I. Establishing Guilt
   a. Burden of Proof
      i. Beyond a reasonable doubt
         a) “moral certainty”
         b) High level of due process/procedural protection b/c of potential for deprivation of liberty
   b. Allocating the proof of Burden
      i. Burden of production
         a) = to come forward with enough evidence to put a certain fact at issue
         b) if def. bears, usually an affirmative defense
         c) MPC – def. must meet burden of production for affirmative defenses, then the prosecution must meet the burden of persuasion to disprove the affirmative defense
      ii. Burden of persuasion
         a) = burden of convincing the trier of fact, to the required standard
         b) Beyond a reasonable doubt
   c. States may not place upon def. the initial burden of proving their innocence
      i. Def. is presumed innocent until proven guilty
      ii. But, a State may lawfully require the def. to bear the burden of proving the affirmative defense’s elements, rather than requiring the prosecution to (dis)prove them (Patterson v NY)
      iii. A statute cannot presume that a def. is guilty of an element to allow for or prove an affirmative defense (Patterson)
   d. Conviction requires proof beyond a reasonable doubt for every (material) fact necessary to constitute a crime (Winship)

II. The Justification of Punishment
   a. Incapacitation
   b. Retribution
   c. Utilitarianism
      i. Specific deterrence
      ii. General deterrence (criminal as an example)
         a) Thus, punishment should not be decreased even if the particular def. will not likely repeat the crime
      iii. Cost-benefit analysis
   d. Rehabilitation
      i. Now a very distant goal in the American correctional system
   e. Proportionality
      i. Punishment should be proportional to the crime
      ii. The US system allows the (extraordinary, only) individual circumstances of the case to be considered in sentencing – to produce individual punishment (Johnson)
   f. 3 principles that limit punishment in the US criminal justice system
      i. Culpability = safeguard conduct w/o fault from punishment (anti Type I)
      ii. Proportionality – reasonable differentiation btw minor & serious offenses
      iii. Legality – give fair notice or warning as to what constitutes an offense
         a) Nullen poena sine lege = no punishment without notice
III. The Elements of punishment
   a. Actus Reus
      i. Voluntary acts – requirement of overt and voluntary acts
         a) MPC §2.01(1) – voluntary act OR omission of act def. is capable of
         b) Unconsciousness is a complete defense to homicide when it is not self-induced.
            a. does not include times when actor does something and does not remember
         c) Possession – MPC §2.01 - states that possession is an act only if the person is aware she has the thing she is charged with possessing.
         d) Hypnosis – MPC took the position that the acts of hypnotized subjects are not voluntary
         e) Sleep walking – not voluntary
         f) Habitual action – no liable if you don’t control, unless you are negligent in putting yourself in a situation to harm others
         g) Legal insanity is a defense, but subjects the person to institution.
      ii. Omissions
         a) At common law, there is no duty to act and therefore failure to act is not criminally liable unless there is some typed of relationship btw the parties (Pope v State)
            a. Generally speaking there is only a duty when one person is responsible for the other person’s conduct
            b. Spouse-spouse, parent-child, innkeeper-tenant, landowner
         b) Some states make it criminal to refuse to help people in emergency situations
         c) Common law situations where omission may be criminally liable.
            a. where statute imposes a duty to care for others
            b. where one stands in a certain status relationship to another
               i. law typically looks at spousal and parental relationship
               ii. other relationships enacted by law
            c. where one has assumed a duty to care for the another
            d. where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. (People v Oliver)
         d) MPC §2.01(3)(a)-(b) = ~ same as common law, supra
         e) Taking someone off life support does not constitute murder b/c it is treated as an omission, not a voluntary act (Barber)
   b. Mens Rea
      i. ~ criminal mind
      ii. Each element of each crime must be committed w/ the requisite mens rea
      iii. Actus non facit reum, nisi mens sit rea – “an unwarrantable act without a vicious will is no crime at all”
      iv. Malice is defined as an actual intention to do a particular kind of harm OR recklessness as to whether such harm should occur or not (Faulkner)
      v. A person cannot be held liable for all consequences that resulted from a criminal act; some sort of foreseeability of harm is required to satisfy the intentionality requirement of criminal liability (Regina v Faulkner)
         a) Foreseeability = check on the line of proximity causality chain
      vi. MPC 2.01 (created to get away from common law distinctions)
a) Purpose – conscious object (intent)
b) Knowledge – with awareness…conscious act.
c) Recklessness – conscious disregard of substantial & unjustifiable risk
   a. **Default Rule** = MPC § 2.02(3) if MPC is silent as to mens rea required, recklessness is required
      i. B/c of presumption of innocence
d) Negligence – inadvertent action creates a substantial and unjustifiable risk of which he ought to be aware.

vii. Types of mens rea:
   a) General intent
      a. Perpetrator intended the consequences of his crime
      b. i.e. Trespass
   b) Specific intent
      a. Action done with the intent to do something else
      b. i.e. burglary = unlawful entry with intent to commit a felony
         i. Trespass becomes Burglary when the perpetrator has the intent to commit a felony
      c. To convict, the prosecution must intent to commit the specific crime

viii. Material elements
   a) Not all elements are material; only those issues that go to culpability, defenses, and attendant circumstances
   b) Every material element must have requisite mens rea
   c) Every material element must be proven beyond a reasonable doubt
   d) 3 kinds of material element according to MPC
      a. [1] Nature of the conduct
      b. [2] Attendant circumstances of the conduct
      c. [3] Results of the conduct

ix. Difference btw motive and intent
   a) Intent = purpose of doing the particular act
   b) Motive = the reason why you do a particular act
      a. Typically irrelevant in culpability
      b. Considered for specific intent crimes and for sentencing

x. Conditional threats
   a) “If you don’t give me the keys, I’ll kill you.” = mens rea unless the condition negates the harm (Halloway)

xi. Deliberate avoidance and positive knowledge are equally culpable (Jewell)

