I. Establishing Guilt  
   A. Proof Beyond a Reasonable doubt  
      1. Due Process (14th Amendment) protects the accused except upon proof beyond a reasonable doubt (In re Winship, Supreme Court)  
      2. Presumption of innocence  
      3. Reduces risk of false convictions  
      4. If the judge decides the evidence raises a reasonable doubt as a matter of law, the judge must direct a verdict for the defendant.  
   B. Allocating the Burden of Proof and Production  
      1. State’s burden to disprove affirmative defenses once def. has brought it up, not the def. burden to bring up and prove  
         a) A state may require a defendant to bear the burden of proving an affirmative defense to a jury, rather than requiring the prosecution to disprove (Patterson v. NY; Court said it did not violate due process to require def. killer to show extreme emotional disturbance).  
      2. MPC § 1.12: (1) Presumption of innocence unless proof beyond a reasonable doubt; (2) state does not have to disprove an affirmative defense unless the def. has proved by a preponderance of evidence; state must disprove it beyond a reasonable doubt  
      3. Burden of production: burden of coming forward with enough evidence to put a certain fact in issue (affirmative defense when def. bears burden of production)  

II. The Justification of Punishment  
   A. Why punish?  
      1. Retribution  
      2. Utilitarian  
         a) specific deterrence  
         b) general deterrence  
      3. Model Penal Code § 1.02: purpose of punishment is to prevent harm, control, correct and rehabilitate, and safeguard  
   B. Case studies  
      1. Killing another is generally punishable. Regina v. Dudley and Stephens (Queen’s Bench): starvation is not justification for killing an innocent person for subsistence. A proposition that justifies such a killing as anything other than murder is dangerous, immoral, and opposed to all legal principle. You can kill an assailant to save your life (self-defense), but not an innocent.  
      2. United States v. Bergman (F. Supp): Even wealthy people who are unlikely to commit crimes in the future should be put in jail if appropriate; general deterrence  
      3. State v. Chaney (Alaska): the principles of reforming criminal offenders and protecting the public from them encompass the goals of rehabilitation, incapacitation, specific deterrence, general deterrence, and retribution (man convicted of rape and robbery received concurrent one-year sentences; court cannot change but can comment)  
      4. United States v. Jackson (career criminal sentenced to life in prison for bank robbery): general deterrence and incapacitation are appropriate sentencing considerations when sentencing a career criminal
5. *United States v. Johnson* (single mother received 6 mo. home detention rather than prison): A federal sentencing judge may exercise discretion and grant a departure from the applicable sentencing guidelines when a def. has extraordinary family circumstances

III. The Elements of Just Punishment

A. Limitations of the distribution of punishment
   1. culpability: overt and voluntary act; must be criminal conduct
   2. legality: to give fair warning of the nature of the conduct that constitutes an offense
   3. proportionality: punishment proportional to crime

B. Actus Reus
   1. Voluntary Acts
      a) A def. must perform the physical act for each element of a crime that has an actus reus component (*Martin v. State* [Alabama]: police officers arrested a drunken man at his home, took him onto a highway, and then arrested him for public drunkenness)
      b) If a person commits an act that is criminal when done voluntarily, lack of consciousness is a complete defense (*People v. Newton* [Cal.] def. shot police after being shot → unconscious shock reaction)
      c) MPC §2.01: A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable. Involuntary acts: reflex or convulsion, act during unconsciousness or sleep; hypnosis; bodily movement otherwise not a product of effort or determination
         i) a habitual act, under MPC, is voluntary
         ii) sleep walking is a complete defense – involuntary
      d) must be involuntary unconsciousness (not drugs or alcohol) ??
      e) Possession
         i) MPC: possession is an act only if the person is aware that he has the thing he or she is charged with possession possessing
         ii) Majority of the courts treat possession as requiring knowledge (*United States v. Anderson*)
         iii) Some courts hold it sufficient that the defendant should have known (*United States v. Garrett*)
      f) mere thoughts are never punishable as crimes
      g) courts are split on whether hypnosis is sufficiently involuntary to not give rise to liability
   2. Omissions
      a) Traditional reluctance to impose criminal liability for omissions
      b) The common law does not impose a duty to take affirmative action upon bystanders in emergency situations if there is no legal duty to act (*Pope v. State* [Md.]; mother killed her child in def. home; court reverses misprision conviction)
      c) Some states have enacted Good Samaritan statutes
d) attempts of concealment of the felony required, rather than just failure to report it (United States v. Johnson)
e) Defendant must owe a legal duty of care to the victim in order to be liable for an omission (Jones v. U.S. – def. neglected infant → death)
f) Five examples in which duty exists
  i) Statute
  ii) Relationship
    - Commonwealth v. Cardwell (Pa.): mother held liable for not preventing her husband from abusing her daughter; fear to self not enough to overcome privileged relationship (mother’s duty of care for daughter)
  iii) Contract
  iv) Voluntary assumed care and prevented others from rendering aid
    - People v. Oliver (Cal.): def. met man at a bar and invited him home w. her where he OD’d on heroin; def. dragged him behind a shed so neighbors wouldn’t see; he died. Def. guilty b/c voluntarily took him somewhere where he was prevented from receiving care from others
  v) one who culpably places another in peril has a duty to assist the imperiled person
    - Jones v. State (Ind.): def. raped a 12y.o. who, in turn, jumped in a creek and drowned. Def. did not attempt rescue, even though he could w/ no danger to himself Ct. held him guilty of murder
    - State ex. rel Kuntz v. Montana: def. acting in self-defense stabbed boyfriend and failed to call police after; he died a few hours later. Ct. held her guilty of negligent homicide.
g) Removal of life support is an omission, not an act, that, if in accord w/ patient’s or surrogate’s wishes, does not give rise to criminal liability (Barber v. Superior Ct. [Cal.])
h) MPC § 2.01: liability cannot be based on an omission unless (1) the omission is made sufficient by the law defining the offense; (2) a duty to perform the omitted act is otherwise imposed by law

C. Mens Rea (culpable state of mind)
   1. The mental state required by the definition of the offense to accompany the act that produces or threatens the harm. Under the MPC § 2.02
      a) purposely: conscious objective to act in such way or cause the result; or the element involves attendant circumstances and he is aware of such circumstances or believes or hopes they exist
      b) knowingly: if the element involves the nature of his conduct or attendant circumstances and he is aware that his conduct is of that nature or that such circumstances exist, and if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result
      c) recklessly: conscious disregard of a substantial and unjustifiable risk that the material element exists or will result from his conduct; gross
deviation from the standard of conduct of a reasonable person in the actor’s situation
d) negligently: when one should be aware of a substantial and unjustifiable risk that the material element exits or will result; reasonable person standard

2. MALICE: The mens rea of malice is satisfied by a showing of either reckless or intentional conduct, a showing of wickedness will not suffice (Regina v. Cunningham UK: a thief stole the gas meter from a house, causing gas to leak into the adjoining house, killing the resident; conviction quashed)
   a) murder and arson are examples

3. Each element of the crime must be committed with the requisite mens rea (Regina v. Faulkner UK: def was convicted of arson in burning a ship, even though he only lit the match to steal rum; one is only criminally responsible for every result occasioned in the commission of a felony that was reasonably foreseeable)

4. NEGLIGENCE: When an element of a criminal statute is the mens rea of negligence, criminal negligence is required, not mere civil negligence, unless otherwise stated in the statute (Santillanes v. New Mexico: def. convicted of child abuse for cutting nephew’s neck w/ a knife during an altercation).

5. SPECIFIC INTENT: A statute that has intent to cause death or serious bodily harm as an element of the crime does not require proof on unconditional intent to kill or harm, rather mere proof of intent to kill or harm is sufficient, even if accompanied by a condition. “Specific intent” to commit a crime still exists even if conditional. (Holloway v. United States: SC interpretation of carjacking statute that included intent to kill); MPC approach
   a) prosecution must put independent evidence of what def. intended
   b) intent cannot be inferred from conduct
   c) mistake is a defense
   d) crimes: inchoate crimes (solicitation, conspiracy, attempt); first-degree murder (statutory murder), robbery, burglary, etc.

