UNIT I – Establishing Guilt

I. THE PURPOSES OF CRIMINAL LAW

1) Punitive
   i. punish those who do wrong

2) Incapacitation ➔ Protection, Removal
   i. protect society by removing those who are dangerous

3) Deterrence
   i. deter others from same behavior

4) Rehabilitation (Corrections)
   i. rehab into a "good citizen"

5) Restitution
   i. victim – and prevent retaliation

II. The Process of Proof – Beyond a Reasonable Doubt – 35-51

1) PROOF BEYOND A REASONABLE DOUBT

   i. GENERAL RULE: State has the burden of proving ALL ELEMENTS of the crime beyond a reasonable doubt
      1. "with UTMOST certainty"
      2. not quantifiable, but you know it when you see it
         a. when courts have tried to quantify, it has been rejected
            i. Cage v. Louisiana – "may give jury instructions on MORAL CERTAINTY"
               BUT "would give rise to grave uncertainty, an actual or substantial doubt NOT SUFFICIENT"

   ii. State has burden of production and persuasion generally
      1. Burden of Production – enough evidence to put a fact at issue
      2. Burden of Persuasion – convincing the trier of fact
         a. So – State must produce enough evidence not only to put the facts at issue but to persuade the trier of fact beyond a reasonable doubt

   3. The WINSHIP standard
      a. In Re Winship – SC – three factors, in holwint that reasonable doubt is necessary standard to satisfy due process 1) from Δ perspective, erroneous conviction results in substantial loss of standing in community, 2) much of force of criminal law would be lost in large #s of innocent people thought to be punished, 3) ord citizen – important to know that will not be convicted of a crime if not guilty
      b. Mullaney – Maine – "malice aforethough must be proven by the prosecution beyond a reasonable doubt.

4. Defendant may generally bear the burden of proof for affirmative defenses
   a. Patterson – shifted burden of proof to the Δ to show by a preponderance that affirmative defense exists, and then generally the state will have to prove beyond a reasonable doubt if defense is not an element of the crime, here, extreme emotional disturbance was an affirmative defense to reduce murder, so Δ can bear burden
UNIT II – The Justification of Punishment

I. Perspectives on Punishment 101-135

I. TWO BASIC THEORIES

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II. PURPOSES OF PUNISHMENT

i. **Retribution**  
   1. looks backward → Seek to justify punishment based on offenders behavior in the past  
   2. Just desserts, morally deserving, "revenge"  
   3. punishment should fit the crime  
      a. **Regina v. Dudley & Stephens** (1884): Four men are stranded on a boat at sea. They kill and eat the smallest and weakest. Two were convicted to death but the penalty was reduced to 6mo. "the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbor, it certainly is not law at the present day."

ii. **Utilitarian-based purposes** — looks forward → seek to justify pun. based on the good cons. in the future

1. **Deterrence (Prevention)**  
   a. general deterrence  
      i. deter the criminal behavior  
      ii. assumes a rational actor, so this is controversial because many so-called "crimes of passion", the criminal may not really weigh the cost-benefit, therefore no deterrence in action  
   b. specific deterrence  
      i. deter the criminal  
         1. **State v. Chaney** (Alaska 1970), an air force man was given lenient one-year concurrent sentences for robbery and rape. This did not effectively serve to express society's condemnation of the act or to in any way deter future criminals.  
         2. **U.S. v. Bergman** (U.S. Dist.Ct., S.D.N.Y. 1976), a wealthy, elderly philanthropist was convicted of defrauding medicare. Rehabilitation, specific deterrence, and incapacitation were not at issue in this case, but the need to generally deter others like Bergman, to affirm that the law has teeth, and to reflect the gravity of the crime required that he spend some time in prison. He received 4 months.

2. **Rehabilitation/Reformation**  
   a. reform criminal conduct by way of developing skills in prison to transform them into productive citizens  
   b. Difference of opinions as to importance, resources – are they capable?

3. **Incapacitation**  
   a. protect society from dangerous persons  
   b. arg. against this is that merely postpone, if not coupled with reformation  
      i. **U.S. v. Jackson** (U.S. Ct. of Appeals 1987), Jackson, a 5-time loser, robbed a bank the afternoon he got out of prison. He was given life under a felon in possession statute, and the clear goal was to incapacitate him from committing future crimes. In a persuasive dissent, Posner suggests that it would be both more efficient and perhaps more humane to lock him up only until his "crime committing years" are past, as the marginal deterrence of a life sentence versus a 20 or 30 year sentence is negligible.
III. Model Penal Code 1.02(1)
   i. The general purposes of the provisions governing the definition of offenses are:
      1. to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens
         substantial harm to individual or public interests;
      2. to subject to public control persons whose conduct indicates that they are disposed to
         commit crimes;
      3. to safeguard conduct that is without fault from condemnation as criminal; (culpability)
      4. to give fair warning of the nature of the conduct declared to constitute an offense; (legality)
      5. to differentiate on reasonable grounds between serious and minor offenses;
         (proportionality)
   ii. FROM MPC → THREE GENERAL PRINCIPLES LIMIT DISTRIBUTION OF PUNISHMENT
      1. CULPABILITY
         a. requires OVERT and VOLUNTARY ACT
            i. safeguards conduct which is without fault from condemnation as criminal
         b. Actus Reas, Mens Reas
      2. LEGALITY
         a. fair warning and notice – due process – gives fair warning of the nature of conduct
            declared to constitute an offense
      3. PROPORTIONALITY
         a. differentiate punishments on reasonable grounds between serious and minor offenses
         b. punishment should fit the crime

II. What to Punish 156-171

I. DIFFICULTIES in Deciding What to Punish – What types of conduct should be made criminal?
   i. Schwartz: Many things are evil without being appropriate for criminal punishment. (lying,
      etc) Sometimes criminalizing something can create more evil than is caused by the targeted
      misconduct.
   ii. Wolfenden Report: "it is not proper for the law to concern itself with what a man does in
      private," and "there must remain a realm of private morality and immorality which is, in brief
      and crude terms, not the law's business."
   iii. Lord Patrick Devlin: A complete separation of crime from sin would not be good for the
      moral law and would be distrous for the criminal. The criminal law is based upon moral
      principle. An established morality is as necessary as a good government to the welfare of
      society.
   iv. Kadish: Moral laws are unenforced because we want to continue our conduct, and
      unrepealed because we want to preserve our morals. Law enforcement pays a price for using
      the criminal law in this way.
      1. the moral message communicated by the law is contradicted by the total lack of
         enforcement, and
      2. the spectacle of nullification of the legislature's solemn commands is an unhealthy
         influence on law enforcement generally.