c. Mistake of Fact
   i. **MPC §2.04** – mistake of fact is NOT a defense, unless ignorance or mistake of fact negates the existence of a state of mind (mens rea) that is essential to the commission of an offense (purpose, knowledge, recklessness, or negligence)
      a) What if a person who wants to kill another with arsenic but uses salt instead
         a. Mistake of fact is not a defense because there is the state of mind
         b. So you can still be guilty of attempted murder
   ii. Exceptions
      a) Statutory provisions make it so that mens rea is not a necessary element.
b) State v White – guy guilty of leaving his pregnant wife even though he didn’t know

d. Strict Liability
   i. Strict liability crimes are ok if [1] it was that legislature’s intent to exclude intent as a material element of a crime AND [2] the statute deals with public welfare (not malim in se) AND [3] the statute is silent as to the mens rea requirement (Baline)
      a) Malim in se = crime that is inherently evil
      b) Malim in prohibitem = crime that is not inherently evil
   ii. RULE = where the common law traditionally required intent, the judiciary cannot read the intent requirement out of the crime without evidence of legislative intent to that end (Morissette)
      a) Typically, malim in se crimes with a tradition of requiring mens rea should not have their intent requirement judicial abrogated w/o legislative intent
   iii. Vicarious criminal liability
      a) = legal transfer of intent
      b) Minority rule = vicarious criminal liability is a substantive violation of due process (State v Guminga)
      c) Majority rule = vicarious criminal liability is OK if the vicarious culpability is reasonably related to the policy goal/public interest of the law in question
   iv. Culpability seems to rest on violation of “moral standards of wrongness”
      a) Not really about the law; def. just “shouldn’t” have done what he did

e. Mistake of Law
   i. Common law: Ignorance of the law is no excuse
   ii. General rule now: mistake of law ≠ excuse, unless negates required mental state (Cheek)
   iii. MPC: Mistake of law is only a defense when: (Marrero)
      a) Def. had a good faith belief his action was legal
         i. B/c mistake of law negates def.’s required mens rea
         ii. Effectively, the prosecution fails to prove a required element of the offense to beyond a reasonable doubt
      b) Def. shows that statute actually permitted the conduct
         a. NOT merely that def. thought the statute permitted the conduct
            i. Incorrect personal interpretation is not a defense
      c) Def. follows a statute, then change in interpretation of the statute and the prosecution tries to prosecute ex post
         a. MPC 2.04(3)(b)
         b. EXCEPT – Does not apply if the def. would be guilty of another crime if the situation would have been as he supposed
      d) Def. reasonably relies on an (incorrect) official statement of the law
         a. MPC 2.04(3)(b)
   iv. If a person destroys another’s property under a reasonable (but mistaken) impression that it was his own then it is okay (Regina v Smith)

f. Cultural defense
   i. Controversial; not widely accepted or raised; does exist in some jurisdictions

f. Legality
   i. Nullen crimen sine lege = no punishment without law
ii. A law is required to [1] have been on the books before the commission of the crime, [2] be sufficiently definite, and [3] provide notice of the elements of the crime.

iii. Vagueness of a law may invalidate (void for vagueness) the law for either of two independent reasons: (City of Chicago v. Morales)
   a) 1. Inadequate notice (people don’t know what conduct is prohibited)
   b) 2. Arbitrary enforcement of the law (may reach innocent conduct)

IV. Rape
   a. History
      i. Early definition – “unlawful carnal knowledge of a woman”
         a) Required: female only, forcibly, against her will and w/o consent
         b) At common law, no rape within marriage
         c) At common law, resistance and consent were 2 sides of the same coin, if she did not “resist to the utmost” she consented
      ii. 1950 – against will and she must forcibly resist
      iii. 1999 – gender neutral, lack of consent, uses reasonable person standard, only need duress
         a) force ~ lack of consent
      iv. MPC – implicit consent requirement, no resistance requirement. §213.1
   b. MPC §213.1 Rape and related offenses
      i. Rape = Male, sexual intercourse, not wife:
         a) compels by force or threat of kidnapping, death, harm, pain to her or others
         b) impaired her power
         c) female is unconscious
         d) female less than 10 years old
      ii. Rape is 2d degree unless [1] actor inflicts serious bodily injury upon anyone OR [2] victim was not a voluntary social companion AND had not previously permitted sexual liberties, in which cases the offense is first degree.
         a) Stranger rape = 1st degree
         b) Date rape = 2d degree, still requires high requirement of force
      iii. Gross sexual imposition – male with female not wife. 3d degree if:
         a) Compels her to submit by any threat that would prevent resistance from ordinary woman
         b) Takes advantage of mental disease
         c) Knows she is unaware or she mistakenly supposes that he is her husband
   c. MPC §213.3 Corruption of minors = Male with not wife OR deviate sexual intercourse
      a) Victim < 16 AND perpetrator is > 4 years older
      b) Victim < 21 years AND actor is guardian
      c) Induced by promise of marriage, which he does not intend to perform
   d. Actus Reus
      i. Determined by victim’s conduct
         a) B/c if victim consents, no crime
         b) Thus, seems to require some objective manifestation of no consent
      ii. Victim’s fear must be reasonably grounded (State v Rusk)
      iii. General intent (not specific intent crime – don’t have to intend to rape)
      iv. Resistance – some state require reasonable resistance, some do not
      v. Requires force and lack of consent
e. Mens Rea
   i. Majority rule = mistake of fact as to consent IS a defense
      a) Def. bears the burden of showing reasonable mistake as to consent
         (Commonwealth v. Sherry)
      b) Minority rule = mistake of fact as to consent is NO defense (Commonwealth v Fisher)
         a. “no means no,” once said, no mistake of fact unavailable (Fisher)