6. KNOWINGLY: To act knowingly is to act with an awareness of the high probability of the existence of the fact in question (United States v. Jewell, def. prosecuted for smuggling drugs in a secret compartment of a vehicle, but deliberately ignorant of drugs; conviction upheld; positive knowledge and deliberate ignorance the same)

7. General intent crimes
   a) catch-all
   b) ex. rape, battery, etc.
   c) if the prosecution shows the conduct, intent is inferred

D. Mistake of Fact (in relation to mens rea)

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<td>Strict Liability</td>
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1. MPC § 2.04: Mistake as to a matter of law
   a) is a defense if it negates the mens rea (purpose, knowledge, belief, recklessness, negligence) or the law provides that the state of mind established by such mistake constitutes a defense
   b) Def. cannot use defense if he would have been guilty of another offense had the situation been as he supposed. In such case, the mistake shall reduce the grade and degree of the offense to that of which he would have been guilty of had the situation had been as he supposed
   c) a belief that conduct does not constitute an offense is a defense if the statute defining the offense is not known to the actor and has not been published or otherwise reasonably made available to the def. or if the def. acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous
   d) proof must be by a preponderance of the evidence
2. MPC § 213.6: when the criminality of conduct depends on a child’s age being below 10, it is no defense that the actor did not know the child’s age or reasonably believed the child to be above 10; When criminality depends on the child’s being below a critical age other than 10, it is a defense for the actor to prove by a preponderance of the evidence that he believed the child to be above the critical age
3. Mistake of fact is not an affirmative defense to prosecution under a statute that does not require “knowing” conduct (Regina v. Prince UK; def., under the reasonable but false pretense, took a 14y.o. from her parents w/o permission and was convicted)
4. A mistake of fact relating only to the gravity of an offense is not a defense to the actual crime committed (People v. Olsen [Cal.]: def was convicted of statutory rape of a girl under 14; he thought she was 17)

E. Strict Liability
1. Liability is imposed on any culpability, even negligence
2. When a statute does not require proof of knowledge, def. can be found guilty, even if they were mistaken in fact. (United States v. Balint [US]: def. were indicted for selling opium, but argued that they did not know they were selling prohibited drugs; conviction upheld)
   a) any defense that negates intention (ex. mistake of fact) cannot be a defense for a strict liability crime
3. Unless a statutory offense is of the public welfare variety, it must be proved that the actor had the proper mens rea as required under common law, even if the legislature omitted such an element. (Morisette v. United States [US]: def. ventured onto an air force bombing range and took some old, rusting bombing casings; conviction dismissed)
   a) if the crime is in the administrative, regulatory, or morality area and has not mention of adverbs (ex. knowingly, willingly, intentionally) in the statute, it is a strict liability crime
4. Unless there is some indication that the legislature intended to leave out a mens rea requirement, a criminal statute will be construed in light of the rules of the common law to require mens rea (Staples v. U.S. [US]: def. was convicted of
violating the nat’l firearms act for possessing a machine gun, even though he
didn’t know the gun was capable of firing more than one shot w/ the activation of
the trigger.)
5. Vicarious criminal liability violates due process when the state interest
involved outweighs the liberty interest of the offender in light of any possible
alternative means of achieving the state interest (State v. Guminga [MN], def,
restaurant owner, is being charged w/ vicarious criminal liability for the sale of
liquor to a minor by one of his employees; vicarious liability is one step removed
so it loses its deterrent effect)
   a) * Generally courts upheld vicarious liability – this case in the minority
   b) exceptions to vicarious liability
      i) def. had not control over the offender
      ii) some jurisdictions hold that if the def. has been sentenced to
          imprisonment, due process is violated unless he is shown to know
          of the violation
6. A voluntary act is required, even in strict liability cases (State v. Baker [KS]:
def. was convicted of speeding, a strict liability offense, but had evidence that the
cruise control was broken)
7. There is a middle level of offenses (b/w strict liability and straight mens rea)
which the prosecution is not required to show any required mens rea but the def.
can present an affirmative defense that he took reasonable care (Regina v. City of
Sault Ste. Marie) **This is not an accepted rule in the United States**
F. Mistake of Law
1. MPC § 2.04: mistake of law is a defense if it negates the mens rea required to
   establish a material element of the defense
2. Mistake of law exceptions are applied extremely narrowly. A mistake of law
does not excuse a violation of the law, even when the interpretation is reasonable
(People v. Marrero [NY]: a federal corrections officer was found guilty of
violating a statute, which he believed gave him the right to carry a gun; conviction
upheld). Mistaken belief must be founded upon an official statement of the law
contained in (a) a statute or other enactment or (d) an interpretation of the statute
made by an official source.
3. At common law, ignorance of the law was no defense
4. A mistake of law, reasonable or unreasonable, that relates to the specific
   mental state required and negates a specific intent is a defense to criminal
   prosecution (Cheek v. US [US]: a pilot stopped filing tax returns b/c he was
   influenced by a group that believed income tax was unconstitutional)
5. Mistake of law is never a valid defense unless the mistake results from the
   def’s reasonable reliance upon an official – but mistaken or later overruled –
   statement of the law (US v. Albertini [US]: demonstrating after 9th Cir. said he
could and b/f the SC overruled; reasonable reliance on 9th Cir. decision was a
   defense to the second prosecution)
   a) MPC §2.04(3): if def. acts in reasonable reliance upon an official
      statement of the law, afterward determined to be invalid or erroneous,
      contained in a statute, judicial decision, an administrative order or grant of
      permission, or an official interpretation of the public officer or body
charged by law for the interpretation, administration, or enforcement of the law defining the offense, it is a defense.

b) MPC defense with widespread acceptance

6. A conviction for violating a law requiring certain classes of people to register with authorities requires that such person either have knowledge of the requirement or have probable reason to know of the requirement (*Lambert v. California* [US]: def. was prosecuted for failing to comply with a L.A. ordinance requiring convicted felons to register if staying more then 5 days)

G. Legality

1. Legality: you cannot have any punishment without law; must have notice of what the law is; due process

2. An ordinance is unconstitutionally vague where it gives absolute discretion to police officers to determine what activities constitute loitering and does not inform citizens what loitering is or is not covered by it (*City of Chicago v. Morales* [US]: Chicago’s anti-loitering law unconstitutionally vague

3. *Papichristou v. City of Jacksonville* [S. Ct]: a law is void-for-vagueness when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute and because it encourages arbitrary and erratic arrests and convictions.

   a) leading vagrancy law case

4. MPC §250.6, Loitering or Prowling: if loiterer prowls in place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Considerations: actor takes flight after seeing peace officer, refuses to ID himself, or manifestly conceals himself or another object. Peace officer MUST give actor an opportunity to dispel any alarm by requesting him to ID himself and explain his presence and conduct.

   a) most courts uphold MPC-like statutes

IV. Rape

A. Definitions

1. common law definition of rape: carnal knowledge of a woman forcibly against her will

   a) gender specific

   b) implied that it was unlawful – could not have rape within marriage

   c) some states still adhere to this framework, ex. Maryland

2. 1950 California Penal code

   a) rape is intercourse accomplished with a female not the wife of the perpetrator

      • where female is 18
      • where she is incapable through lunacy
      • where she resists, but is overcome by violence
      • where she is prevented from resisting by threats of great bodily harm, or by intoxicating substance
      • where she is unconscious of the act
• where she is mistakenly believed the person committing the act is her spouse
  b) way to show lack of consent was proof of resistance; or threats of great or immediate harm accompanied by present power of execution

3) modern statutes
   a) Not gender specific (person instead of woman)
   b) Threat does not have to be immediate; future threats of harm suffice
   c) Threat does not necessarily have to be against victim
   d) Duress (force, violence, danger, etc.) is enough – resistance to the utmost no longer required
   e) Lack of consent requirement retained

4) MPC § 213.1: a male who has sexual intercourse with a female not his wife is guilty of rape if:
   a) he compels her to submit by force or threat of imminent death or serious bodily harm, extreme pain or kidnapping, to be inflicted on ANYONE, or
   b) has substantially impaired her power to appraise or control her conduct by administering or employer w/o her knowledge drugs, intoxicants, or other means of preventing resistance, or
   c) the female is unconscious, or
   d) the female is less than 10 years old
   e) Notes
      i) Lack of consent is implicit in the statute – but does not need to be shown as a specific element of the crime
      ii) Gets rid of resistance requirement

B. Actus Reus

1. Most rape statutes have a force requirement
   a) However, reasonable fear of death or serious bodily injury obviates the need to show actual force or resistance (State v. Rusk [Md.], a woman drove a man home from a bar, and, after he took her keys, she went in his house where he raped her.)
   b) force is not necessary when the victim is underage, unconscious, or mentally incompetent

2. A growing number of jurisdictions treat all nonconsensual intercourse as a criminal (either rape or a lesser degree of sexual assault), even in the absence of force – minority view however. At common law, in the absence of force, nonconsensual intercourse was only criminal under special circumstances (statutory rape, unconscious, mental incompetence)

3. Some states require resistance as one of the formal elements of the crime, but more often, resistance has be implicit in the elements of force or non-consent
   a) the old requirement was that a woman had to resist to the utmost. Today, all jurisdictions, except Louisiana, have abandoned this requirement
   b) many jurisdictions still require reasonable resistance, unless resistance would lead to death or serious bodily injury
   c) some jurisdiction require earnest resistance, meaning resistance that could be expected from a person who does not want to participate
d) some jurisdictions abandoned the resistance requirement completely (ex. Wisc.)

