or *note case* w/ husband plan to kill mom and wife says “I won’t stand in your way” – both inferred encouragement); **presence + conspiracy** (*Hicks*) = **sufficient a/r for accomplice liability** (and can be punished as princ 1st w/out regard to princ 1st’s own prosecution b/c princ 2nd). But *Vaillancourt had a noteworthy dissent* which said that presence alone w/ purpose of aiding (m/r) implies furnishing of moral support / encouragement in comm’n of crime = a/r. That’s why **many juris say mere presence enough when designedly encourages, facilitates, or prevents detection of crime.**

iii. **Causation:** No causation required for accomplice liability – all that matters is **princ 1st** caused crime. Focus is on accomplice’s **motives** (dual m/r), not his degree of influence over princ 1st. **Exception:** If accomplice’s act/encouragement actually hinders substantive offense / makes it harder, no accomplice liability but if you can find dual m/r and more than preparatory steps toward aiding/abetting, perhaps you can get attempted accomplice liability only in MPC (no attempted a/l at c/l).

iv. **Other requirements:**

1. **No conviction as accomplice or princ 1st based only on accomplice testimony** – testimony must be corroborated by independent evidence tending to **connect D to comm’n of substantive offense** (*Helmenstein*-no a/l because all witnesses were accomplices and only other evidence was that crime was committed – *not* that D was connected to that commission).

2. **No accomplice liability unless substantive crime was actually committed** – central element of A/L is that substantive offense was committed by someone! (*Genoa* – no accomplice liability although D satisfied both dual m/r and a/r b/c princ 1st was undercover cop who
never actually committed the substantive offense – note even if can get princ 1st on attempt, can get accomplice liability b/c attempt is a distinct offense – but here, cop never even made attempt).

DEFENSES: Five categories of defenses: 1) Failure of proof (i.e. mistake of fact negates m/r; incapacitation negates a/r); 2) Offense modifications; 3) Justifications (negates act’s social harm / harm outweighed by need to avoid greater harm or further greater societal interest); 4) Excuses (negates actor’s moral blameworthiness b/c not capable of exercising free will); 5) Nonexculpatory public policy defenses (stat lim, immunity, and incompetency). D must prove affirmative defenses by preponderance of evidence (more likely than not) (Patterson) whereas cannot ask D to prove failure of proof defenses b/c would be shifting prosecutor’s burden of proving all elements BRD (Winship) to D by asking D to disprove an element – would violate due process (Mullaney precedent in Patterson). Note: if any of these defenses gets rid of an offense, will also get rid of FM based on that offense. Also re: accomplice liability: if accessory before in trad’l c/l, if defense exculpates princ 1st, will also exculpate accessory before b/c derivative (in modern c/l, may have abolished distinction b/t princ 2nd and accessory before so not derivative).

1) FAILURE OF PROOF DEFENSES

a. AUTOMATISM – negates a/r (Utter): Automatism=behavior over which D is unaware/has no conscious control i.e. sleepwalking, hypnosis, epilepsy, spasms, reflexes, conditioned responses. (Utter). Merely physical reactions to external stimuli are involuntary acts and therefore cannot constitute a/r (Utter). However, for a conditioned response, defense will need to introduce evidence of a trigger – something to initiate response (in Utter insuff evidence of trigger - WWII vet being approached from rear).

i. Time-Framing: Prosecution can defeat lack of volition by time-framing broadly (Defense would want to time-frame narrowly). Can say volition to drink/take drugs/fail to take medication/drive w/knowledge of seizures transfers to volition to do drunken/automatistic act. (Martin class discussion; Seizure hypo). But an intervening cause (such as police in Martin) can interrupt the transfer of volition. Moreover, though broad time-framing can prove a/r, defense could still argue no m/r.

ii. Automatism: failure of proof defense vs. aff’ve defense:). Automatism can be seen as a subset of insanity (affirmative defense) but defense would prefer to use it to prove lack of volition (failure of proof defense) b/c then burden on prosecutor and if prosecutor fails, D walks. Whereas prosecutor prefers to use as affirmative defense so burden on defense and even if proved, D would be committed to penitentiary. -

b. MISTAKE OF FACT – negates m/r: If statute construed to be specific intent crime, need only honest mistake for defense unless intent required is negligence which necessarily implies reasonableness (all other intents require actual knowledge, which is defeated by mistake) (Navarro). If construed as general intent, need honest + reasonable mistake (to attack moral blameworthiness) (Navarro) – remember to ask who is the reasonable person (pros would argue most abstract; defense would argue similarly situated). If construed as s/l, no mistake of fact, period (Garnett). ***Rape and mistake of fact is controversial issue – whether defense is allowed is dependent on how statute construed – general or specific (Sherry). If includes any m/r language, can prob argue m/r attaches to each element so specific intent required.