V. Homicide
   a. At common law
      i. Murder = unlawful killing of a human being with malice aforethought
         a) “Malice aforethought”
            a. = highly technical terms of art describing any type of killing that is murder
               as opposed to homicide, thereby raising the grade of the offense
            b. Purpose of malice requirement is to aggravate the degree of the offense
               and thus increase the punishment
               i. Reflection of the greater moral culpability
            c. = slightly above recklessness and up; i.e.:
               i. intent to cause death or serious bodily harm is sufficient
               1. ~ MPC’s purpose
               ii. knowledge that act which causes death will probably cause death is sufficient
               1. ~ MPC’s knowledge
               iii. a shade above recklessness is sufficient
         b) Malice could come from Felony-murder rule
            a. Impute malice from the committing of another felony
         c) Malice attached to lying in wait b/c lying in wait and killing was considered more
            culpable/worse than killing in a quarrel
      ii. Premeditation
         a) Used to distinguish btw 1st degree murder and 2d degree murder
         b) Some jurisdictions allow instantaneous time btw formation of intent and actual
            killing (Carroll)
         c) Some jurisdictions requires some period of time (however short) btw formation of intent
            and the actual killing (Guthrie)
         d) Problem = period to time requirement can produce some absurd results
            a. Where a person did not “premeditate” but stabbed daughter 60 times
               (Anderson)
         e) Rationale = premeditated crimes are deterrable and therefore should be subject to
            harsher penalties to maximize deterrent effect
   b. MPC §210.1
      i. Criminal homicide – “purposely, knowingly, recklessly or negligently causes death”
      ii. Criminal homicide subdivided into:
         a) Murder - § 210.2
            a. Except under 210.3(1)(b) [under influence of extreme mental or emotional
               disturbance for which there is reasonable explanation or excuse] criminal
               homicide = murder when:

i. It is committed purposely or knowingly, OR  
ii. It is committed recklessly AND manifesting extreme indifference to the value of human life  
   1. Recklessness and indifference is presumed in felony-murder rule-like situations (i.e. felony robbery, rape, arson, burglary, kidnapping, or felonious escape)  
   b. Murder = felony in 1st degree  

b) Manslaughter - § 210.3  
a. Criminal homicide = manslaughter when:  
   i. Committed recklessly, OR  
   ii. The homicide would be murder, EXCEPT the killing is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse  
      1. Reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be (subjective standard)  
   b. Manslaughter = felony in 2d degree  
c) Negligent homicide - § 210.4  
a. Criminal homicide = negligence homicide when:  
   i. Committed negligently  
   b. Negligent homicide = Felony in the 3d degree  

iii. Abolishes “aforethought”  
a) But premeditation (aforethought) is still important b/c it (can) shows purposeful action  

c. Provocation  
i. Purpose = reduce the grade of the crime (e.g. 1st degree → 2d degree)  
ii. Common law  
a) Formulaic standard  
b) Only allows provocation as a justification to reduce the grade of a killing when there is [1] heat of passion, [2] witness of the act, and [3] no cooling off period AND in ONLY the following circumstances:  
   a. Extreme assault or battery on def.  
   b. Mutual combat  
   c. Def.’s illegal arrest  
   d. Injury or serious abuse of a close relative of the def.  
   e. Sudden discovery of a spouse’s adultery  

iii. MPC  
a) More relaxed standard  
b) Determination of provocation requires a determination of whether there is an “influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse, as determined from the viewpoint of a person in the actor’s situation under the circumstances as he believed them to be”  
c) Present the evidence to the jury and the jury considers the individual’s circumstances to determine if mitigation of punishment is warranted based on the def.’s emotional state.
d) TEST for extreme emotional disturbance for provocation = (Casassa)
   a. Pre-req: show extreme emotional disturbance via situation
   b. [1] Def. must have “acted under the influence of extreme emotional disturbance” AND (wholly subjective standard)
   c. [2] Must be “a reasonable explanation or excuse” for such extreme emotional disturbance (objective standard)
      i. Reasonableness determined from the viewpoint of a reasonable person in the def.’s situation as the def. believed the circumstances to be

e) MPC is attractive b/c it gives the jury to bring community values to bear on the intrinsic and extrinsic circumstances of the killing and adjust the punishment accordingly (State v. Elliot)

f) Juries typically consider age (don’t put an “old man’s head is not put on a young man’s body”); less likely to consider sex; generally unsympathetic to cultural circumstances

iv. Words are not sufficient to constitute provocation (Girouard)
   a) Policy reasons:
      a. People must endure the difficulties of life
      b. Civilized society
      c. Inherent difference btw words and actions
   b) Exception: Some jurisdictions allow words if the words contained facts (i.e. “I just raped your wife.”)

v. Cooling time period
   a) Common law barred provocation if any cooling off period
   b) Many modern courts are unwilling to allow “rekindling” of prior provocation

vi. Insanity defense is different than provocation
   a) Insanity is a complete defense – no guilty by reason of insanity
   b) Conversely, provocation – guilty of lesser crime (reduced conviction and punishment)