4. Arguably, a woman’s resistance to rape decreases the chance of rape and injury

C. Mens Rea

1. A defense of mistake of fact must be based on a reasonable, good-faith standard (Commonwealth v. Sherry [Mass.]: 3 drs. are convicted of rape after taking a nurse to a house and separately having sex with her, despite mistake of fact of nurse’s consent)
   a) Mass. does not hold that an honest and reasonable mistake as to consent is a defense to rape
   b) most states hold that a def. must be negligent w/ respect to consent; some states w/ recklessness standard
   c) Cannot raise reasonable mistake of fact if the victim says no – no always means no

2. Some states (ex. PA) hold rape as a strict liability offense – cannot have reasonable mistake of fact; (Commonwealth v. Fischer [Pa.]: during the 2nd sexual encounter b/w def. and victim, def. believed victim was consenting to their rough sex, when victim was actually protesting)

3. A few American jurisdictions require proof of recklessness as to lack of consent (ex. Alaska), at least where there is no resistance requirement

V. Homicide

A. Intentional Killings

1. Murder
   a) Common law: unlawful killing with malice aforethought
      i) common law malice: intention to cause death, knowledge that the act will probably cause death, intent to commit any felony, and intent to oppose by force an officer of justice…
      ii) At common law, no degrees of murder. “Murder” at common law is statutory murder in the second degree (malice crime)
      iii) CA Penal Code: malice can be express or implied
   b) MPC § 210.2: murder: must be committed purposefully or knowingly; or committed recklessly under circumstances manifesting extreme indifference to human life (incl. felony murder rule) [First degree crime]
   c) victim must be human

2. Premeditation
   a) If premeditation is required, most courts hold that no time is too short
      i) In Pa, when determining whether a murder was premeditated (1st degree), a court will disregard the length of time it took for the def. to form the intention to kill (Commonwealth v. Carroll: man shot and killed his wife after an argument)
   b) However, other courts require proof of actual reflection on the decision to kill for first-degree murder
      i) State v. Gunthrie, [WV]: to prove that a murder was premeditated and deliberate, there must be some evidence of a pre-
existing reflection (While being teased at work, def became angry and shot coworker)

c) *State v. Forrest* [NC]: son killed his terminally ill father and was convicted of first-degree murder; conviction upheld b/c he thought about it beforehand)

i) Following the lead of the MPC, some states have rejected premeditation and deliberation as the basis for identifying murders that deserve the greatest punishment.

3. Provocation ➔ Voluntary Manslaughter

a) At common law, mere words were not adequate provocation to reduce murder to manslaughter. Needed extreme assault or battery, mutual combat, def. illegal arrest, injury or serious abuse of a close relative of the def, sudden discovery of spouse’s adulterous relations

i) *Girouard v. State* [Md.]: Under Maryland law, words alone are not enough to constitute adequate provocation to mitigate a murder conviction (Def. and his wife arguing; wife had resumed a relationship w/ an ex-boyfriend. During the argument, she repeatedly asked him “What are you going to do?” He stabbed her 19 times, killing her.)

b) some jurisdictions allow juries to examine the words overheard by the def. as well as conduct witnessed in determining whether a def. was provoked, even though provocation was not in def. presence.

i) *Maher v People* [Mich.]: a man suspected that another man was sleeping with his wife, when a friend confirmed his suspicions; he shot the man

ii) Under MPC, provocation probably would not go to the jury, even though here, it went to the jury

iii) If the def reason at the time of the act is disturbed or obscured by passion to an extent which might render ordinary men of fair and average disposition liable to act rashly or w/o due deliberation or reflection, and from passion, rather than judgment, murder can be mitigated to manslaughter

c) cooling time: lapse b/w killing and provocation will render provocation inadequate (common law rule).

i) *State v. Gounagias* [Wash.]: man sodomized and sodomizer bragged about it. Two weeks later, def. killed sodomizer. Court held that there was enough cooling time as a matter of law that can’t claim provocation

d) MPC §210.3: committed recklessly, or where otherwise murder, committed under extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. Reasonableness based on a viewpoint of a person in the actor’s situation under the circumstances as he believes them to be [Second degree crime].

i) *People v. Casassa* [NY]: the test of whether the extreme emotional disturbance of the killer had a reasonable explanation or excuse depends on a reasonable evaluation of the external
circumstances that the killer believed he was facing and not on the killer’s personal point of view. (Def. dating woman who told her he was no longer interested; kills her under “emotional disturbance”; affirmed)

ii) MPC broadens application of manslaughter (victim need not do any provoking), but only so far (In Casassa, still guilty)
   - State v. Elliot [Conn.]: for years def. feared his brother and one day, killed him for no reason. Conn. S.C. said that jury must be instructed on extreme emotional disturbance (passion, w/ no time to cool off)

iii) adopted by at least 14 states

iv) many courts hold that reasonableness should be based on age and gender of the defendant (ex. Cal.)

B. Unintentional Killing

1. Manslaughter
   a) Common law: unlawful killing w/o malice aforethought
   b) A person is guilty of involuntary manslaughter when his wanton or reckless breach of a duty of care causes the death of another
      i) Commonwealth v. Welansky [Mass.]: person who dominated a corp. may be guilty of involuntary manslaughter for corp’s breach of duty. (Owner of nightclub with inadequate exits guilty of involuntary manslaughter after a fire killed patrons)
   c) Differs from the Common law where one only had to be negligent for criminal liability; now, standard of reckless, culpable or gross, a deviation from the reasonable standard (State v. Barnett)
      i) A showing of negligence may be sufficient to support a conviction of manslaughter in some situations. State v. Williams [Wash.]: parents guilty of manslaughter for not recognizing the severity of child’s illness (abscessed tooth) in time to save his life
d) Contributory negligence is not a defense. Dickerson v. State [Miss.]: def. driving over speed limit when he saw a vehicle blocking his lane. Def. applied his brakes, but no tin time to avoid a collision that killed the driver of the other car.
e) MPC §210.4, Negligent homicide: committed negligently (felony of the third-degree)

2. Unintended Murder
   a) MPC § 2.02(2)(c) treats unintended killing as murder when it is committed recklessly; § 210.2 and under circumstances manifesting extreme indifference to the value of human; inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder
      i) Russian Roulette Cases – death by Russian Roulette is murder in the second degree, even though it is not intended b/c killer’s actions show a callous disregard for human life and the consequences of his actions (infer malice) Commonwealth v. Malone [Pa.], People v. Roe [NY]
ii) Omissions: Father, knowing his baby was starving, withheld food and water, causing the baby to die; court upheld murder conviction *People v. Burden* [Ca.]

iii) Death by drunk and reckless driving – constitutes murder, not manslaughter when evidence that there was a risk of serious harm and the def. knew and disregarded the risk. *U.S. v. Flemming* [4th Cir.]
   - majority of jurisdictions have held that egregiously dangerous driving can support a conviction of murder.