II. Us. V. Johnson – court authorized a reduction in sentences in federal court, although court did not allow reduction
    for "general family circumstances." Court justified this in fact that rule did not say anything re: extraordinary circum.

III. Bowers v. Hardwick (SC 1986), a Georgia man was convicted under an anti-sodomy law and appealed his
     conviction on 9th Amendment and Due Process grounds. In a 5-4 verdict, the court held that there is no constitutional
     right to sodomy and that the laws are based on morality Dissent, argument was put forth that there is a constitutional
     right to privacy, the "right to be let alone" and there is NO justification to punish private behavior.
UNIT III – The Elements of Just Punishment

I. DEFINING CRIMINAL CONDUCT
   a. Culpability - safeguard conduct that is without fault from condemnation as criminal
   b. Legality - give fair warning of the nature of conduct declared to constitute an offense
   c. Proportionality - differentiate on reasonable grounds between serious and minor offenses

II. CULPABILITY – ACTUS REAS – CULPABLE CONDUCT
   a. ACTUS REAS – "guilty act"
      1. justification for requirement is that one should not merely be punished for guilty thoughts
      2. Common law culpability gen. requires a criminal act and a criminal mind (mens rea)
      3. ACT – 3 ELEMENTS
         a. voluntary act – willed muscular contraction or failure to act when a duty
         b. that causes
         c. a social harm, (crime)
   b. Voluntary Acts & Positive Actions
      i. basically means a willed muscular contraction
         1. circumstances and consequences or merely voluntary muscular contractions
      ii. Defenses to Voluntariness of Acts
         1. Infancy
         2. Insanity
         3. Involuntary
            a. reflexive, unconscious, involuntary intoxication, asleep, convulsive
      iii. CASES
            Martin was drunk at his home, where he was arrested and taken to a public highway where he became loud and profane. The court reversed his conviction for public drunkenness, stating that under the plain terms of the statute, a voluntary appearance was presupposed.
            A man who knew he was subject to epileptic seizures chose to drive his Buick on the highway. He had a seizure, lost control, and killed four. Conduct including a voluntary act is required. Here, the voluntary act is choosing to drive because he knew he was subject to seizures - Voluntary acts which lead to involuntary ones can be deterred.
            During a traffic stop, Newton was shot in the abdomen and then he shot Officer Frey. He claimed that the shot to his abdomen rendered him unconscious and his shooting of Frey was therefore involuntary. The court held that refusing the jury instruction to the effect of involuntary action being a complete defense was prejudicial error and reversed his conviction.
         4. Falater, the Phoenix man who killed his while allegedly sleepwalking, was exhibiting calculating behavior, as was Newton. This may not be enough to demonstrate consciousness.
c. **Omissions**

1. **General Rule:** There is no liability for failure to act UNLESS a duty is imposed by law
   
      
      Pope took in a woman and her baby who had nowhere else to go. While at Pope's home, the woman went into a violent religious frenzy resulting in fatal injuries to the baby. The court reversed Pope's conviction of felony child abuse on the grounds that she was not responsible for the baby's supervision while the mother was present. The court said she had a moral duty but no legal duty, and so could not be guilty of a felony.
   
      
      Jones was convicted at trial of involuntary manslaughter after his housemate's baby died of neglect when he had the means to provide for it. The court reversed and remanded because the trial judge failed to instruct the jury to first find a legal duty to care for the child.

2. **5 Situations Where There Is a Duty to Act – SCARS**
   
   a. Statute creates a duty to act
   
   b. Contractual duty to act
   
   c. Actor creates the peril
   
   d. Reliance – begins to acts and then (also includes when one voluntary assumes responsibility for another's care and other is so secluded, helpless that it prevents other from aid
   
   e. Status relationship (i.e. mother, spouse, employee – relationship of dependence)

   ***Note*** when thinking of the omissions and legal duty, consider where the courts are willing to draw the line, and where they are willing to impose liability, and consider the MPC section 2.01 on omission

3. **Cases**
   
   a. **Barber v. Superior Court** - the court ruled that the cessation of heroic life saving treatment is not an affirmative act but rather is withdrawal of further treatment, and that the Δ had not duty to continue treatment, and thus were not guilty
   
   b. **People v. Beardsley,** 113 N.W. 1128 (Mich. 1907)
      
      D, married man, spent weekend with another woman they drank constantly through the weekend, she took some morphine and fell into a stupor. D didn't get help, only took her to a basement room to lay down, where she later died. Court said this relationship was too casual to create a legal duty.
   
   c. **Regina v. Stone and Dobinson,** (Q.B. 1977)
      
      Defendants let Stone's sister move in in exchange for a small rent. She was a bit off, and developed anorexia, hiding in her room for days eating only biscuits and pop. Defendants tried to find her doctor and another doctor, but were unsuccessful. Fanny retired to bed and wasted away, dying several weeks later. Defendants were both convicted of manslaughter because they had assumed a duty of care.
   