d. Manslaughter = Unintended Killing
   i. Criminal liability for involuntary homicide requires [1] death to be shown to have resulted from def.’s [2] wanton or reckless disregard for the safety of others = MA Test (Commonwealth v Welansky)
      1. Requires a high degree of likelihood of injury to another
      2. Standard of wanton and reckless conduct is both objective and subjective
         a. Objective = facts that would cause a reasonable man to know the danger
         b. Subjective = the def. must have known the facts
            i. B/c wanton or reckless conduct = intentional conduct
   ii. No defense of contributory negligence
      1. But this may be an used to see if DEF. was the proximate cause
   iii. Courts apply objective standard of reasonableness (uneducated parents case)
   iv. MPC Manslaughter - § 210.3
      1. Criminal homicide = manslaughter when committed recklessly OR committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation of excuse
      2. Awareness of risk is required
3. Less formulaic, more individualized
   v. MPC Criminal Negligence - § 210.4
      1. Criminal homicide = negligent homicide when it is committed with substantial or unjustifiable knowledge of likelihood of injury and gross deviation from what the reasonable person would have done
      2. says that awareness of the risk is required for manslaughter, BUT a person who is unaware of the risk may be punished for negligent homicide
      3. Need more than “ordinary” negligence
   vi. Russian Roulette
      1. Russian Roulette players are guilty of murder (not manslaughter) because even though they typically lack the intent required for murder, because of the high probability of death or serious bodily harm they exhibit recklessness under the circumstances that manifests extreme indifference to the value of human life = malice (Malone)
      2. Generally,
         a. Natural and Probable Consequences Doctrine = when you engage a deadly weapon and a person dies, it is murder
   vii. Drunk driving
      1. An intentionally drunk driver has the requisite malice to be convicted of murder (in the 2d degree) when he drives in a manner that evidences depraved disregard for human life (Fleming)
   b. Felony-murder RULE
      i. = impute (bootstrap) malice for murder from the fact that (any) person is killed in the course of a felony you are committing (common law)
      ii. MPC 210.2(1)(b) = felony-murder rule equivalent = recklessness and indifference to human life required for a murder conviction are (rebuttably) presumed if the actor is engaged in the commission of robbery, rape, arson, burglary, kidnapping or felonious escape
      iii. As long as life is shortened, even if the person would have died, the felonious act can impute malice (People v Stamp)
         1. Criminal laws version of Thin Skull Rule
      iv. Felony-murder rule is very harsh on the def. b/c it strips a strong defense; the only defense left for a def. charged with felony-murder is causation, infra
   v. Judicial limitations to felony-murder
      1. “Inherently dangerous to human life” limitation
         a. Only felonies that are inherently dangerous to human life are eligible for felony-murder rule
         b. NB To determine if a felony is inherently dangerous to human life, look at the felony in the abstract, not at the particular facts of the case
            i. In the abstract = CA rule
            ii. RI says look in view of circumstances
            iii. MPC limits the doctrine to a set of felonies
         c. e.g – stealing money is not inherently dangerous, thus felony murder rule is inapplicable.
      2. Merger Doctrine limitation
a. The court is prevented from imputing malice under the felony-murder rule where the felony is an integral part of the homicide (People v. Stewart) AND the evidence is shown to be an offense included in fact within the offense charged (People v. Ireland)

3. “Not-in-furtherance” limitation
   a. Felony-murder rule is not applicable to deaths that occur “not-in-furtherance” of the felony
   b. Two theories:
      i. Agency theory
         1. Limits felony-murder to “agents” in furtherance of the felony such that only if the killing is done by a co-felon or someone acting in concert with a co-felon will the felony-murder rule apply
      ii. Proximate cause theory
         1. Says that any killing allows imputation of malice b/c killing, no matter by whose hand, is w/in the foreseeable risk of the commission of felony
         2. Weird thing here is that 1 co-felon could be convicted of murder for the killing of his co-felon by the victim
   vi. Vicarious liability
      1. = def. can be vicariously liable for the killing of a co-felon by a victim when the killing was committed by a resisting victim or police officer WHEN the conduct of the def. (or his accomplice) was sufficiently provocative of lethal force to support a finding of implied malice (Taylor)
      2. Not much difference btw Proximate cause theory of felony-murder and Vicarious liability
         a. Difference = traditional felony-murder required the felon commit the murder; so the victim’s killing doesn’t fit

VI. Causation
   a. Generally,
      i. Causation = material element of all (completed) substantive crimes; except attempt
      i. [1] Actual cause = “but for”
         a) Threshold test, not required to be the only cause
         b) Accused setting chain of action in motion = sufficient
         c) Accused contributing to chain already in motion = sufficient
      ii. [2] Proximate cause = legal cause
         a) Foreseeability
            a. Sufficient direct cause (People v. Warner-Lambert) AND
               i. Def.’s conduct need not be sole and exclusive factor, just sufficiently direct cause
            b. Ultimate harm is something that should have been reasonably foreseen
            b) Natural and Probable Consequences ~ substitute for foreseeability
            c) Where the def. does something “wicked” the courts are more likely to find proximate cause
d) Intervening 3d-party negligence can break that causal chain, but not necessarily (People v. Acosta – police helicopter chase)
   a. Example – intervening unskilled or improper medical treatment that aggravates an injury and contributes to death will not protect original perpetrator from criminal liability
   NB (supposedly) Higher standard than civil liability

c. Omission
   i. Omission can be a legal cause if there is a legal duty to act (based on relationship)

d. Transferred Intent
   i. **MPC §2.03** – If the purpose of the act is the same, the intent transfers
      a) Example – A intends to kill B, but ends up killing C, A is liable for the murder of C even though he didn’t intend to kill C under the idea of transferred intent b/c the purpose is the same

e. Subsequent Human actions
   i. Common law – concept of free will ➔ no one is responsible for the actions of another = no liability if there is subsequent human action
      ii. Generally, one is not guilty of murder when one successfully urges or assists another to commit suicide, as long as the deceased was mentally responsible and was not forced, deceived, etc.
      iii. BUT, causation exists where subsequent human actions occurs as a result of being **rendered irresponsible** from mental and physical injuries inflicted by def. (Stephenson)
      iv. Causation can be broken by subsequent, reckless human actions
      v. (Sulgrove) voluntary and reckless participation in a drag race does not of itself bar def. from being convicted of involuntary manslaughter.

f. Russian Roulette cases
   i. Def’s liable for murder; causation under natural and probable consequences and foreseeability.

g. Assisted suicide
   i. **Common law** = murder
   ii. **Majority rule** = only murder if the def. participates in the **final overt act**
      a) Involvement in events leading up the commission of final overt act is insufficient
      b) Relies on notion of free will and subsequent human action
   iii. **MPC** says assisted suicide is on par with manslaughter but disagrees that free will is an intervening human action that ends criminal liability

h. Novus Actus Doctrine
   i. = the law tends to treat a subsequent human action as an intervening human event that breaks the proximate cause chain, ending criminal liability
   ii. **EXCEPT** if you recklessly provide the means of harm to someone who is despondent