3. Felony Murder
   a) Felony murder rule was the common law way of imputing malice; if you convict a felony and a person dies during the felony, you are liable for murder as if you did it with malice aforethought
      i) *Regina v. Serné* [UK]: Felony murder is homicide created by an action that is dangerous in and of itself and likely to result in the death of another and that is taken by a defendant with the intent to commit a felony (man burned down his house w/ servant and son inside after taking out insurance policy)
      - Case narrows the common law felony murder rule to only inherently dangerous crimes
   b) Strict liability for all killings that occur during commission of a felony; foreseeability does not matter. *People v. Stamp* [Ca.] (man dies of heart attack during a robbery; def. held guilty for murder)
   c) Causation must still be established. *King v. Commonwealth*, [Va.] (plane crashed while transporting marijuana. Court held that the drug-distribution crime was not the proximate cause of the death; crash was not made more likely by the fact that there was marijuana in it)
   d) Misdemeanor manslaughter rule: A misdemeanor resulting in death can provide a basis for an involuntary manslaughter conviction without proof of recklessness or negligence – “unlawful act” doctrine
   e) Reform
      i) England abolished rule in 1957
      ii) Mich. is only state to abolish rule
      iii) Some states limit conviction to second-degree (not first) murder
      iv) Some states limit rule to certain felonies (ex. “Inherently dangerous”)
      - *People v. Phillips* [Ca.], rule is only applicable where felony itself threatens human life (chiropractor with “cure” for cancer that failed; felony = fraud; conviction reversed)
      - *People v. Satchel* [Ca.], In determining whether a felony is inherently dangerous to human life, it must be viewed in the abstract and the specific facts of the case should not have a bearing on the determination (felony = ex-felon w/ weapon, conviction reversed)
Omissions: *People v. Stewart* [R.I.]: the jury should determine whether a particular felony is inherently dangerous (def. son died from dehydration, resulting from mother’s neglect on drug binge; conviction upheld)

iv) Where homicide is an integral part of the felony, the felony-murder doctrine does not apply, *People v. Smith* [Cal.] (def. and her boyfriend beat her child to death; felony child abuse (the felony) contains death as an element, thus, cannot also be held for murder)

f) Co-felons
   i) Proximate cause theory: any murder committed in furtherance of the felony the felon can be held liable for
   ii) Agency theory: if the killing is done by the felon or his agents can the def. be held liable
      o *State v. Canola* [NJ], conviction of felon for murder of accomplice reversed when, during an armed robbery, the store owner shot accomplice in self defense
   iii) Reckless malice standard used to convict robbers of murder of their accomplice. *Taylor v. Superior Court* [Cal.]: getaway car driver charged with murder of his accomplice in robbery where the store owner killed the accomplice and thus, the felony murder rule couldn’t be invoked
   iv) most courts prefer agency theory

g) Avoiding liability
   i) If the def. has a defense to the underlying felon, then he has a defense to felony murder
   ii) the felony committed must be something other than murder
   iii) must states have rejected the concept of attempted felony murder

h) deaths caused while fleeing a felony are felony murder, but once the def. reaches a place of temporary safety, can not be convicted of subsequent felony murders (for deaths caused after reaching place of temporary safety)

VI. The Significance of Harm
A. Causation
   1. Actual Cause
      a) but for causation
         i) *People v. Acosta* [Ca.] proximate cause exists, even with intervening third-party negligence and recklessness, if harm from def. conduct is a possible consequence, which is reasonably foreseeable. (Def, a fleeing criminal suspect, was pursued by police in a car chase, during which two police helicopters collided and killed 3; conviction upheld)
      
         b) substantial factor
i) Poor medical care that aggravates injury caused by def. will not relieve def. of responsibility *Hall v. State* (during robbery, def. struck victim in the head, fracturing his skull. Victim died 10 days later from blood poisoning); *State v. Shabazz* (def. stabbed victim, who died b/c negligent medical treatment; b/c he would have died absent medical treatment, no evidence of negligence was allowed to be admitted)

2. Proximate Cause: not too remote to be unfair to hold def. liable
   a) For a defendant’s conduct to be deemed the legal cause of the victim’s injury, the immediate triggering cause of the injury must have been foreseeable to the defendant. *People v. Warner-Lambert Co.* [NY] (def. corporation was indicted for second-degree manslaughter and criminally negligent homicide for the deaths of several employees after an explosion in one of it chewing gum factories, reversed)
   b) Thin-skull rule: def. takes victim as he finds him. *People v. Stamp* [Cal.] (man suffers heart attack during robbery b/c of fright)
   c) MPC §2.03: def. act is the proximate cause of the harmful result if the result is not too remote or accidental in its occurrence to have a just bearing on the actor’s liability or the gravity of his offense.
   d) *People v. Deitsch* [NY]: fire in warehouse controlled by def. Signs to exit in warehouse were poorly marked and exit blocked. Held: def. liable b/c he created a condition in which he could have foreseen death resulting from a fire.
   e) Transferred intent: Def. shoots at Lucky, intending to kill him, but accidentally hits Unlucky, killing him. Def. is still liable for murder; def. intent to kill one is transferred to his action that killed another

3. Intervening cause:
   a) dependant v. independent intervening acts
      i) dependant: acts which would not have occurred except for def. act (ex. medical treatment for wound caused by def.)
      ii) independent: would have occurred even if def. did not act, but when combined w/ def act, caused the harmful result – harder to establish def. liability
   b) *People v. Arzon* [NY]: A defendant’s conduct need not be the sole and exclusive factor in the victim’s harm in order to maintain the necessary causal link b/w conduct and harm. An independent intervening factor that contributes to the resulting harm does not break the causal link (Fireman died from fighting fire in building w/ two fires, one of which was set by the accused)
   c) Subsequent human action usually breaks causal link, but not always
      i) Common law position: The doctrine of foreseeability is not applicable to establish causation where intentional subsequent human action exists. Suicide excludes homicide. *People v. Campbell* [Mich.] (Def gave his gun to another and encouraged him to use it to commit suicide, which he did; def. murder conviction reversed)
Assisting or urging suicide is not murder unless a statute specifically provides so; *People v. Kevorkian* [Mich] (doctor assisted two terminally ill women in committing suicide)

Majority of jurisdictions take this approach

ii) MPC approach: *People v. Duffy* [NY]: a person who, knowing that another is contemplating suicide, deliberately prods that person to do so and furnishes the means is guilty of second-degree manslaughter for recklessly causing death

iii) MPC § 210.5: a person who aids or solicits another to commit suicide is guilty of a felony of the second degree

iv) EXCEPTION: a defendant can be held liable for murder if his commission of a felony onto another caused that person to commit suicide; *Stephenson v. State* [Ind.] (def. charged with murder of female who died from complications after attempting to commit suicide after being rendered irresponsible due to injuries from his conduct). Here, subsequent human action did not break the chain b/c victim irresponsible due to def. conduct.

d) Subsequent action that recklessly risks the result, sometimes breaks the chain of causation

i) a defendant who engaged in unlawful or reckless conduct, causing, but not directly, the death of another cannot be held liable for involuntary manslaughter; *Commonwealth v. Root* [Pa.] (Drag racers racing on 2-lane hwy, other driver, on wrong side of the road, hit truck). Subsequent human actions that recklessly risk harm break the chain of causation; tort standard

ii) EXCEPTION: *People v. Kern* [NY]: (white youths assaulted group of black men, one of which ran away across a hwy, where he was hit by a car and killed; convictions upheld); when an actor is forced to take action that is a reckless risk to his safety due to def conduct, the def. is responsible for the actions death

iii) a defendant who engages in reckless conduct, causing foreseeable death to another, but who did not directly cause the death of that person, can be held liable for murder; *State v. McFadden* [NY] (drag racing w/ another and other man and innocent driver killed; conviction upheld for both deaths.) Proximate cause applied in criminal proceedings rather than direct causal; higher standard than it tort.