   **People v. Oliver** (Cal. 1989)
      
      D met a man in a bar, took him him home, and gave him a spoon with which to take heroin. He passed out, so she went back to the bar. D instructed her daughter by phone to drag him out behind the shed. D saw man still there upon her return, and the next morning found him there, dead. Court found duty to aid here because she had brought him from a public place where others might have helped him to a private place where only she could.

ii. **MPC Section 2.01 – Requirement of a Voluntary Act**

   1. 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 which he is physically capable of
   
      a. **WHAT IS NOT VOLUNTARY**
         
         i. reflex or convulsion
         
         ii. bodily movement while unconscious or asleep
         
         iii. during hypnosis or hypnotic suggestion
         
         iv. bodily movement which otherwise is not a product of the determination of the actor, either consciously or habitually
   
   b. Liability for the commission of an offense may not be based on an omission unaccompanied by the actions unless:
      
      i. omission is EXPRESSLY made sufficient by law determining the offense (STATUTORY)
      
      ii. DUTY to perform the omitted act is otherwise imposed by law
   
   c. Possession is an act if the POSSESSOR KNOWINGLY procured or rec'd thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession
d. **MENS REA**
  
i. Actor's culpable mental state of mind - "intent"
   1. generally, there must be a mental state (required for the offense), which is usually defined by the statute of the offense

2. **COMMON LAW MENTAL ELEMENTS**
   a. **Willful**
      i. purposely and knowingly
   b. **Recklessly**
      i. conscious disregard for a substantial and unjustifiable risk
   c. **Maliciously**
      i. extreme indifference to the consequences
         1. Under *Cunningham* – does not require ill will per se,
            a. 1) actual intention of harm, or
            b. 2) recklessness as to whether such foreseen harm should occur

3. **MODEL PENAL CODE MENTAL ELEMENTS § 2.02 General Req. of Culpability**
   a. **purposely**
      i. conscious object to engage in conduct or cause result
      ii. awareness of attendant circumstances or belief that they exist
   b. **knowingly** (satisfies a willfulness requirement)
      i. aware of nature of conduct or existence of circumstances
      ii. aware conduct will be practically certain (high probability) to cause result
   c. **recklessly** (DEFAULT – when no mens rea is specified)
      i. conscious disregard of substantial and unjustifiable risk
      ii. gross deviation from reasonable person standard of care
         1. FACTORS as to unjustifiable
            a. weigh the gravity of the harm and the probability of it occurring against the reason person acted
            b. SUBSTANTIAL (objective)
               i. grossly in violation of due care
            c. AWARE of risk (subjective)
   d. **negligently**
      i. should be aware (reasonable person) of substantial and unjustifiable risk
      ii. gross deviation from reasonable person standard of care
   
e. **Model Penal Code Section 2.02 General Requirements of Culpability**
      i. Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
         1. "material element of offense"
            a. relates to harm or evil sought to be prevented, or existence of a justification or excuse for such conduct
         2. "element of offense"
            a. circumstances or (iii) such result of conduct as
               i. is included in definition of offense
               ii. established required culpability
               iii. negatives or excuses or justification of conduct
               iv. negatives a defense under stat. of limitations
               v. establishes jurisdiction of venue
4. Specific Intent and General Intent
   a. Specific intent: Crimes that involve some further purpose are specific intent crimes. Premeditated murder, Assault w/ intent to kill, burglary (breaking and entering w/ intent to commit a felony thereing) The prosecution must prove specific knowledge of the circumstances. Actor must have the general intent to act and specific intent to commit crime
      i. Example of specific intent crime: For common-law burglary, on the other hand, it must be shown that D not only intended to break and enter the dwelling of another, but that he also intended to commit a felony once inside the dwelling. This latter intent is a “specific intent” — it is an intent other than the one associated with the actus reus (the breaking and entering).
      ii. requires proof that the actor’s particular state of mind
      iii. DEFENSES TO SPECIFIC INTENT
         1. voluntary intoxication
         2. mistake of fact
   b. General intent: An intentional act is all that is required for conviction of a general intent crime such as rape or assault, murder (not premed). No knowledge of circumstances or proof of intention is required. ACTOR must only intend results.
      i. Example of general intent crime: Battery is usually a “general intent” crime. The actus reus is a physical injury to or offensive touching of another. So long as D intends to touch another in an offensive way, he has the “general intent” that is all that is needed for battery. (Thus if D touches V with a knife, intending merely to graze his skin and frighten him, this will be all the (general) intent needed for battery, since D intended the touching, and no other intent (such as the intent to cause injury) is required.
      ii. only requires proof of the act intended, not the state of mind of the actor
      iii. DEFENSES
         1. reasonable mistake of fact
         2. Involuntary intoxication – (vol. intoxication is not)
   c. However, many modern codes, and the Model Penal Code, have abandoned the general/specific distinction, and instead set forth the precise mental state required for each element of each crime
5. CASES
   a. Cunningham - Cunningham was convicted of "unlawfully and maliciously" causing Sarah Wade to take a noxious gas at trial. He broke open the gas meter in the basement of the apartment occupying the other half of the house in which Wade lived, causing the house to be filled with the leaking gas. His conviction was quashed on appeal because the jury should have decided if he had a culpable mental state with respect to injuring Wade in addition to his clear culpability in breaking open the gas meter.
   b. Faulkner - In the act of felony theft of rum from a ship's hold, Faulkner accidentally started a fire which destroyed the ship. The court quashed his conviction because the jury hadn't been instructed to consider his mental state regarding the fire. He had no intent to burn the ship, and his being in the act of a felony doesn't necessarily imply intent for felonious accidents.
   c. United States v. Neiswender - Neiswender attempted to defraud the defendant in a lawsuit by claiming to be able to pay off the jury for $2000. The court upheld his obstruction of justice conviction, not because he intended to obstruct justice in the case, but because that was a foreseeable result of his actions and on policy grounds they wanted to deter that type of conduct.
      Note: This was incorrect because obstruction of justice is a specific intent crime and the court treated it like a general intent crime.
   d. Holloway – court did not require proof of an unconditional intent to cause harm for highjacking, only proof required is the intent to cause harmful act. Proof of "conditional" intent to harm satisfies statutory requirement of intent to harm
   e. Jewell - Jewell was convicted of transporting 110lb of marijuana into the United States. He knew of a secret compartment in the car but deliberately avoided knowledge of what was in it. The court affirmed his conviction, holding that deliberate ignorance is as culpable as positive knowledge.
e. **MISTAKE OF FACT**

1. When an actor commits a crime without the requisite mens rea
2. **Traditional view:** The traditional rule has generally been that D’s *reasonable* mistake will not negate the privilege, but that an *unreasonable* mistake by D will negate the defense.
3. **Modern view:** But the modern trend, as exemplified by the MPC, is to hold that so long as D genuinely believes (even if *unreasonably*) that the facts are such that the defense is merited, the defense will stand. (There is an exception if D is charged with an act that may be committed “recklessly” or “negligently” — here, he loses the defense if the mistake was “reckless” or “negligent.”)