VII. Attempt
a. Generally,
   i. Criminal liability EVEN though your actions did not constitute a crime
   ii. Inchoate crime = actions that form a crime even though not harm resulted
      a) The offense is merely to doing of particular actions

b. Common law
   i. Misdemeanor
ii. Punishment for attempt = $\frac{1}{2}$ of punishment of completed offense

c. MPC
   i. Punishment for attempt = punishment for completed offense
      a) Rationale = if you “attempt” you are equally morally culpable as the successful criminal, therefore you deserve the same punishment

d. Most states
   i. Punishment for attempt < punishment for completed offense
      a) Rationale = general belief that if you didn’t complete the crime, you shouldn’t receive the same punishment; when no harm occurred, it is practically more difficult and less desirable to prosecute

e. Mens rea
   i. MPC §5.01
      a) Definition of attempt
         a. Purposely engages in conduct which would constitute the crime if circumstances were as he believes, OR
         b. Causing a particular result in an element of the crime (act or omit) with the purpose or belief it will cause such result without further conduct on his part, OR
         c. Purposely acts or omits to do anything when such act or omission constitutes a substantial step
      b) Substantial step includes (5.01(b))
         a. Lying in wait
         b. Enticing the contemplated victim
         c. Reconnoitering the place for crime
         d. Unlawful entry of a structure, vehicle
         e. Possession of materials to be used, which can serve no other lawful purpose
         f. Possession, collection or fabrication near place, where they can serve as no other purpose
         g. Soliciting an innocent agent
      c) MPC = combination of equivocality test and dangerous proximity test for substantial step determination
         a. Equivocality test
            i. Whether the act is “unambiguously” criminal activity
            ii. Use common sense
         b. Dangerous Proximity Test
            i. Criminal liability attaches if the act advances very near to the accomplishment of the intended crime
            ii. Common law required last proximate act
            iii. MPC requires dangerously near (Rizzo)
      c. Substantial Step TEST: requires:
         i. [1] firmness of criminal design AND
            1. Such that would satisfy mens rea for completed crime
         ii. [2] a substantial step toward the commission of the crime
            1. Strongly collaborative of the criminal purpose
            2. Need not be “last proximate act”
ii. Specific intent is necessary for attempt
   a) Higher standard b/c of concerns of undue restriction on liberty/freedom
   b) Attempt requires specific intent (purpose) to produce the proscribed result EVEN WHEN recklessness or some lesser mens rea would suffice for conviction of the completed offense (Campbell)

iii. Exceptions to attempt
   a) No attempted felony murder
   b) No attempted involuntary manslaughter
   c) Recklessly firing a gun into a crowded room is not attempted murder if no one dies; but if you intentionally fire into the crowd and no one is injured, you can be convicted of attempted murder

iv. There is NO attempted involuntary manslaughter
   a) Because of lack of intent/purpose

v. Can be convicted of “attempted statutory rape”
   a) Immaterial if the person knew of age

vi. Solicitation of a person to commit a crime ≠ attempt when the person has no intention of actually carrying out the crime because the solicitor’s action are merely “preparatory” (State v Davis)
   a) MPC 5.01 eliminates this oddity and treats solicitation the same as attempt

vii. Defenses to attempt
   a) Factual impossibility
      a. = even if the person where to do what he plans to do, he is unable to commit the crime
      b. REJECTED by nearly ALL jurisdictions
   b) Legal impossibility
      a. = even if the person were to do what he plans to do, he does not commit a crime (b/c one of the elements of the crime cannot exist)

VIII. Group Criminality
   a. Common law
      i. Principle in the 1st degree = the actor
      ii. Principle in the 2d degree = person who is physically present, aiding, and abetting the commission of the crime
      iii. Accessory = not present at commission of the crime
          a) Before the fact = help plan the crime
          b) After the fact = give assistance, comfort, or aid to felon after commission of crime
   b. MPC § 2.06 – Complicity
      i. Eliminates the common law distinctions above
      ii. Everyone is either a principle OR an accomplice after the fact
      iii. Not required to convict principle in order to convict the accomplice(s)
   c. Mens Rea
      i. [1] Mens rea of Principal
          a) Requires specific intent (purpose) to aid or abet the principle (Hicks)
          b) Test for aiding and abetting = specific intent to further the commission of the crime (Luparello)
iii. **MPC §2.06(3)** – You are an Accomplice IF you act:
   a) “with the purpose of promoting or facilitating the commission of the offense, he:”
      a. solicits other person
      b. aids or agrees or attempts to aid such person planning or committing
      c. having legal duty to prevent the commission of the offense

iv. Intent – Finding the guilty mind
   a) Intent can be found if one says to another “I’ll help you kill him if you can’t do it yourself.”
   b) A person cannot be guilty of aiding or abetting where there is no connection or association with principal (Gladstone)
      a. There is a “nexus” requirement between accused and the principal
      b. Some states have a lower standard crime of “criminal facilitation.”

d. Expansion of Complicity liability (Luparello)
   i. Aider and abettor is liable for specific intent to further the commission of the crime (Hicks) AND for any reasonably foreseeable (natural and probable consequences) offenses committed by the person they aid or abet
      a) Type of vicarious liability
   ii. This expansion is widely followed while widely criticized

e. Attendant Circumstances
   i. To be convicted of aiding and abetting, the accomplice must be shown to have the requisite mens rea for every material element, including the attendant circumstances

f. Actus reus
   i. To be criminally liable for complicity a person must act in furtherance of the crime and to be able to act in furtherance the def. must be aware that the performer is breaking the law (he must know the attendant circumstances)

IX. **Conspiracy**
   a. Agreement is the core concept
      i. **MPC §5.03(1)(a)(b)** – aid without agreement does not constitute conspiracy
      ii. Some states require an agreement plus overt act.
   b. Merger
      i. General rule: can be charged with BOTH conspiracy and substantive crime (no merger)
      ii. MPC: cannot be charged with both (merger)
   c. Renunciation
      i. Common law: renunciation is no defense
      a) At common law you could not renounce, but you could abandon
      ii. **MPC 5.03** says renunciation = defense IF conspirator renunciates AND performs an overt act to prevent the crime from occurring
d. Conspiracy Hearsay Exception (Krulewitch v U.S.)
   i. Evidence that is otherwise barred from trial by the hearsay rule is admissible if the statement was made in furtherance of the objectives of an ongoing conspiracy
   ii. Courts will not assume that there is a conspiracy to hide the facts of an old conspiracy for the purposes of this rule
   iii. Rationale = involving additional people is inherently more dangerous and thus less deserving of procedural protections