- says *Root* is wrong!

iv) *Commonwealth v. Atencio* [Mass.] subsequent human actions that recklessly risk resulting harm do **not** break the chain of causation where def. encourages or cooperates in a joint activity w/ the victim which results in harm (Russian Roulette game results in death of decedent, for which def. was charged)

- EXCEPTION: *Lewis v. State* [Ala.]: def introduced boy to Russian Roulette and boy played it alone, w/o def, and
died. Court reversed conviction b/c free will of boy intervened; distinguishable b/c def. not present in room to encourage

B. Attempt
1. MPC § 5.01: acting with the culpability otherwise required for the commission of the crime, and engaging in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or where causing a result is an element of the crime, he does or omits something with the purpose of causing result or a substantial step. (EX: lying in wait, enticing victim to go to place of commission, unlawful entry, possession of materials which serve no lawful purpose, soliciting an innocent agent in conduct constituting an element of the crime.)
2. Punishment
   a) at common law, attempt was a misdemeanor
   b) today the usual punishment is a reduced factor of the punishment for the completed crime
3. Mens rea
   a) Common law and most statutes require specific intent; must intend to commit the substantive crime
   b) MPC permits a defendant to be held liable for attempt for results obtained knowingly, if not intentionally
   c) most states have declined to extend attempt liability to recklessly committed crimes
   d) Smallwood v. State [Md.]: specific intent may not be inferred where the def. conduct only posed an inc. risk of death, not a natural and probable result of such conduct. (HIV-positive man charged with assault w/ intent to murder after raping 3 women w/o a condom; conviction reversed b/c risk of infection did not make death probable or likely)
      i) attempt requires some purpose or specific intent to produce the proscribed result, even though recklessness or some other mens rea would suffice for the crime
      ii) position taken by most jurisdictions, and common law
   e) no attempted felony-murder; no attempted-involuntary manslaughter; attempted voluntary-manslaughter does exist
4. Attempt v. Preparation
   a) Generally mere preparation to commit a crime, even if coupled w/ intent, is not attempt if further acts are required to complete the crime
      i) King v Baker [NZ]: there is no test, but it is established that the first step along the way is not sufficient and the final step is not required
   b) Traditional “Proximity” Approach – dangerous proximity to successful commission of the crime = attempt
      i) People v. Rizzo [NY]: attempt when act is so near to the accomplishment of the crime that in all reasonable probability, the crime itself would have been committed if not for timely interference. (4 men convicted of attempted robbery after caught
driving, searching for their intended victim, which they never found; conviction reversed)
i) try to leave opportunity to repent, a “locus penitentiae”
   o State v. Duke [Va.]: court reversed conviction b/c def. could have changed mind (undercover agent posed on internet as 12 y.o., and inticed def. to meet her at parking lot for sex, where def. would signal by flashing his lights. Def. was arrested after flashing his lights)

c) Abandonment
   i) common law traditionally denied any defense of abandonment
   ii) some states recognize abandonment as a complete defense, but must be under circumstances manifesting a voluntary and complete renunciation of the criminal purpose (NY, MPC)
   iii) People v. McNeal, [Mich.] def. accosted a girl at a bus stop, forced her at knife point to go to a house with him, with the intent to rape her. After an extended conversation where the girl pleaded with him to let her go, def. released the girl and said he was sorry. The Court affirmed the conviction for attempted sexual assault, holding the unexpected resistance made the def. renunciation involuntary
   iv) Ross v. State [Miss.]: similar facts, and court found abandonment as a matter of law. Def. did not fail in his attack; no one prevented him from completing it

d) purely innocent conduct may constitute attempt if an intent to commit the crime is proved, even by inferential evidence McQuirter v. State [Ala.] (black man convicted of attempted rape after following white woman home)
e) Equivocality test: how clearly the def. conduct speaks to his intent to commit a crime
   i) People v. Miller [Cal.] conviction of attempted murder reversed when def., who had threatened to kill another, walked straight toward him and stopped to load his rifle, but at no time lifted it to aim and was arrested. Court said it was uncertain whether def. would carry out his threat
   ii) King v. Barker [NZ]: looks at how clearly def. acts bespeak its intent to commit a crime
   iii) few states adhere, but it has influenced the widely adopted MPC proposal
f) MPC “Substantial Step” Test: conduct which constitutes a substantial step toward the commission of the crime and is corroborative of the def. intent may suffice for an attempt conviction
   i) United States v. Jackson [2d Cir]: conduct which constitutes a substantial step toward the commission of the crime and is strongly corroborative of the firmness of the def. intent may establish attempt (Def. and 2 others convicted of attempted robbery after
driving around bank on 2 occasions w/ the necessary paraphernalia to commit the crime
ii) 2/3 of federal circuits now use “substantial step” test
iii) United States v. Mandujano [5th Cir.]: conviction for attempt to sell heroin affirmed when def., as solicited by undercover cop, made several unsuccessful calls to try to procure heroin
iv) United States v. Joyce [8th Cir.]: reversed attempt conviction b/c def. failed to take a substantial step (def. left scene of drug deal after negotiations were conducted but prior to purchasing)
v) United States v. Harper [9th Cir]: def set up bill trap to rob ATM fixer. Attempt conviction reversed b/c def never made move toward the victim or bank – not substantial step

5. Attempt v. Solicitation
   a) Merely soliciting one to commit a crime does not constitute an attempt (but it does constitute solicitation). Attempt requires some overt act toward the commission of a crime; solicitation doesn’t. State v. Davis [Mo]: def hired an undercover police officer to kill his lover’s husband; conviction reversed
   b) United States v. Church [Military]: def. obtained services of person to kill his wife, participated in planning, drew a map, advised how to shoot, and paid. Conviction upheld. Solicitation may be punishable as an attempt if it constitutes a substantial step toward the commission of the crime
   c) At common law, once a person agrees, there is a conspiracy, and def. is no longer guilty of solicitation, only conspiracy

6. Impossibility
   a) nearly all states reject the defense of factual impossibility
      i) ex. When attempts misfire b/c of poor aim or the use of defective or inadequate weapon, such as an unloaded gun
      ii) at common law, factual impossibility never a defense to attempt
      iii) Under MPC, if the facts could have been as the def. believed them to be, guilty for attempt
   b) legal impossibility is sometimes a defense
      i) ex. where a pickpocket picked an empty pocket
      ii) COMMON LAW APPROACH: legal impossibility is a defense. People v. Jaffe [NY]: a person cannot be convicted of attempt to buy stolen goods, believing them to be stolen, when in fact they had not been stolen (Def. bought cloth he thought was stolen)
         o United States v. Berrigan [3d Cir], defense of legal impossibility allowed when the defendant intended to commit a criminal act but commits an act that does not amount to a crime (Priest in prison gave letters to courier, unaware the warden knew)
         o United States v. Oviedo [5th Cir.], legal impossibility is a defense where the objective acts committed by the def. do not clearly indicate the def. intent to commit a crime (def.
sold substance to undercover police officer, which he said was heroin, but was not. Def. said he knew it wasn’t; court reversed conviction

iii) MPC APPROACH: Statutory reform did away with defense of legal (and factual) impossibility in some jurisdictions. *People v. Dlugash* [NY]: def. shot person he believed to be alive, but was killed moments earlier; def. guilty of attempted murder

iv) One circuit (3d) held that regardless of criminal intent, legal impossibility is a valid defense. Other circuits have held, consistent with the MPC, attempt is established when the def. actions would have constituted the completed crime if the surrounding circumstances were as he believed them to be (2d). Others (5th, 9th, 11th) take a middle ground, requiring that the objective acts of the def. taken as a whole strongly corroborate the required culpability for criminal attempt.

VII. Group Criminality
   A. Complicity
      1. Common law
         a) four degrees of complicity (principal, accessory, accessory before the fact, and accessory after the fact)
         b) must convict principal to convict accomplice
      2. Modern statutes and MPC
         a) eliminated distinctions, except for accessory after the fact, which usually is subject to lesser punishment
         b) Do not have to convict principal in order to convict accessories
      3. Mens Rea
         a) two involved: that of the accomplice (specific intent) and the principal
         b) A person cannot be convicted as an accomplice to murder unless the encouragement was made with the intention of encouraging the murderer. *State v. Hicks* [U.S.] (An Indian is convicted of murder for words that he uttered to ‘encourage’ murder; conviction reversed)
           i) mere presence is not enough to hold liable as an accomplice
           ii) must be an active participant
         c) *Wilson v. People* [Colo.], because intent to commit the crime is required for conviction, when the accomplice seeks to catch the principal in the act, as in the case of a detective, the accomplice is not guilty of the crime (Def. thought Prince, principal, stole his watch so convinced him to break into store so Prince would get caught; conviction reversed)
         d) Defendant cannot be guilty of aiding and abetting where there is no connection or association with the principal. *State v. Gladstone* [Wash.]: police informant was hired to buy marijuana from def, who did not sell him any, but referred him to another, who def. did not contact, to buy pot; conviction reversed
i) MPC requires that an accomplice assist the principal with the purpose of facilitating the crime; knowingly is not enough to establish accomplice liability

ii) NY Penal code creates a separate offense for those who knowingly facilitate a crime, which is a lesser offence than accomplice liability

iii) United States v. Fountain [7th Cir.]: knowingly facilitating the crime is sufficient for accomplice liability for major substantive crimes (Prisoner flashed knife at another prisoner and came close enough to bars for him to grab it and kill guard)

e) Some courts hold def. liable for unplanned, unintended acts of co-conspirators IF they are natural, probable, and foreseeable consequences of the assistance. People v. Luparello [Cal.]: def sent his friends to find out where ex-lover is from Martin; when friends did not get an answer, they returned and killed Martin; conviction of Luperallo, who was not present, upheld

i) Roy v. United States [D.C. App.]: natural and probable consequences means a consequence reasonably likely to ensue from the planned events w/o interference of any intervening factors. (Miller tried to by handgun from def. who sent him to another; other man robbed Miller during purchase; conviction reversed) Dif. b/w conceivable and foreseeable.