4. **COMMON LAW – Generally**
   a. Specific Intent Crimes
      i. Any mistake which negates a specific element of the crime no matter how unreasonable
   b. General Intent Crimes
      i. Must be *reasonable*
   c. Strict Liability Crimes
      i. No defense for mistake of fact – it is irrelevant

5. **Model Penal Code Section 2.04, Ignorance or Mistake**
   d. Must negate the state of mind required for an element
   e. NOT AVAILABLE if guilty of another defense
      i. Reduces grade and degree possibly
   f. NOT available in negligence or reckless use of force
   g. Available if belief that conduct does not legally constitute a crime if
      i. Statute is not known defining offense (not reasonably made available prior)
      ii. Acts in reliance of an official statement of the law
   h. Standard of proof
      i. Δ must prove this defense by a *preponderance of the evidence*

6. **CASES**
   a. **Regina v. Prince** (Ct. Crown Cases Reserved 1875)
      *Prince was convicted of taking an unmarried girl under the age of 16 out of the possession and against the will of her father. He had reason to believe she was 18 when in fact she was 14. The majority affirmed his conviction essentially on the grounds that because his act was malum in se he was guilty even without knowledge of each element. A more persuasive dissent argued that a mistake of fact on reasonable grounds is an excuse that is implied in every criminal statute.*
      
      **Note:** *This is an example of the moral wrong doctrine exception to the usual rule that a mistake of fact excuses when it negates culpability.*
      
      **Rule:** If the act is malum in se, the offender may be guilty even if he honestly believed that under the circumstances his act was legal.
   b. U.S. courts have upheld convictions w/o mens rea in **White v. State** (man didn't have to know his wife was pregnant to be convicted of abandoning pregnant wife) and **United States v. Collado-Gomez** (man didn't have to know the drug he possessed was crack to get the enhanced penalties for crack).
   c. **People v. Olsen** – no defense because under statute strict liability – so rs’bl mistake is not a defense
f. **STRict Liability**

1. No culpable mental state at all must be shown — it is enough that D performed the act in question, regardless of his mental state
   a. crime does not involve awareness of all factors – elements of the crime do not require a state of mind
   b. ***Mistake of fact and intoxication are not defenses***
   c. usually two categories – Public Welfare and Administrative

2. **Examples of strict liability crimes:** The following are often defined as strict liability offenses:
   a. Statutory rape (D is generally guilty if he has intercourse with a girl below the prescribed age, regardless of whether he knew or should have known her true age); mislabeling of drugs; polluting of water or air; concealment of a dangerous weapon while boarding an aircraft.

3. **Interpretation:**
   a. The mere fact that the statute does not specify a mental state does not mean that the crime is a strict liability one — judges must determine whether a particular mental state was intended by the legislature. In general, the older the statute (especially if it is a codification of a common-law crime), the less likely it is to be a strict-liability offense.
   b. Most strict liability offenses are modern, and are of relatively low heinousness.

4. **Complex statute that is easy to violate innocently:** If the statute is complex, or easy to violate innocently, or imposes serious penalties, the court is likely to read in a mens rea requirement, and thus to refuse to treat the statute as imposing strict liability.
      *National Firearms act requires Gov’t to PROVE that Δ knowingly possessed unregistered automatic weapon and knew what kind of weapon it was* → **Rule:** Felony offenses are serious enough that culpability is required.

5. **Common Law**
   a. primary exceptions to general rule requiring mens rea is for sex offenses with minors (Prince) and the felony-murder/misdemeanor-manslaughter offenses.

6. **MPC § 2.05:**
   a. Under the MPC, the only offenses that are strict liability are ones called “violations.” These are minor offenses that do not constitute a “crime” and that may be punished only by fine or forfeiture.

7. **Issues to examine**
   a. Can the person be deterred? Need they be retributed against? Was there fault? Where should the timeframe be drawn? Mistake of fact is no defense to strict liability offenses. Is the “public welfare” the justification for the statute?

8. **CASES**
   a. **Morrisette**
      i. Morissette was convicted of unlawful conversion after he entered a government firing range, took some shell casings and sold them for scrap. His defense was that he honestly believed they were abandoned. Reversing his conviction, Court held it was a matter for the jury to decide whether he sincerely believed they were abandoned - omission of any mention of intent in a felony statute “will not be construed as eliminating that element.” **RULE:** Culpability is required for felony offenses.
   
   b. **State v. Guminga,** 395 N.W.2d 344 (Minn. 1986)
      Guminga was convicted of a gross misdemeanor when his employee sold alcohol to an underage woman. The court held that vicarious criminal liability (a form of strict liability) is a violation of substantive due process under the Minnesota and United States Constitutions. **Rule:** Criminal sanctions are inappropriate for vicarious liability offenses.
   
      A defense against a strict liability speeding offense was that his cruise control malfunctioned, making his act involuntary. The court expanded the timeframe to include his voluntary act of turning on the cruise control. **Rule:** Voluntariness is required for strict liability offenses, but the delegating control to a device does not constitute a defense because of the voluntary delegation.
   
   d. **Regina v. City of Sioux St. Marie – ARGUMENTS FOR & AGAINST SL**
      i. Argues for 3 categories, mens rea, sl and a third in the middle
         1. that way, no conviction for those that did not intend evil
g. **MISTAKE OF LAW**

1. As a general rule, “mistake of law is no defense.” More precisely, the fact that D mistakenly believes that no statute makes his conduct a crime does not furnish a defense.