e. Pinkerton extension of conspiracy liability
   i. All members of a conspiracy are criminally liable for all substantive crimes committed by any member of the conspiracy that are
      [1] in furtherance of the conspiracy; OR
      [2] fall in the scope of the conspiracy (very broad); OR
      [3] could be reasonably foreseen in the conspiracy (Pinkerton); OR
      [4] not within the scope of conspiracy if the substantive crime is reasonably foreseeable as the necessary or natural consequences of the conspiracy (Bridges)
   ii. Limitations (Requirements) (Alvarez)
      [1] Conspirator must play more than a “minor” role in the conspiracy; OR
      [2] Conspirator must have actual knowledge of at least some of the circumstances and events culminating in the reasonably foreseeable but originally unintended crime
   iii. Allows co-conspirators to be held liable for lots of stuff that attempt wouldn’t cover
      a) This is the strength of conspiracy law – and why prosecutors like it so much – independent actors acting on their own, but in furtherance of the general conspiracy who could not be charged with accomplice liability CAN be charged under conspiracy liability
   iv. NOT retroactive
      a) A person can enter a conspiracy after it has formed
      b) BUT, can only be liable for substantive crimes committed after his joining

f. Because Pinkerton is so broad, most states reject it
   i. Most states reject Pinkerton b/c of the large expansion of the doctrine
      a) Instead, co-conspirators are liable for substantive crimes committed by a co-conspirator when they meet the requirements of accomplice liability
         a. i.e. Aided and abetted
   ii. MPC §2.06 rejects Pinkerton
      a) Uses standard for accomplice liability
      b) Whether def. solicited commission of the particular offense or aided, or agreed or attempted to aid, in its commission
   iii. BUT, Federal courts use Pinkerton

g. Actus Reus
   i. = merely the agreement itself

h. Overt Act requirement
   i. Common law: overt act not required
   ii. Recent law: overt act is required to counteract the sprawling expansion of conspiracy law
   iii. MPC:
      a) Overt act not required in most cases
      b) Overt act required in serious crimes
   iv. Rationale for overt act requirement
a) = The function of the overt act in conspiracy prosecution is simply to determine that the conspiracy is still at work – that the conspiracy is neither just a thought and therefore no conspiracy nor completed and conspiracy no longer exists

v. Most states set the bar really low for overt act
a) ≠ substantial step; e.g. procuring a get-away car is sufficient

i. Mens Rea
   i. Common law: specific intent crime
   ii. MPC §5.03 – the agreement must have been made “with purpose of promoting or facilitating”
   iii. Prosecution must prove intent, mere knowledge is insufficient (People v Lauria). Such can be found from direct evidence of intention to participate OR indirect evidence of intention to participate such as:
      a) Def. acquired a stake in the venture
      b) There is no legitimate use for the goods or services
      c) Volume of the DEF.’s business with the buyer is grossly disproportionate to any legitimate demand for his goods or services

X. Exculpation
a. Generally,
   i. 3 types of defenses a def. can raise:
      [1] Prosecution failed to est. 1 or more required (material elements) of the offense
      [2] Justification = admit the elements of the crime are present, but argue the act wasn’t bad b/c it was justified
         - “erase” criminal liability, therefore, b/c accomplice liability is derivative, if the principle has a justification, the accomplice is not liable
      [3] Excuse = admit the act was bad, but deny responsibility b/c the conduct is excused
         - personal to the actor, therefore accomplice cannot invoke the principles’ excuse
   b. Justification
      i. Self-defense
         a) Excuse is personal to the DEF.
         b) Justification erases responsibility of the original act.
            a. Someone that helps someone defends another from serious bodily harm is not accessory to murder
            c) U.S. v Peterson (common law)
               a. Self defense is allowed when…
                  i. Threat
                     1. Unlawful and immediate
                     2. Response must be proportional
                  ii. Imminent peril of death or serious bodily harm
                  iii. Defensive response necessary to save himself or another from death or serious bodily harm
                  iv. Belief of imminent peril must be objectively reasonable (objective)
                     AND honestly entertained (subjective)
               d) Objective/Subjective standard
a. **MPC 3.04(2)(b)** – Def. only need show he “believed that the use of force was necessary to protect himself against death, serious injury, kidnapping, or rape”

b. NY Penal law (People v Goetz) – reasonableness is based on the “circumstances” facing a def. or his “situation” – where situation includes def.’s relevant knowledge (prior experiences) and def.’s physical attribute

c. Generally, courts are willing to individualize self-defense and allow a quite subjective standard

e) Grading

a. some states allow “imperfect defense” when there is honest belief but unreasonable grounds

b. belief is a defense unless it was reckless or negligent (3.09)

f) Cannot kill unless imminent threat (State v Norman)

a. some states relax this

b. Battered Woman Syndrome

ii. Necessity

a) Choice of evils

b) You can use the justification of necessity if you are faced with a choice of evils and you choose the lesser evil

a. Cannot kill to avoid your own death b/c the harm you are perpetuating is the same as the harm you are averted to (not choice of lesser evil)

c) Weighing the evils

a. MPC says the def. must believe in the necessity (subjective)

b. Then the evils are weighed by the court (objective)

   i. Pretty heavy handed influence of the court, occurring ex post

d) Lovercamp requirements for necessity defense (prisoner escape setting):

a. Specific threat of death or serious bodily harm

b. No time to go to authorities OR authorities won’t help

c. No time or opportunity to resort to the courts

d. No force or violence used against “innocents”

e. Escaping prisoner immediately reports to the proper authorities when he has attained a position of safety

e) MPC §3.02

a. Conduct which actor believes to be necessary to avoid harm or evil to himself or another is justifiable, provided that…

   i. The harm sought to avoid is greater than that sought to be prevented by the law, AND

   ii. Law provides exceptions or defenses, AND

   iii. Legislative purpose to exclude the justification claimed does not otherwise plainly appear

f) NY Penal law – main differences:

a. Choice of evils must “clearly outweigh” – attempt to constrain the choice

b. Limits use in negligent ancillary crimes

   c. Requires imminent injury
c. Excuses
   i. The law allows either a full or partial defense b/c the def. has a disability or defect that
      render him either without blame or less blameworthy
   ii. 3 categories
      a) [1] Involuntary actions
         a. Person literally has no control over bodily movements (Pushed, seizure)
      b) [2] Deficient but reasonable actions
         a. Defect of knowledge
            i. Similar to mistake of fact, separate, but similar
            ii. i.e. looks like an animal but you shoot it and turns out it is a person
         b. Defect of will
            i. i.e. Duress
      c) [3] Irresponsible actions
         a. i.e. Legal insanity
   iii. Duress
      a) Common law: duress only available when coercion involves use of threat which is
      present, imminent, and pending
      b) MPC §2.09 Duress
         a. Duress = actor was coerced by force of threats of force [against the actor
            or a close family member] “that a person of reasonable firmness in actor’s
            situation would have been unable to resist”
         b. Murder is never excused under duress
            i. Some jurisdictions allow duress to mitigate murder to
               manslaughter
         c. Not applicable when actor recklessly (or negligently) placed himself in a
            situation of duress
         d. Must be the coercion of another person, not a physical situation (fire)
   iv. Insanity
      a) MPC §4.04 – “No person who as a result of mental disease or defect lack
         capacity to understand the proceedings against him or to assist in his own defense
         shall be tried, convicted, or sentenced for the commission of an offense so longs
         as such incapacity endures.”
      b) McNaughten Rule – If [1] the actor was unable to control his behavior OR [2] the
         actor was not able to appreciate the criminality (wrongness) of his act because of
         his inability to differentiate between right and wrong
         a. Required:
            i. [1] Mental disease or defect
               1. Not alcohol or lack of knowledge
               2. “mental disease or defect” do not include an abnormality
                  manifested only by repeated criminal or anti-social conduct
            ii. [2] Unaware or don’t know the “nature and quality of the act”
               1. Not stupidity or impulsiveness
      c) Recent changes have eliminated [1] above, the volitional part of the test
      d) Determination of “sanity” is a mixed medical and legal question
         a. Courts will hear expert testimony about mental disease but the ultimate
            determination is a legal decision made by the fact finder
e) Burden of proof
   a. Old rule = prosecution had to prove beyond reasonable doubt def. was sane
   b. New rule = def. has to prove insanity by clear and convincing evidence

**International Criminal Law**

I. Generally
   A. Two Types:
      1. International Crimes, strictly
      2. Transnational Crimes
   B. Big issues are triggered in international law:
      1. Difficult issues of proof; location of def.
      2. Have to deal with multiple (sometimes conflicting) legal systems

II. The Crime of Terrorism
   NB. Terrorism = an act of violence committed for a political purpose
   A. Criminalizing terrorist acts
      1. There are 12 treaties on international terror; the US a party to all of them
      3. ➔ The US is a major part of the effort to criminalize terrorism
      4. US Territorial Long Arm Terrorist Statute:
         a. Whoever kills a national of the US, while such national is outside the US AND:
            [1] If the killing is a murder, etc…
            [2] The Attorney General must certify that the offense was intended to coerce, intimdate, or retaliate against a gov’t or a civilian population
         b. This statute creates a conflict of jurisdiction
            i. Conflict btw jurisdiction of state (nation) where the act was committed and the US
   B. Types of jurisdiction
      1. Basis for US asserting jurisdiction over terrorist accused people:
         • **Passive Personality**
            o = Nationality
            o Assert US jurisdiction over acts committed outside US territory *affecting US nationals*
         • **Territoriality**
            o Used when the act is committed on US property
            o Abnormal, b/c usually a state’s law do not apply extra-territorially
         • **Protective principle**
            o Assert jurisdiction over acts of violence against US citizens when such an act is determined to be an attempt to *undermine the US gov’t*
               • Principle only extends so far; questionable whether an attack against civilians in a allied country would suffice (US v. Rahman)
         • **Universality principle**
            o Some *crimes so shock the conscious of the human mind* that any state that can apprehend the criminal can assert jurisdiction and try the person
            o Used regularly by the US to try international terrorists
         • **Nationality**
 Assert US jurisdiction b/c the accused *perpetrator is a US national* (US v. Yunis; John Walker Lindh case)

C. Physical presence of def.
   1. US courts cannot prosecute accused persons in absentia
   2. Def. must be caught and brought under the jurisdiction of the court
   3. Exception, if the def. flees during the trial, the trial can continue

D. John Walker Lindh (American Taliban)
   1. American citizen fighting with the Taliban in Afghanistan; captured in Afghanistan; once the US found he was a US citizen, transferred him to US civil courts; tried; convicted; incarcerated
   2. Jurisdiction gained under “Nationality” principle
      a. But, also the US military captured him, so he was sort of in physical jurisdiction

III. The Crime of Genocide
A. Genocide is the specific intent crime to destroy, in whole or in part, a religious or ethnic group
   1. The ICTY says that a person cannot be vicariously liable for specific intent crime
   2. BUT, command responsibility is one of very few omissions that can be criminal
   3. Genocide, b/c it is a specific intent crime, focuses on the motive of crime as a material element of the crime

B. History
   1. International definition of genocide stemmed from WWII
   2. 1948 Genocide Convention was one of the first attempts to criminalize human rights crimes/crimes against humanity
      a. The Convention resulted in the Genocide Treaty
      b. The US did not ratify this treaty until 1988, 40 years after the original ratification in 1948
         i. The US has an exception that this crime must be consistent with First Amendment Free Speech rights
   3. The Treaty criminalized incitement/encouragement of genocide
      a. Recognition that crimes of genocide do not occur because a few people kill, but because a large group of people are encouraged and incited to kill

C. Jurisdiction
   1. Territorial basis for genocide jurisdiction; AND
   2. International jurisdiction for an international tribunal to enforce the convention under international jurisdiction

D. Extradition
   1. Remedy when one state has custody of a criminal, but not jurisdiction
   2. Custody state will move the criminal to the state with jurisdiction
   3. Idea of no haven