ii) Other courts only hold def. liable for those acts he procured, counseled, commanded or encouraged. State v. Marr [N.C.]: def had two others break in trailer to steal goods; in process, also burned down trailer and shot victim; conviction reversed

iii) def usually liable for the crime itself and all other foreseeable crimes

f) attendant circumstances

i) United States v. Xavier [3d Cir.]: knowledge of attendant circumstances is necessary for conviction of aiding and abetting ex-felon’s possession of a firearm. (Def. helped his brother acquire a gun to shoot his enemy; brother was an ex-felon and defendant was unaware)

ii) to be responsible for aiding and abetting, there has to be some knowledge that one’s actions are assisting another in the commission of a crime

g) Liability for acts of others

i) a person can be convicted of being an accessory b/f the fact to the crime of manslaughter arising through criminal negligence State v. McVay [R.I.]: def order the captain and engineer of a steamship to depart, knowing the dangerous conditions regarding the boiler, which exploded and caused the death of three people

ii) two or more people who intentionally participate in an inherently dangerous and unlawful activity share culpability for any crime committed as a result of that activity (3 def. engaged in a
gun battle that killed an innocent party; all found guilty of second-degree murder, reckless disregard for human life)

iii) Where criminal liability arises out of the act of another, it must appear that the act was done in furtherance of the common design, or in prosecution of the common purpose for which the parties assembled or came together.  *State v. Ayers* [Iowa] (def sold a handgun to a minor w/o a permit; minor accidentally shot another at a party; conviction reversed)

iv)  *State v. Travis* [Iowa]: def recklessly drove motorcycle and let 15 y.o. do the same; 15 y.o. hit and killed 6 y.o.; def. guilty of involuntary manslaughter b/c did more than assent – he initiated it, counseled, and instructed (poorly)

4. Actus Reus
   a) A person may be guilty of aiding and abetting a criminal act by being present, taking part, concurring in, or encouraging the act.  *Wilcox v. Jeffery* [UK] (Def. was a music magazine writer who was charged with aiding and abetting an alien to take employment)
   b) Def. can be convicted of being an accomplice to a crime even though the crime would have been committed without his or her assistance
      i)  *State ex rel. Attorney General v. Tally, Judge* [Ala.]: one who facilitates murder by destroying an opportunity to escape that the victim might otherwise have is guilty as an accomplice, even if victim would have died anyway (Judge convicted telegraph operator not to deliver warning telegraph to victim)
   c) Sometimes the actus reus requirement can be satisfied by a failure to act
      i) under MPC, a person can be an accomplice to a criminal act if he has a legal duty to prevent the crime, but fails to do so with the purpose of facilitating the crime.
      ii)  *State v. Davis* [W.V]: father stood by and watched son rape family friend guilty of facilitating the rape
      iii)  *People v. Stancial* [Ill.]: mother had a duty to protect her child from mother’s boyfriend’s abuse; mother an accomplice to daughter’s murder
   d) Relationship b/w Liability of the Parties
      a) Some courts have held that an accomplice cannot be held liable if the principal did not have the requisite intent.  *State v. Hayes* [Mo.]: def conspired w/ another man to burglarize a store, but his accomplice set him up to be caught.
      b) Other courts have held that a party can be criminally responsible as an accomplice when the crime is committed by an undercover agent, who did not have the requisite mens rea b/c he was an officer.  *Vaden v. State* [Alaska]: hunter appealed has conviction as accomplice to illegal hunting, which was obtained after an undercover agent solicited his help in illegally hunting; affirmed.
      c) An excuse to the commission of the crime is personal to the actor and cannot be used by an accomplice to avoid liability.
Taylor v. Commonwealth [Va.]: woman convicted in aiding boyfriend in kidnapping his own child; boyfriend escaped liability b/c parent, accomplice did not.

B. Conspiracy
   1. Definitions
      a) Common law:
         i) an agreement between two or more persons to commit an unlawful act
         ii) at common law, prosecution must show:
            o Agreement: meeting of the minds not required
               ▪ Does not need to be express
               ▪ Conspirators need not know one another
            o unlawful act
            o mens rea: culpable mind – must intend to agree and pursue an unlawful objective
         iii) at common law, there had to be 2 guilty minds in order to have a conspiracy. Thus, if one person was a police officer, there was no conspiracy. Most jurisdictions changed this to only require one guilty mind.
         iv) common law/minority rule: only need an agreement, not an overt act
      b) MPC §5.03
         i) definition: a person is guilty of conspiracy with another person to commit a crime if with the purpose of promoting or facilitating its commission, he:
            o agrees that one or more of them will engage in conduct which constitutes such crimes
            o agrees to aid the other in the planning or commission of such crime
   2. Hearsay:
      a) Common law: Krulewitch v. United States: an act or statement of a co-conspirator committing during and in furtherance of the conspiracy may be admitted against the co-conspirator
         i) followed by most states
      b) before a co-conspirator’s statements can be admitted, the judge must determine by a preponderance of the evidence that a conspiracy exists and the def. was involved. Bourjaily v. United States
   3. Duration
      a) attempts to conceal conspiracy are not considered part of the original conspiracy unless the cover-up is proven to be part of an express agreement among the conspirators to conceal. Grunewald v. United States
      b) once formed, a conspiracy remains in effect until its objectives have been met or abandoned
         i) statute of limitations begins to run when the conspiracy terminates
c) MPC: a conspiracy terminates (and statute of limitations begins to run) when the co-conspirators are no longer engaged in any action in furtherance of the conspiratorial objectives.

4. Abandonment
   a) most courts require the abandoning party to engage in some sort of act aimed at thwarting the conspiracy
      i) federal courts have no such requirement
   b) At common law, withdrawal was not a defense to conspiracy, because the crime of conspiracy was complete when the agreement was entered into
   c) MPC recognizes withdrawal as a complete defense to conspiracy – must thwarts the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose

5. Punishment
   a) a majority of states fix the level of punishment for conspiracy at some level below that of the object offense
   b) 1/3 of states follow the MPC, and punish conspiracies to the same degree as the object crime, except in the cases of the most serious felonies
   c) a few states treat conspiracy as a generic offense with a punishment scale unrelated to the scales for the object crime
      i) 18 U.S.C. § 371 takes this approach w/ conspiracies to commit felonies; misdemeanors treated much like MPC approach

6. Scope
   a) MPC: need not know the identity of all persons involved
   b) impossibility is no defense to conspiracy

7. Actus Reus
   a) At common law, actus reus of the offense is the agreement itself
   b) Interstate Circuit Inc v. United States [US]: evidence of a conspiratorial agreement can be based on inferences drawn from the course of conduct of the alleged conspirators (two theater chains were convicted of entering into a conspiracy with film distributors to violate the Sherman Antitrust Act)
   c) today, most jurisdictions require an overt act
      i) manifests that the conspiracy is at work and is the intent of the conspirators
      ii) any little act will suffice
   d) MPC, and many jurisdictions dispense with the necessity of an overt act for the most serious offenses
   e) Some states, however, require a more substantial overt act.
      i) Ohio: an overt act is sufficient only when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed
      ii) Maine: substantial step

8. Mens rea
   a) MPC requires purpose for conspiracy
b) most states require purpose in conspiracy cases, even when the object crime is a serious felony

c) *People v. Lauria*: the intent of a supplier who knows his supplies will be put to criminal use may be established by (1) direct evidence that he intends to participate, or (2) through an inference that he intends to participate based on (a) his special interest in the activity or (b) the felonious nature of the crime itself. (def. ran a telephone-answering service, which he knew was used by several prostitutes in their business ventures; def. indicted for conspiracy to commit prostitution; reversed)