2. May be a defense
   
   a. if the statute requires that Δ be "aware of the law".
   b. when ignorance NEGATES a specific element of the crime
      
      i. i.e. mistake as to claim of property ownership may negate required intent for larceny
         1. D’s car has been repossessed by Finance Co. D finds the car, breaks in, and takes it back. D’s belief that car is still legally his will absolve him, because it prevents him from having the requisite mental state for theft (intent to take property which one knows or believes to belong to another). (But if D had taken his neighbor’s car, his ignorance that there is a statute making it a crime to take one’s neighbor’s property would not be a defense.)
   c. if the statute is not reasonably available
   d. if Δ relied on an official interpretation of law which was later declared invalid
   e. erroneous advice from official charged with administering the law
      
      i. BUT NOT FROM AN ATTORNEY!!!!!!!!!!

3. **MPC § 2.04 – Mistake or Ignorance**

4. CASES

      
      Federal corrections officer arrested for unlicensed possession of a pistol, statute contained exception for "correction officers of any state correctional facility or of any penal correctional institution." The court affirmed holding that one may be excused only if the law in fact authorized the behavior and was later found erroneous, relying on policies not wanting to "encourage ignorance," or encourage bad faith "game playing" by criminals contriving defenses. A persuasive dissent argues that the majority overrules the only possible purpose for the N.Y. statute adopting the MPC mistake of law defense. ➔
      
      Note: The majority uses a "parade of horribles" argument to buttress their policy reason. If we allow a defense of diligence to learn the law, then we have to listen to someone's story about how they tried, and in America we don't like to do that.

      Rule: One may rely on a court decision until it is found by a higher court to be wrong, but mistaken interpretation of law is no defense because of public policy.

   b. **Cheek v. United States** (SCOTUS 1991)
      
      The Court held that a good faith misunderstanding of the tax law was a defense, because it showed that the gov't hadn't met it's requirement to prove D's awareness of a legal duty. As to his constitutional arguments, the Court uses a different standard. Without looking at any evidence, Justice White dispenses with the knowledge of criminality requirement.

      Rule: In tax cases there is a higher standard for willfully, the government must prove the accused's awareness of the legal duty, not just willful action.

   c. **United States v. Albertini** (SC 1987)
      
      Albertini's conviction for demonstrating on a naval base in violation of a bar order was reversed in 1st Amendment grounds by the Court of Appeals and prior to the SCOTUS granting cert. he was again charged. SCOTUS ruled against him and he was convicted on the second set of charges. On appeal of these charges, the court held that prior to cert being granted, he was entitled to rely on the appeals court ruling.

      Rule: One may rely on the decision of a court until it is found by a higher court to be wrong.

   d. **Hopkins v. State**, 69 A.2d 456 (Md. 1950)
      
      The advice of counsel, even though followed in good faith, furnishes no excuse to a person for violating the law." Note: Risk is that people might form a subjective opinion about the law and get off if the jury believes them. Reliance must be reasonable.

      
      Lambert was convicted of violating a criminal registration statute. The SC overturned her conviction because there was no indication she knew of the statute and also found the statute unconstitutional on due process grounds b/c no reason to believe circumstances should move her to inquire about the law.

      Note: It's unclear what Lambert stands for. It's something outside the MPC, perhaps combination of passivity and difficulty of finding out.

      Rule: Crimes of omission in areas that reasonable people would not expect to be highly regulated violate due process.
III. PROPORTIONALITY 278-290

a. Jeremy Bentham Article – Principles of Penal Law
   i. Rules for punishment – must not be too much or too little
      1. Value of Punishment must not be less in any case then what is necessary to outweigh that of the profit of the offense
      2. If profit is higher than crime will be committed again, if not, crime will be deterred
      3. When two offenses compete the punishment for greater must be suff. to induce a man to prefer the less
         a. if it is for the same, than they will choose the worse crime, since punishment is no worse
      4. Adjusted in manner to each particular offense that for every part of the mischief there may be motive to restrain the offender from giving birth to it
      5. Punishment ought in no case be more than what is necc. to bring into conformity with the rules here given
      6. Value of punishment may outweigh the profit of the offense it must be increased in point of magnitude in proportiona as it falls in short in point of certainty (VIII – proximity)

b. HYMAN GROSS
   i. theory that punishment is not disp. great is based on same theory that you do not punish the innocent, Any excess of what is deserved is “punishment without guilt”

c. EWING
   i. Effect of punishment as values and morality, and if too severe, than the public will not think about the crime, but only the amount of suffering, (unfair) and will discredit the law and have the opposite affect that punishment is to have

d. FITZJAMES
   i. If object of punishment is simply prevention, the case will not be that the wickedness increase will aggravate or increase punishment

e. Harmelin v. Michigan
   i. constitutional guarantee against disproportionate punishments
   ii. THREE SOLEM FACTORS – rejected BUT STILL GOOD LAW to determine proportionality
      1. inherent gravity of offense
         a. Refers to fact that as to gravity – Michigan legislature a better judge of this
      2. sentences for similarly grave in same jurisdiction
         a. no objective standard of gravity – What judges consider grave
         b. Job of the legislature, not the job of the courts to determine sentences
      3. sentences for same crime in other jurisdictions
         a. some states don’t even punish some things that others do
      4. ALSO – distinguishes difference when death penalty is the crime

IV. LEGALITY 300-312

a. Morales
   i. Loitering Ordinance is vague – Does not satisfy the requirements of due process because fails to give the kind of notice to enable an ordinary person to understand which conduct is prohibited may authorize or encourage arbitrary or discriminatory enforcement, ordinance broadly covers an additional amount of activity other than what is meant to be prohibited

b. Model Penal Code on Loitering
   i. requires specific circumstances vs. other statutes which the MPC believes are likely vague

c. Issues to Think About
   i. Why do we have loitering Law? What is the purpose? → preventative crime → BUT – should we be able to criminalize something that is not really a crime "yet
I. RAPE

a. Historical definition:
   i. "carnal knowledge, of any woman, not the wife, forcibly and against her will."
   ii. quantum of force → force or threat must be sufficient to overcome any resistance the woman might make
      1. "against her will" means that woman must affirmatively resist
      2. UNLESS the victim is at risk of death or serious injury or the resistance would be futile