E. Two international tribunals
   [1] ICTY – International Criminal Tribunal for the former Yugoslavia
      a. Sits in the Hague
      a. Sits in Arusha

NB ICTY and ICTR have a common appeals chamber, separate trial chambers

F. Krstic case
1. Conflict = fight for territory btw Serbs and Bosnian Muslims b/c the Serbs wanted more territory and the only way to get it was take it from Bosnian Muslims
d
2. Serbs attached Srebrenica, people fled, the Serbs caught about 2/3 of men who were leaving and killed them

d
3. Theory of criminal liability
   a. Founded on complicity inherent of command
   b. That the killings and genocide occurred while Krstic was in command and a commander is responsible for all acts he knew or should have known of OR for any actions that he did not punish
   c. Distinguishable from strict liability in that if Krstic had been elsewhere he may not have been convicted of genocide

4. Genocide requires specific intent because it is a specific intent crime
   a. Thus, the prosecution is required to show the specific intent to destroy, in whole or in part, a religious or ethnic group
   b. The ICTY says a person cannot be vicariously liable for specific intent crime (such as Genocide)
   c. BUT, command responsibilities is one of very few omissions that can be criminal
   d. The court uses Krstic’s presence and awareness of the killing to satisfy the purpose requirement similar/contained in the MPC
      i. Example of Genocide prosecutions focusing on the motive of crime as a material element of the crime

IV. Where to Try the Accused?

A. Domestic Courts
   1. John Walker Lindh
   2. United States v. Yunis

B. International Courts
   1. ICTY
      a. Ad hoc, temporary
      b. Limited jurisdiction – certain geographic areas
      c. US dislikes but tolerates, says should disband by 2010
      d. Crimes within the jurisdiction of the ICC (Art. 5):
         i. Genocide
         ii. Crimes against Humanity
         iii. War Crimes
   2. ICC and International Law
      a. Permanent
      b. Jurisdiction (Art. 11):
         i. Crimes occurring in/on the territory of a member (consenting) state
         ii. Nationality of accused is a party to the statute
         iii. Consent
         iv. When Security Council refers the case to the ICC, the jurisdiction is unbounded by geography (Art. 13(b))
         v. When a State party refers the case to the ICC AND there are one or more crimes w/in the jurisdiction (Art 13(a) and Art. 14)
         vi. Prosecutor can refer and investigate w/in the jurisdiction (Art. 13(c))
vii. No custodial jurisdiction
viii. No retroactive jurisdiction, only crimes after July 1, 2002 (Art. 11)
  A. Saddam Hussein cannot be tried by the ICC, even if the Security Council wanted to send him to the ICC
ix. The ICC must, according to the complimentary, relinquish jurisdiction to a state if that state wants to try the party first
  A. The ICC is not a court of first impression
c. US objects/wants to destroy the ICC; b/c:
  i. US does not control or veto power over the ICC
  A. Conversely, ICTY was created by Security Council
     ai. ICTY = creature of the Security Council
     aii. Security Council picks ICTY judges
     aiii. US can exercise its veto power over ICTY
  ii. The ICC is controlled by (through the election the judges) The “Assembly of States Parties” (member states)
     A. 139 Signatories; 92 Parties
  iii. No American judge(s) on ICC
     A. B/c judges can only be from member states
  iv. US doesn’t want to join ICC b/c:
     A. Afraid of frivolous prosecution
     B. Afraid of US citizens being prosecuted
d. Crimes within the jurisdiction of the ICC (Art. 5):
  i. Genocide
  ii. Crimes against Humanity
  iii. War Crimes
  iv. Aggression *(additional crime than ICTY)
     A. e.g. Nazi Germany is the paradigm of these crimes (Nurnberg Trials)
     B. Jus in bello = methods used in war, conduct in war
     C. Jus ad bellum = are you allowed to launch the war in the first place = aggression

3. Ugandan Referral
  a. Case against Ugandan rebel leaders (Lord’s Resistance Army) who have kidnapped thousands of children to serve as soldiers or sex slaves
  b. This is a Crimes Against Humanity case and a War Crimes case

C. Military Commissions
  1. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism
     a. Walker-Lindh (American Taliban)
        i. American Citizen, captured in Afghanistan, brought to US District Ct. in Virginia (b/c American citizen), tried, convicted, 20 years
     b. Hamdi v. Rumsfeld
        i. American citizen captured in Afghanistan, brought to GITMO, discover he was American citizen, transfer to military brig, no Habeas, cert to US S. Ct.
ii. HELD, a US citizen who is *captured abroad* can be designated as an enemy combatant by the President under his war power and under the Joint Resolution

c. Padilla v. Rumsfeld
   i. American citizen, captured in US, defined as enemy combatant, Habeas granted, cert to US S. Ct.
   ii. HELD, the President does not have the authority (on his own, w/o Congressional authority) to designate an American citizen, *captured in the US* as an enemy combatant and, therefore, held without rights

d. Gherebi v. Bush
   i. Enemy combatant captured in Afghanistan, brought to GITMO, whether GITMO enemy combatants have writ of Habeas Corpus in the US courts, cert. to US S. Ct.
   ii. HELD, US has sovereign control over GITMO, therefore US Constitution applies, therefore enemy combatants must have access to US civil courts

2. Generally
   a. There is no international law in these detainee suits
      i. Geneva conventions are not self-executing; therefore unless the US chooses to apply Geneva, it is inapplicable

3. When the President operates at Commander and Chief during an active conflict, his power is at its zenith

4. Enemy combatant status
   a. A person is not a POW (prisoner of war)
   b. Classification created by President
   c. Status cannot be challenged
   d. Can be detained until you are no longer a threat; hostilities end
   e. Unusual, not often used
   f. No rights
      i. Not covered by international law (3d Geneva Convention)
      ii. Not covered by US Constitutional law

5. POWs
   a. More typical
   b. Get rights of 3d Geneva Convention
   c. No major differences btw enemy combatant and POW

6. 2 Major issues:
   [1] Whether the President has the power to classify people as “enemy combatants”?
   [2] If classification of enemy combatant is made, can the person protest the classification in US civil court?