9. Liability

a) in many jurisdictions, a party can be liable for crimes committed by co-conspirators during the course of the conspiracy, even when he could not be held accountable for those crimes under traditional principles of accomplice liability

b) *Pinkerton v. United States*: participation in the conspiracy is enough to sustain a conviction for the substantive offense in furtherance of the conspiracy, without participation in the substantive crime

i) not retroactive (cannot be held liable for substantive crimes committed by co-conspirators prior to entering the conspiracy)

c) many jurisdictions use a foreseeability test. *State v. Bridges* [NJ]: a co-conspirator may be liable for the commission of substantive criminal acts that are not within the scope of the conspiracy if they are reasonably foreseeable as the necessary or natural consequences of the conspiracy

i) under *Pinkerton* and *Bridges*, co-conspirator can be held liable for acts not intended, so long as they are reasonably foreseeable as the necessary or natural outcomes of the conspiracy

ii) *United States v. Alvarez*: when a co-conspirator is in a position such that it is reasonably foreseeable to him that an unintended crime might occur, he can be held responsible for that crime if it indeed occurs. (undercover drug sale → death of a federal agent, co-conspirators held liable)

VIII: Exculpation

A. Basics defenses to bar conviction

1. Prosecution failed to establish one or more of the required elements of the offense

2. Justification: although actor committed the wrongful act, it was a good thing, the right or sensible thing, or permissible thing to do

3. Excuse: actor did the act, but in his circumstances, act was not “wrong”

B. Justification

1. Self-defense

   a) Common law: there must have been a threat, actual or apparent, of the use of deadly force against the defendant, which was unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm and his response was necessary to
save himself therefrom. Must be an objectively reasonable belief. *United States v. Peterson*

i) most states superceded with statutes, but retain many of common law definitions

ii) ex. *People v. Goetz*: Justifiable self-defense must be objectively reasonable under the circumstances, but the circumstances may include perceptions of the attackers’ intentions (def. shot 4 youths on NYC subway when they asked for money)

b) MPC §3.04: use of force is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person

MPC §3.04. Use of force is not justifiable:

i) resisting an arrest

ii) to resist force used by the occupier or possessor of property. Unless (a) a public officer acting in performance of his duties; (b) actor has been unlawfully dispossessed of his property and is making reentry (c) the actor believes such force is necessary to protect himself from death or serious bodily harm

The use of deadly force is not justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping, or sexual intercourse by force, (majority rule) Unless

i) the actor proved the use of force against himself

ii) the actor knows he can avoid the necessity of such force with complete safety by retreating

MPC §3.09:

i) The defense of self-defense is unavailable if: the actor’s belief in the unlawfulness of the force or conduct against which he employs force is erroneous

ii) When the is negligent or reckless in having belief that the use of force is necessary, justification is unavailable for crimes where mens rea is recklessness or negligence

c) Battered-woman’s syndrome

i) *State v. Kelly*: when battered women kill there batterers and claim self-defense, expert testimony on battered woman’s syndrome is admissible to prove they faced imminent risk of injury (battered wife stabbed her husband and claims self-defense)

ii) today, admissibility is overwhelmingly accepted by courts and legislatures, by judicial decision or statute

iii) Texas has the broadest provision inasmuch as it is not restricted to battered women’s cases

iv) Many courts that permit the use of the battered woman’s syndrome to support a claim of self-defense accept similar evidence in cases involving a battered or abused child who kills the abusive parent

v) *Werner v. State* (Tex): court refused to apply “Holocaust Syndrome” to def
d) Threat must be \textbf{imminent} in order for the defense of self-defense to go to the jury – cannot be based on perceived threats of later harm. \textit{State v. Norman} (abused for 25 years by husband, forced into prostitution, etc., kills husband while he was sleeping)

   i) In cases like \textit{Norman} where the abuser is killed in his sleep, most courts remain unwilling to admit battered-spouse evidence or to permit jury instructions on the possibility of legitimate self-defense

   ii) Inevitable harm is not the same as imminent harm. A reasonable fear of future harm does not authorize a person to hunt down and kill an enemy. \textit{Ha v. State} (victim tried to kill the def., but interveners prevented it. Def. killed him the next day)

   iii) Words alone are not sufficient threat for use of force. \textit{State v. Schroeder} [Neb.] (inmate threatened by cellmate of impending sexual attack; self defense not permitted)

   iv) MPC §3.04 modestly relaxes the imminence requirement, providing it is sufficient that the actor reasonably believed the use of defensive forced was immediately necessary

e) Third-persons: The widely accepted rule is that someone who comes to the aid of a person in peril can use deadly force to prevent the attack, under the same circumstances that would justify the use of force by the endangered person herself; see MPC §3.05

f) Minority rule requires a victim, prior to using self-defense, to retreat

2. Necessity

a) Lesser of two evils: MPC § 3.02: conduct which the actor believes to be necessary to avoid a harm or evil to himself is justifiable, provided that

   i) The harm sought to be avoided is greater than that sought to be prevented by the law defining the offense charged

   ii) Neither the Code nor other law defines exceptions

   iii) A legislative purpose to exclude the justification does not appear

When the actor was reckless or negligent in bringing about the situation requiring a choice of evils, the justification is unavailable for any offense for which recklessness or negligence establishes culpability

b) \textit{People v. Unger}: prison escapees may claim the defenses of necessity and duress (traditionally unavailable for escape) (def. reasonably feared sexual assault and bodily harm and harm was imminent)

   i) After this case was decided, the Supreme Court held in \textit{United States v. Bailey}, that the prisoner must surrender as soon as the duress or necessity had lost its coercive force

c) If govt has a strong interest in the law defining the offense, defense of necessity may be prohibited

   i) MPC§ 3.02: the harm sought to be prevented by the law defining the offense may be viewed broadly enough to permit judicial attention to the effects of law enforcement of allowing the defense in the particular circumstances
ii) *Borough of Southwark v. Williams*: necessity not an excuse for homeless breaking into the property of others; would open the door for many more and property would no longer be safe

iii) *Commonwealth v. Hutchins*: govt’s interest in regulating drug possessions barred def. from using necessity as an excuse to possession and cultivation of marijuana when def. used it medicinally to help ease the symptoms of a horrible, and painful disease for which there is no cure.

d) For the necessity defense, the danger must be clear and imminent. *Commonwealth v. Leno* (Operators of a needle exchange program sought to apply necessity defense by asserting the program would reduce the spread of AIDS; rejected)

   i) protesters cannot claim necessity for indirect civil disobedience. *United States v. Schoon* (protesters who disrupted IRS office and disobeyed police not allowed necessity defense to protest killings in El Salvador)

   ii) *Regina v. Dudley Stephens*: killing an innocent is never justified

e) defense to all crimes except homicide

B. Excuse

1. Basics

   a) involuntary actions

   b) deficient but reasonable actions

      i) defect of knowledge – must be reasonable

      ii) defect of will – duress

   c) irresponsible actions – infancy and legal insanity

2. Duress

   a) MPC § 2.09: it is an affirmative defense that the actor engaged in conduct charged to constitute an offence b/c he was coerced to do so by the use of, threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist (permits murder)

      i) *State v. Toscano* [NJ]: duress is a defense to any crime, other than murder, if the def. committed the crime b/c he was coerced by the use or threat of unlawful force against himself or another, which a reasonable person in the situation would be unable to resist (chiropractor, accused of insurance fraud, claimed duress defense, claiming a co-conspirator forced him to cooperate)

   b) At common law, duress was a valid defense only if the person committed a crime under threat of imminent death or seriously injured, and the death was so grave that a reasonably courageous person would comply.

      i) future harm not enough

      ii) threat of monetary loss and property damage insufficient

      iii) *United States v. Flemming* [military]: imminent, inescapable danger or death is required for excuse of duress (Korean war P.O.W. court-martialed for following Koreans’ orders)
c) For immanency requirement, The def. must show he had no reasonable opportunity to escape. The trier of fact should decide this. The opportunity to escape must be reasonable. *United States v. Contento-Pachon* (def. arrested with balloons of cocaine in his stomach; said he did so under duress of Columbian drug lords, who pay off the police)