b. Common Changes to Statutory Definitions (i.e. California) 4 central issues:
   i. gravity of facts to be proven
      1. non-gendered
      2. expanded mental capacity to give consent
      3. threat of future retaliation
      4. intoxication is now "known or should be known" → no longer required to be administered by the actor
   ii. whether and in what way the crime is graded
      1. used to be just rape, now it is graded by level of force, consent, type of conduct
      2. also, treats non-consensual as a lesser offense
         a. recognized the fact that resistance is not part. essential
   iii. level of punishment authorized
      1. maximums are lower
   iv. views towards spousal rape
      1. newer versions allow for spousal rape, (usually, under limited circumstances)
c. MPC Article 213 – Sexual Offenses

   i. Definitions
      1. Sexual Intercourse
         a. penetration however slight, per os or per anum
      2. Deviate Sexual Intercourse
         a. per os or per anum between human beings not spouses or with animal

   ii. Rape
      1. Male who has sexual intercourse with a female not his wife if:
         a. uses force or threat of imminent threat on anyone
         b. has impaired her power to appraise, control by intoxicants, other methods to prevent resistance
         c. female is unconscious
         d. female is less than 10 years old
      2. 3rd Degree Rape
         a. compels by threat that would prevent resistance of a person of ordinary resolution
         b. knows other suffers from disease or mental defect
         c. knows other submits because unaware act is being committed upon him

   iii. Deviate Sexual Intercourse by force or imposition – Felony of the 2nd Degree ***Non-gendered
      1. engages or causes another to engage in deviate sex and
         a. compels by force or threat
         b. impairs power to control, resist by force by intoxicants with knowledge of other
         c. other person is unconscious
         d. other person is less than 10 years old
      2. 3rd degree
         a. compels by threat that would prevent resistance of a person of ordinary resolution
         b. knows other suffers from disease or mental defect
         c. knows other submits because unaware act is being committed upon him

   iv. Corruption of Minors and Seduction
      1. victim >16, actor is <4 years older – FELONY – (2-4 are misdemeanors)
      2. victim >21 and actor is guardian or resp. for general supervision/welfare
      3. actor has custody, guardian, supervision of victim in custody of law or hospital
      4. victim is female induced to participate by promise of marriage which is not meant.
         a. DEFENSES
            i. alleged victim by preponderance engaged in promiscuous relations w/ others

   v. MPC defenses to ALL Article 213
      1. Mistake as to Age
         a. reasonable belief by preponderance if victim is older than 10
      2. Spousal Relationship
         a. persons living as man and wife
            i. excludes legal separation
      3. Prompt Complaint
         a. must be reported w/in 3 months if victim is over 16
         b. if victim over 16, w/in 3 months of parent or guardian learning of it
      4. Testimony of Complainants
         a. no conviction of felonies upon uncorroborated testimony of victim

   vi. MODEL PENAL v. COMMON LAW
      1. common law – must be penetration
      2. MPC – divides by degrees by amount of threat
         a. most severe is bodily injury, no prior relationship
         b. Second worst – other non-deadly force, threats
         c. GSI – would be rape as common law
            i. victim is retarded, insane cannot understand, does not need to be force
II.  **Actus Reas - Rape**
   a.  Force
      i.  most states specify that absent special circumstances, a conviction of rape requires proof of intercourse committed by force or forcible compulsion
      ii.  minority of jurisdictions allow for all non-consensual intercourse regardless of force
   b.  Resistance
      a.  Earnest Resistance (more objective)
      b.  Reasonable Resistance
         i.  all resistance reasonable under the circumstances
         1.  **People v. Warren** — court found that since victim did not scream or objectively resist, defendant not guilty — requires victim to communicate in some objective manner her non-consent to assure that defendant realizes that the victim is afraid and does not consent
   c.  Policy Concerns with Resistance Requirement
      i.  possibility of further injury to victim, although there are studies which suggest that further injury risk is exaggerated
         1.  **State v. Rusk** — Statute required force and lack of consent - court found that a jury could reasonably find force and thus established as an element - holds that a majority of jurisdictions find that fear must only be "reasonable" fear which a jury could find that woman's apprehension of physical harm as reasonable from victim's view — NOTE: Dissent – court should look to actions of the defendant were reasonably calculated to give rise to that fear and resistance is objective non-consent – not subjective – actor must be aware that the victim is resisting
      d.  under the MPC – allows for more ways of conviction, under gross sexuate deviance, would a woman of ordinary resolution be prevented by the defendant's actions?

III.  **Mens Reas - Rape**
   a.  In most states – Reasonable Mistake as to consent is a defense
   b.  CASES
      a.  **Sherry** — 3 dr.s and a nurse - person is at own risk to continue after a woman says no because that is a manifestation of non-consent and after that defendant is at own risk
      b.  **Fisher** — dorm room romp - reasonable mistake as to consent is a defense

IV.  **The Marital Exemption**
   a.  MPC view
      a.  preserves the marital exemption except in cases where the judicially decreed separation
      b.  along the lines of sanctity and privacy of marriage.
   b.  CASES
      a.  **Liberta** — marriage exemption extends except under certain situations (legal separation, living apart for a defined amount of time, etc.) movement toward getting rid of marital exemption.
I. Intentional Killing

a. **Common Law Murder**
   i. "the unlawful killing of another with malice aforethought"
      1. *Actus Reas*
         a. act or omission resulting in the death of another human being
      2. *Mens Reas*
         a. *malice aforethought – acting with a depraved heart*
            a. Four states of mind (mens rea)
               1. intent to kill or to inflict grievous bodily harm
               2. "Abandoned and Malignant heart" depraved indifference to human life
                  a. awareness that human life is being "unjustifiably" risked
               3. intent to commit a felony (FM rule)
               4. intent to oppose force of any officer in line of duty
         b. to establish malice aforethought – *Premediation*
            a. planning activities
            b. motive
            c. Δ prior relationship to victim
            d. evidence regarding manner or nature in which the victim was killed which indicate a deliberate intention to kill according to a preconceived design.