c. INTOXICATION: Intoxication is a failure of proof offense (not an excuse) so can be used to negate an element of the crime (usually m/r) and say crime never proven BRD.
i. **Voluntary Intoxication:** cts split b/t rules based on jurisdiction and usually choose b/t two for policy reasons

1. **Graves:** voluntary intoxication can negate the m/r of any *specific* intent crime (because if a specific m/r is a required element of a crime and D did not have that m/r b/c intoxicated, then that particular crime has not been committed b/c no concurrence of the elements – regardless of the policy implications.

2. **Tarver:** voluntary intoxication can only be used in 1st M or 1st FM cases and only to lower *degree* of crime to 2nd M (vol intoxication cannot change nature of crime – must still remain murder). *Tarver* and *Graves* dissent use broad time-framing to say that intent to drink (vol intox) transfers to m/r of crime so that it still remains murder. These jurisdictions go by a policy rationale that one should be held liable as intending the natural and probable consequences of their actions (*Conley*) – here, drinking.

ii. **Involuntary Intoxication:** like *Graves* invol intox is exculpatory – but applies to *both* specific intent and general intent crimes b/c here D not morally blameworthy. **4 invol intox rationales:**

1. Coerced: D coerced to drink/take drugs, etc under duress
2. Pathological: D has internal malfunction where response to drug is unforeseen
3. Innocent Mistake: D tricked into drinking/taking drugs
4. Unexpected Intox: D has bad reaction to prescription/legal meds.
5. Some juris also consider invol intox as temporary insanity so acquitted but no civil commitment b/c only temporarily insane.

2) **AFFIRMATIVE DEFENSES**

a. **SELF-DEFENSE:** perfect self-defense is *exculpatory* – get-out-of-jail free card. Analyze self-defense keeping in mind *overarching themes: necessity, imminence, reasonableness of D’s apprehension* (is this the “typical” or “aspirational” reasonable man – think *Goetz*), and *proportionality* (textbook necessity is that we don’t respond w/ deadly force unless faced w/ deadly force but we have strayed from this – hard to judge D’s determination of proportionality when he is under attack). Imperfect self-defense (honest but unreasonable belief of peril/necessity of response is *mitigatory* – can lessen from murder to mansl.

i. **C/L Self-Defense Elements (*Peterson)*:

1. **Threat (actual or apparent) of D/SBH against D:** consider nature of threat – the threat must have an “air of reality”
2. **Threat is unlawful and immediate** (differs in MPC)
3. **D honestly + reasonably believes** – entirely subjective (w/ catch) in MPC:
   a. **he is in imminent peril of D/SBH** (*imminence = immediate danger that must be *instantly* met and cannot be guarded against by calling for assistance or for protection of law – *Norman* and...**
b. response was necessary to prevent D/SBH (there must be an element of necessity – if D has a choice, presumably no necessity)

c. The Vital Ques: reasonableness of D’s apprehension: While there is no requirement that D’s belief be correct, it must be both honest and objectively reasonable. However, the objective test considers action taken by the “assailant,” physical characteristics (including race, gender, size) of all involved, D’s knowledge about assailant, and all prior experiences, including those which have taken place long before – all of which shed light on the reasonableness of D’s belief. (Goetz subway killer who, from experience, believed “give me $5 bucks” by black youths meant danger; and Wanrow woman killed neighborhood molester - ct said jury instructions full of masculine pronouns were insufficient to inform jury that should consider situation from D’s point of view.). Note: honest but unrea belief = imperfect self defense = mitigatory.

i. Thematic: subjectivized reas man, considering all prior experiences, for self-defense (Goetz) but not so for rape (Alston – where did not consider Cottie’s prior abuse by D) – should the reas person be subjectivized similarly in rape cases? – maybe diff is that in self-defense reas person is used to exculpate whereas in rape, used to inculpate D.