3. Insanity
   a) MPC § 4.01: a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of law
      i) at common law, a jury evaluating an insanity defendant should be instructed to acquit as insane a def who, at the time of the act, had a mental disease or defect, which caused a defect of reason, which made him unable to understand either the act’s nature/quality or wrongness. *M’Naghten’s Case*: if at the time of conduct, the def. lacked the ability to know the wrongfulness of his actions or understand the nature and quality of his actions.
      ii) *Blake v. US* [5th Cir.]: model penal code expansive definition adopted; volitional (def. suffered from schizophrenia; robbed a bank; challenged meaning of “insane”) OVERRULED
         iii) *United States v. Lyons*: overrules “irresistible impulse” test of insanity; test: must be unable to appreciate wrongfulness of action (no longer able to show def. acted under irresistible impulses which made him unable to act legally) (Def. suffered from drug addiction and was convicted of possessing drugs)
   b) MPC § 4.03: mental defect or disease is an affirmative defense; not admissible unless the def, at the time of entering his plea of not guilty, file a written notice of his purpose to rely on such defense
   c) MPC § 4.04: no person who as a result of mental disease or defect lacks the 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 long as such incapacity endures
      i) *Khiem v. United States* (D.C): permitted forcible medication of def. in order to render him competent for trial
      ii) *Riggins v. Nevada* [S. Ct.] declined to hold that forcible medication was impermissible per se, but held that forcible medication in that case was a violation of due process, because the state had not shown that other means to render the def. competent were unavailable
   d) commitment
      i) *Jones v. United States* [S.Ct.]: upheld the constitutionality of mandatory commitment
      ii) Supreme Court held that an insanity acquittee subject to automatic commitment could be held indefinitely, even where the period in confinement exceeded the maximum sentence authorized for the offense
iii) In some jurisdictions, ex. NJ, the maximum period of confinement is the maximum sentence the committed person would have received if he had been convicted
iv) In Michigan, statute created a third option: guilty but mentally ill, which retains the same sentencing authority for the court as in guilty verdicts, but if the court sentences him to prison, he is to be given treatment as indicated for his illness
v) Most jurisdictions, including the Supreme Court, DO NOT instruct the jury on the procedures that follow and insanity acquittal, on the ground that what will happen to the def. is not relevant to whether the def. met the test of legal insanity

e) Burden of Proof
i) Presumption of legal sanity at trial
ii) Some states only require some evidence of legal insanity to eliminate the presumption of sanity; others require more, ex. reasonable doubt of the sanity of the accused
iii) Once insanity becomes an issue, ~ 12 states require the prosecution prove the sanity of the def. beyond a reasonable doubt; About 38 states and the federal courts place the burden of proof of insanity on the defendant by clear and convincing evidence.
iv) State v. Green [Tenn.]: in a MPC state, if the burden of proof is on the prosecution, the prosecution must prove that the def. acts were sane, and could not have been the result of insanity (schizophrenic for life convicted of murdering a police officer)
f) can be used as a defense to strict liability crimes

IX. INTERNATIONAL CRIMINAL LAW
A. Domestic Legislation
1. 18 U.S.C. §2332:
   a) homicide: Whomever kills a nation of the United States while such national is outside of the United States shall:
      i) if the killing is murder, be fined or imprisoned for any term of years or for life, or both
      ii) if the killing is voluntary manslaughter, be fined or imprisoned not more that 10 years, or both
      iii) if the killing is involuntary manslaughter, be fined or imprisoned not more than 3 years or both
   b) attempt or conspiracy to kill as US national:
      i) attempt to commit a killing that is murder \(\rightarrow\) fined or imprisoned not more than twenty years or both
      ii) conspiracy to commit a killing that is murder \(\rightarrow\) fined or imprisoned for any term of years or for life or both
   c) anyone outside the United States who engages in physical violence w/ the intent to cause serious bodily injury to a national of the united States w/ result that serious bodily injury is caused, shall be fined or imprisoned not more than 5 years.
d) prosecution only on written certification of the Attorney General certifying that such offense was intended to coerce, intimidate, or retaliate against a government or civilian population

e) purpose:
   i) expand jurisdiction over crimes by terrorists against American citizens abroad
   ii) must be terrorism, not simply barroom brawls, etc.
   iii) US needed statute b/c had no jurisdiction outside the US, but rather would be w/in the jurisdiction of the territory of the country in which it was committed (territoriality jurisdiction)
   iv) Protective Principle (passive personality)
      o US wants to protect US citizens
      o Territorial jurisdiction country is not doing an adequate job of protection

2. United States v. Rahman (S.D.N.Y)
   a) Def. charged with law that provided “If two or more persons in any State…conspire to overthrow, putdown, or destroy by force of the Government of the United States, or to levy war against them, or to oppose by force of the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States… they shall be fined not more than $20,000 or imprisoned not more than 20 years, or both.”
   b) Crimes: bombing of WTC, attempted assassination of Meir Kahane, a rabbi and leader of a small radical group opposed to Arab presence in Israel
   c) Held: can be convicted for WTC bombing but not for Kahane assassination attempt b/c Kahane not a political leader, and thus, not aimed at overthrow of US.

3. United States v. Yunnis (D.C. Cir.)
   a) Jordanian aircraft hijacked in Lebanon w/ two US nationals on board
   b) Hostage Taking Act: whoever inside or outside the US, seizes or detains and threatens to kill or to injure or to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act shall be punished by imprisonment by any term of years or for life. If outside the US, the offender or the person seized must be a national of the US, the offender must be found in the US, or the governmental organization sought to be compelled is the US gov’t
   c) Antihijacking Act: criminal punishment of people who hijack aircraft outside the special aircraft jurisdiction of the US if the hijacker is later found in the US
   d) Yunnis was indicted for air piracy while awaiting trial on hostage taking in the US.
      i) Yunnis said not found in US, b/c taken involuntarily
      ii) Court rejects argument – does not matter how he got to US

B. Genocide
1. Genocide: intent to destroy, in whole or part, a national, ethnical, racial or religious group, by
   a) Killing members of the group
   b) Causing serious bodily or mental harm to members of the group
   c) Inflicting conditions to bring about destruction of group
   d) Imposing methods to prevent births within group
2. Background of Geneva Convention
   a) US ratified treaty in 1988, 40 years after it was made
   b) One of the most ratified treaties in the world
   c) International criminals are supposed to be caught in a web
      i) state with territorial jurisdiction
      ii) If state does not have territorial jurisdiction, extradition agreement
      iii) Makes sure there is no safe-haven for criminals
   d) courts
      i) 1998, ICC, international criminal court, formed, 50 years after proposed
      ii) ICTY – int’l tribunal for Yugoslavia; located in the Hague
      iii) ICTR – int’l tribunal for Rwanda; located in Arusha, Tanzania
3. August 2, 2001, Radislave Krstic becomes the first person convicted of genocide (in Srebrenica)
   a) Fights over territory → “ethnic cleansing,” but was it a genocide?
      i) Only killing the men
      ii) Camps where women raped to change ethnicity of the babies
      iii) General Assembly said it was genocide, but Security Council said it was not
   b) Genocide is a specific intent crime
      Did Kristic have specific intent?
      i) Knowledge, and the eventuality is practically certain
      ii) Omission crime – he could have stopped it but he didn’t
      iii) Count combines presence, position (command), etc. and determines “how could he not have known”
C. International Criminal Court
   1. Permanent institution with power to exercise jurisdiction over member States
   2. Jurisdiction limited to the most serious crimes:
      a) genocide
         i) killing or causing serious mental or bodily harm to members of the group
         ii) deliberate imposition of conditions to bring about its physical destruction in whole or part
         iii) imposing measures to prevent births w/in group
         iv) transferring children of group to another group
      b) crimes against humanity
         i) murder
         ii) extermination
         iii) enslavement
         iv) torture
         v) rape
vi) etc.

c) war crimes
   i) breaches of Geneva Convention (killing, torture, deportation, hostage taking, etc.)
   ii) attacks against civilians or humanitarian assistance
   iii) attacks against combatant who laid down arms
   iv) child soldiers
   v) etc.

d) crimes of aggression

3. Prosecution for crimes committed in territory of signing country

4. Process
   a) situation referred to the Prosecutor by a State Party, Security Council, or investigation initiated by Prosecutor
   b) The Prosecutor analyzes the situation
   c) pre-trial division
   d) trial division
   e) appeals division

5. Case Study: Ugandan Referral
   a) Ugandan Pres. filed formal complaint against rebel army

D. Terrorism
   1. Hamdi v. Rumsfeld
   2. Padilla v. Rumsfeld