b. **Common Law Manslaughter**
   i. The unlawful killing of another *without* malice aforethought.
      1. mitigates murder to manslaughter for want of mens rea
      2. Voluntary – heat of passion due to reasonable provocation
         a. *ELEMENTS*
            a. sudden and intense passion in the mind of an ordinary person causing him to lose self control
            b. *Provocation*
            c. NO – cooling off period in time for reasonable person
            d. Δ did not cool off
            e. *WORDS* are generally insufficient provocation
               1. SUFFICIENT COMMON LAW PROVOCATION
                  a. Substantial physical injury or assault
                  b. mutual quarrel or combat
                  c. illegal arrest
                  d. adultery with offender's
                  e. but *not* mere words gestures or trespass to property
      3. Common Law Involuntary Manslaughter
         a. death caused by negligence, unlawful act, misdemeanor manslaughter rule)
c. Statutory Homicide

i. Statutory MURDER
   1. Graded (generally two degrees)
      a. First degree - premeditation ("all murder, which shall be perpetrated by means of 1) poison, or 2) by lying in wait, or by any other kind of 3) willful, deliberate and premeditated killing or 4) which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree; all other kinds of murder shall be deemed murder in the second degree." PA Statue 1794, later followed by most jurisdictions)
         a. Willful – purposeful
         b. premeditate – think about beforehand (even for a second)
         c. deliberate – measure and evaluate
            1. ALSO – must be in cold blood
      b. Second degree - no premeditation – all other murders than those above
      c. Felony murder - occurs during commission of a felony, with mens rea as to the felony, not the murder

ii. Statutory Manslaughter
   1. Voluntary
      a. sudden and intense passion resulting from serious provocation by:
         a. the person killed
         b. another whom actor endeavors to kill but the victim is negligently or accidentally killed
      b. unreasonable belief that murder would be justified, that if reasonable, would justify
   2. Involuntary
      a. unlawful or lawful act in reckless or grossly negligent manner

d. MPC Homicide Rules § 210
   1. Murder
      a. rejects degrees, but takes into consideration aggravating circumstances
      b. PURPOSELY, KNOWINGLY
      c. Recklessly by manifesting extreme indifference to human life
         a. FM Rule – Recklessness is presumed if actor is engaged in commission of felony robbery, rape, arson, burglary, kidnapping
   2. Manslaughter
      a. Recklessly – conscious disregard
      b. extreme mental disturbance with reasonable explanation
         a.
   3. Criminally Negligent
      a. negligently
         a. reasonable person aware of substantial and justifiable defense
e. Premeditation

i. Common Law
1. Courts split – many require proof prior calculation and design (i.e. Guthrie)
2. Others – no time is too short (i.e. Carrol)
   a. however, doesn't this erase the line between 1st and 2nd degree murder?

ii. Proof of Premediation
1. Types of Evidence ➔ From Guthrie
   a. planning activity
   b. Δ prior relationship to victim in indicating a motive
   c. evidence regarding manner or nature in which the victim was killed which indicate a deliberate intention to kill according to a preconceived design.
         Carrol killed his wife by firing two shots from a .22 caliber pistol into the back of her head while laying in bed with her. In distinguishing between 1st and 2nd degree murder, the court used the 1st degree requirement "willful, deliberate, and premeditated" as a term of art, not as three elements. They ended up holding that only an intentional killing was required for first degree murder. Deliberate in this context refers to intentional killing.
      b. State v. Guthrie – must be some period between the formation of intent and actual killing which indicates killing by prior calculation and design
         Anderson brutally killed a 10 year old girl by multiple stabbings. His conviction was reduced to 2nd degree because the court found he didn't meet their three part test for first degree: (1) planning activity, (2) prior relationship indicating a motive, (3) manner of killing indicating a preconceived. The court requires either strong evidence of (1) or evidence of (2) in conjunction with (1) or (3).

iii. MPC View
1. Rejects premeditation and deliberation to identify the murders that deserve the greatest punishment – relies on mitigating and aggravating circumstances to consider when determining punishment
   a. prior reflection may reveal tortured conscience not exceptional depravity
   b. i.e. mercy killings
      a. is someone who plans a killings worse than one who flies into a rage and kills?
      b. reserve the greatest punishment for the worst crimes
f. Provocation 404-424

i. Common law generally requires "hot blood (no cooling off time)"

ii. REQUIREMENTS to mitigate murder to voluntary manslaughter
   1. Δ must be so governed by passion that unable to reason to the extend to for a deliberate purpose to take a life
   2. no cooling of time
   3. Δ did not in fact cool off
   4. the circumstances arousing the passion must be such that an ordinary reasonable person would be similarly governed
      a. To Determine whether the provocation was adequate from an objective viewpoint
         a. must be sufficient to engender such passion in heart of reasonable person
         b. no cooling off time

iii. COMMON LAW SUFFICIENT PROVOCATIONS
   1. Substantial physical injury or assault
   2. mutual quarrel or combat
   3. illegal arrest
   4. injury or serious abuse of close relative
   5. adultery with offender wife (not after 1997)
   6. but not mere words gestures or trespass to property

iv. Contrasting Approaches
   a. Girourd
      a. A verbal domestic dispute cannot serve as a partial justification for homicide. Social policy requires this.
      Common Law Rule: Words alone can't be provocation enough to mitigate murder.
   b. Maher
      a. A charged with assault with intent to kill when shot and wounded man who he believed had just had sex with his wife. The court held that being told of the combined with the circumstantial evidence was enough to let a jury decide whether he was provoked. "Jurors are better qualified to judge of the sufficiency and tendency of a given provocation."
      Rule: Reasonable man standard, departure from "mere words," allows provocation defense if a reasonable man upon hearing the information would be provoked. Jury is in a better position to evaluate reasonableness of provocation.