4. Duty to Retreat?: c/l split by juris- Traditionally, D had duty to “retreat to the wall” if he could safely, and once D had reached a safe haven, he should not go back and inject self into fray (Laney and Rowe precedents in Peterson). But in some jurisdictions, D may stand ground and use deadly force whenever seems reas necessary to save self. Castle Doctrine: c/l doctrine that said D did not have to retreat if attacked w/in his own home (invoked by Joe Horn 911 caller who killed robbers of neighbor). But aggressor / D who provokes affray may not claim benefit of castle doctrine (Peterson). –must retreat or surrender possession of thing / avoid confrontation in MPC - no stand your ground option.

5. Aggressor cannot invoke self-defense unless he communicates to adversary his intent to withdraw and in good faith attempts to do so (Peterson – D confronted wiperbalde-thieves w/ pistol). “Clean hands doctrine” - one who has dirty hands / is blameworthy / is at fault is no longer justified in claiming self-defense.

a. *Aggression = an affirmative, unlawful act reas calculated to produce an affray (a fight) foreboding injurious or fatal consequences.

ii. MPC Self-Defense Elements (3.04 + 3.09)

1. Entirely Subjective (w/ catch): 3.04 provides that force is justified “when D believes” force necessary to protect self against use of unlawful force by another. Thus, only D’s honest belief that force necessary is
required (unlike c/l honest + reasonable). But 3.09 puts a check on this to say that if D is reckless or negligent in his belief, then he is not exonerated, and can face reckless or negligent homicide charges (like c/l “imperfect self-defense” = mitigatory but not exculpatory).

2. **Imminence as to response:** whereas c/l requires “immediate threat” (tight time-framing), 3.04 “immediacy relates only to D’s subjective view of immediacy of response (as long as D subjectively believes response is immediately necessary, can get jury instruction on self-defense in MPC juris – w/ catch of 3.09 reckless or neg in belief).

3. **Duty to Retreat:** while c/l split by juris on whether duty to retreat if can do so safely or right to stand ground, 3.04(2)(b)(ii) requires D to retreat if can do so safely or to surrender r possession of thing / comply with demand if will avoid danger –no stand your ground option in MPC.
   a. Though 3.04(2)(b)(ii)(1) does say D not obliged to retreat from “dwelling or place of work” unless he was initial aggressor (like c/l castle doctrine with aggressor exception).

b. **BATTERED SPOUSE SYNDROME (BWS) (Norman):** where spouse achieves almost complete control and submission by psychological and physical domination – to the point where wife believes there can be no rescue from this person. BWS cycle (repeats):
   i. Tension-building stage
   ii. Acute battery / actual abuse
   iii. Contrition stage / honeymoon phase

1. Theory is that in Stage 2 / confrontation, where usual self-defense operates, battered spouse immobilized by fear so can’t respond or defend self. But battered spouse can start to see transition from honeymoon to tension-building phases, and can see imminence where non-battered public cannot. Similarly, BWS reduces battered spouse to state of “learned helplessness” (a perceived “lack of choice” – expounded on by expert testimony as to necessity) which non-battered public may not understand why D didn’t just go for help. Some jurisdictions will allow BWS testimony even in non-confrontational homicides where spouse is asleep/passive (as in Norman), b/c of these ideas of an expanded notion of imminence and learned helplessness – but some follow Norman and reject expanded notion of imminence to focus on the temporal aspect of imminence and say no self-defense b/c no necessity.

c. **DEFENSE OF OTHERS (Kurr – mom killed boyfriend to protect quadruplet fetuses):** allows person to use reasonable force (proportionality) to defend another when (elements):

   i. D honestly + reasonably believes that the other person is in immediate danger of unlawful bodily harm; and
   ii. that the use of force is [apparently] necessary to avoid the harm.
   iii. Most jurisdictions allow consideration of the defense even where the belief in need to protect the other is erroneous and the person being protected would not have had the right of self-defense – the focus is on the reasonableness of D’s belief that the other would have had the right.
1. Like self-defense, D may not use more force than he reasonably believes is necessary to relieve the risk (deadly force usually only justified when faced with a deadly attack).

2. Kurr held that the defense of others may be used to protect even a nonviable fetus from an unlawful assault against the mother (court focused on mother to prevent force used to protect embryos in freezer, etc, and court distinguished b/t lawful and unlawful threats to prevent anti-abortion activists from using defense of others to stop physicians from performing lawful abortions).

d. DEFENSE OF PROPERTY (Ceballos): General rule is that force used in defense of property is justified only when committed against one who manifestly intends to commit felony of a forcible and atrocious variety (i.e. felony in a manner/character that creates reas fear of D/SBH – not a non-violent burglary) – again consider threat, necessity, and proportionality.

d1. Use of deadly mechanical devices: Though the trad’l c/l rule was D can do indirectly what he could have done directly (that is, he could use a deadly mechanical advice if he would have been justified in using deadly force where he present, many courts like the one in Ceballos decline to accept this rule for policy reasons. These cts hold that Ds cannot use deadly mechanical devices to protect property – policy reasons: peril to innocents, including police and fire fighters, and devices are w/out mercy or discretion (can’t judge necessity as D would be able to were he present).

e. USE OF FORCE BY LAW ENFORCEMENT IN CRIME PREVENTION (Garner): Even if police have probable cause to believe a suspect is a felon, the apprehension by use of deadly force is a seizure (restraining freedom of person to walk away) subject to 4th amendment reas requirement. 4th amendment reas requirement prohibits officers from using deadly force to effect arrest of a fleeing felon, unless: 1) deadly force is necessary to prevent escape, and 2) officer has probable cause to believe suspect poses threat of D/SBH to officer or others. Use balancing test: extent of unconstitutional intrusion (highest w/ deadly force situations) vs. govt interest / need for search and seizure (lower for unarmed, nondangerous, fleeing felons like in Garner but maybe enough if felon is armed or dangerous).

f. NECESSITY (Nelson – truck stuck): While necessity is an overarching theme of other defenses, pure necessity is a trad’l exculpatory justification defense b/t choice of two evils (violation of the law and harm sought to be avoided). Defense of necessity justifies unlawful actions taken to prevent an even greater harm from occurring. Note: in c/l must choose either necessity or duress / can’t have both put before jury (b/c the two are binary – either natural or human force; no free will or choice b/t evils, etc). But in MPC both can be argued.

f1. C/L Elements (Nelson – truck stuck):

1. D honestly + reasonably believes:

   a. Traditionally, evil must have arisen from natural source

   b. “Emergency” choice of evils (requires immediacy) – but still choice/free will, and choice is justified (attacks a/r).

   c. Act must have been done to prevent significant evil

   d. No adequate (lawful) alternatives
e. (2 steps): 1) D must have believed at time of acting that reas foreseeable harm caused would not have been disproportionate to harm avoided (proportionality) but 2) D’s value determination will be judged objectively by court after the fact.

f. Typically justified by utilitarian logic (promoting “greater good”)

2. Cannot take an innocent person’s life and claim defense of necessity (Dudley cannibal). There is not an absolute and unqualified necessity to preserve one’s own life and Dudley held that the highest duty is to sacrifice self rather than kill an innocent. Serious policy concerns would be raised if we allowed people to claim such necessity, even if the necessity arose out of “act of God” – would raise ques about whose life is more valuable and who is to judge such determinations?

a. Prison Escape cases: analyzed under necessity or duress - necessity can be used b/c two evils (violate law/escape or suffer sexual assault) even though evil is source of human force and no greater good (both bad) (Unger and Lovercamp analyzed prison escape in terms of necessity and allowed escape considering Lovercamp factors: 1) specific threat of D/SBH in immediate future, 2) no time for complaint to authority or history shows complaints futile, 3) no time/opp to resort to courts, 4) no evidence of force/violence towards guards/other innocents, 5) D immediately reports to authorities when reaches safety – note these are relevant but not determinative to decide necessity. Other precedent Harman analyzed under duress but Unger disagreed b/c said no absence of free will. In MPC, could have put both before jury.

ii. MPC Elements: 3.02 Choice of Evils (this is one time where MPC stricter than c/l)

1. D subjectively/honestly believes choice of evils, but
2. D must be correct – judged by court and no room for mistake! (“harm sought to be avoided is greater than that sought to be prevented by law)
3. No mention of natural source
4. NO mention of immediacy – no “emergency” choice of evils language

g. DURESS (Contento-Pachon-smuggler): C/L must pick necessity or duress (in some jurisdictions distinction very clear, but in others cts blue these and willing to let go some requirements for analysis – recall prison escape cases Unger where lets go of necessity natural source and greater good).

i. C/L Elements (Contento-Pachon):

1. Evil arisen from human source
2. Immediate threat of d/sbh if D does not commit crime (but note that Contento-Pachon allowed defense of duress even when threat of future harm b/c said specific and continuing threats to family members = threat of specific, immediate harm.
3. Well-grounded fear that threat will be carried out (probably more subjectivized focus – no mention that D must be of “reas firmness” like in MPC)

4. Duress must have been such that there is an absence of free will (no choice) (attacks m/r)

5. No *reasonable* opportunity to escape (objective focus but in *Contiento-Pachon* D’s belief that police corrupt so no escape was enough to go to jury)

6. Where defense is successful, the “coercer” is guilty of crime

**ii. MPC Elements: 2.09 Duress**

1. Yes, mention of human source

2. Objective requirement: person of “reasonable firmness” in D’s situation would not have been able to resist (no mention of this in c/l – no need for D to be of reas firmness)

**h. INSANITY:** Insanity is an excuse defense (saying D is not morally blameworthy – 1st principles). If successful, this defense acquits D (not guilty) but D will be committed to penitentiary (switch to medical modality – whereas for “evil/bad” Ds, objective is correctional/punitive; for “mad/sick” Ds, objective is medical/custodial). *Expert testimony is crucial for insanity defense!*

**i. M’Naughten Rule:** This rule predominates in insanity analysis for both policy and political reasons.

1. *At time of committing act*, D laboring under such defect of reason as result of disease of mind (DOM proved by expert testimony), as:
   
   a. Not to *know* nature and quality of act (*cognitive incapacity*), *or*
   
   b. If he did know, did not know it was wrong (*moral incapacity*)

**ii. Policy Criticisms of the M’Naughten Rule:** criticisms of M’Naughten Rule as out of step with psychiatry and the way DOMs really work.

1. Focuses on *total incapacity of cognition* (no knowledge at all), rather than MPC’s “appreciate” standard (appreciate is more nuanced than mere knowledge and might be more realistic in terms of degrees of incapacity).

2. Lacks *volitional capacity question* – does not allow for defense of inability o control impulses.

3. Lacks *emotional impairment concern* – doesn’t inquire into ability to appropriately cope or deal with emotions.

**iii. Three Objectives of any acceptable insanity test (Johnson):**

1. that it conform with underlying principles of the criminal law and with community values (idea is that insane persons can’t conform to either)

2. That it allow the admission of appropriate psychiatric evidence

3. That it permit the jury to serve as final arbiter
a. 4 states have no aff’ve insanity defense but allow evidence of mental illness directly on element of m/r (failure of proof) – this is a much harder test b/c have to prove so mentally defective that no m/r at all, but if can prove, could lead to acquittal (like Graves) or just lower degree (like Tarver).

iv. **Procedural Context:** Pre-trial assessment of insanity

1. Accused is competent to stand trial unless: 1) insufficient present ability to consult w/ lawyer w/ reas degree of rat’l understanding and 2) lacks rat’l and factual understanding of proceedings.

2. Leg may constitutionally require that D prove/persuade factfinder that he was insane at time of crime (this does not violate Due Process)

3. If D incompetent to stand trial, criminal proceedings suspended and D committed to mental health facility until regains competency (constitutional implications b/c possible D never regains competency and could spend more time committed than would if convicted of underlying offense)

i. **NEW INITIATIVES**

i. **CULTURAL DEFENSE:** Not a true defense but can be used to 1) attack m/r (no intent, malice, or by saying cultural understanding created mistake of fact!), 2) play a role in determining reasonableness – especially if considering similarly situated reasonable person, 3) infuse a traditional defense (provocation, self-defense, diminished capacity, insanity), 4) some have argued for it as a stand-alone defense, but this has not been widely accepted, or 5) analyze goals of punishment. Cultural experts play a big role in this to determine the cultural value of the act (Kargar). Alternatives to cultural defense are prosecutorial discretion, plea bargaining, jury nullification, and sentencing discretion.

ii. **ROTTEN SOCIAL BACKGROUND (RSB):** not an accepted defense, but defense attnys often use same principles of RSB to get w/in another doctrine (i.e. insanity or diminished capacity), and again can invoke theories of punishment (can we invoke societal norms on the very poor who are excluded from society?, etc).