v. MPC Rule (210.3(b)) [minority of states have adopted this approach]
   1. rejects common law for a more flexible approach HYBRID of objective/subjective
   2. a homicide which would otherwise be murder committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuses
      a. reasonableness is determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.
      b. ultimately left to the jury to decide issue of reasonableness
   3. Extreme Emotional Disturbance
         Casassa was obsessed with Miss Lo Consolo after she rejected him, and he professed extreme emotional disturbance when he killed her. The court applied a two part test: (1) D must have acted under the influence of EED, and (2) there must have been a reasonable explanation or excuse for the EED, to be determined from the viewpoint of a person in D's situation under the circumstances as D believed them to be. I is subjective, it requires only the D did in fact act under EED. 2 is the part Casassa fails to meet, because there was no reasonable explanation for his disturbance, which is objective (like MPC rule)
      Note: the MPC rule 210.6(4)(b) explicitly intended to discard the "mere words" rule. See also 210.3(1)(b).
   4. Two major issues
      a. how extreme must the disturbance be?
         a. courts agree that outermost extremity is pretty much insanity
      b. reasonableness of the explanation or excuse
         a. not quantifiable, but unwarranted jealousies, etc. will not suffice.
II. Unintentional Killing

a. Involuntary Manslaughter 425-39
   i. Involuntary - reckless or grossly negligent
      1. death cause by criminal negligence or an unlawful act
      2. Misdemeanor manslaughter- killing during commission of a misdemeanor

b. Unintentional Killings As Murder – 439-447
   i. Common Law
      1. defining characteristic is MALICE
         a. Definitions vary, but "wicked, depraved, and malignant heart," "reckless and wanton and a gross deviation from a reasonable standard of care MPC approach
   ii. MPC VIEW
      1. Unintentional killings are murder when committed recklessly and under circumstances manifesting *extreme indifference to the value of human life.*
   iii. Distinguishing Civil and Criminal Liability
         A nightclub owner, was charged with involuntary manslaughter when a fire broke out and many people died because the fire exits were locked and hard to find. The court applied the *wanton and reckless* standard of negligence here, saying that grave danger must be apparent to the reasonable man and then the person must choose to run the risk. Only D's disregard of customer safety has to be wanton and reckless, not the cause of the fire.
         a. MPC rule: homicide is manslaughter when it is committed recklessly, reckless requires a *conscious disregard* of a substantial and unjustifiable risk.
         b. Contributory negligence: not a defense, but can lead to arguments about proximate cause of death.
   iv. Objective versus Subjective Liability
      1. State v. Williams, 484 P.2d 1167 (Wash. 1971)
         D, two Native Americans with limited education were convicted at trial of manslaughter in the death of their 17 month old son. They thought the kid just had a toothache, and gave him baby aspirin, but he got an infection and died of gangrene. They feared taking the son to a hospital because they worried they might take the boy from them. An autopsy suggested that medical care in the last week wouldn't have saved him, so the issue here is whether D should have noticed the severity of the boy's illness and provided medical care after the infection started and before the last week. Evidence showed they didn't understand the severity, and that they had the means to provide the care. They didn't live up to the reasonable person standard, and thus met the simple negligence standard required for a manslaughter conviction.
         D's 4-year-old daughter fell ill, got a stiff neck. turns out she has meningitis and D only got a Christian Science prayer healer for her. Most courts won't bar involuntary manslaughter conviction of parents in this type of case. Ct. said question was whether a reasonable person in D's position would have been aware of the risk: religious accomodation - one may not "make martyrs of his children," getting a prayer practitioner for you kid isn't good enough if the kid dies.
         a. murder by omission Omission of a duty is equivalent of an act for purposes of grading homicide. Father's conviction in death of son upheld when he didn't feed the kid because he "just didn't care."
v. Controversy over standards of liability

1. **Objective standard**
   - *defense:* helps establish a general standard for all, since the object is to prevent danger to human life, one should know and be held to a common standard.
   - *criticized:* sometimes punishment will be inflicted on non-culpable people. this is unjust, and negligence doesn't respond to deterrence.

2. **MPC** says punish mistakes in order to encourage people to behave more reasonably.

3. **Hart's subjective standard:** We should only punish those who are capable of conforming to the standard. Without flexibility, some people will be punished who are incapable of conforming to the standard.
   - *criticism:* it's a slipper slope, where do we draw the line? can one be forced to act by their aggressive, brutish nature?

4. **MPC** rejects Hart, but does have dual objective subjective standard, employing both a reasonable person test and allowing consideration of that person's situation.

c. The Murder-Manslaughter Distinction

i. Common Law

1. Intent to commit grievous bodily harm will suffice for murder
2. Majority agree with Fleming that awareness of the risk is sufficient
   a. No hatred or intent to kill is required for malice. The difference between malice and gross negl is one of degree. The difference between murder and manslaughter lies in the accused's awareness of the risk.
      a. most courts allow extreme carelessness in the operation of a vehicle to support a murder conviction by way of the extreme indifference
   b. No defense for voluntary intoxication
      a. United States v. Fleming, 739 F.2d 945 (4th Cir. 1984)
         *Appeal of conviction for second degree murder. Fleming, with a BAC of 0.315, lost control of his car on a curve marked 30mph while doing ~70-80 and collided with a woman who died at the scene. No hatred or intent to kill is required for malice. The difference between malice and gross negl is one of degree. The difference between murder and manslaughter lies in the accused's awareness of the risk. The court stated that D's "depraved disregard of human life" persuaded them that murder was appropriate for him. Affirmed.*

ii. MPC

1. Requires proof that the Δ acted "recklessly" (disregarded a known risk of which Δ was aware) under circumstances manifesting extreme indifference to human life
   a. inadvertent risk, no matter how justified, is not murder
   b. Serious felony sanctions should be reserved to secure the subjective culpability of the actor
2. Voluntary intoxication is not a defense to recklessness
III. **Felony Murder** 448-482

a. Generally
   i. If Δ, while he is in the process of committing certain felonies, kills another, even if accidental, the killing is murder.
      1. intent to commit the felony is sufficient to meet the mens rea requirement for murder
         a. *People v. Stamp* - Store clerk dies of heart attack during the robbery, Δ is guilty of FM b/c the robber takes his victim as he finds him
      2. NOTE on Causation
         a. The Δ act must be the actual and proximate cause of the death, even for FM
         b. Usually, the death must be the natural and probable cause to suffice for prox. cause
c. **Victim or police officer kills bystander:** Where the fatal shot is fired by the *robbery victim* or by a *police officer*, and a *bystander* is accidentally killed, courts are split as to whether the robber is the proximate cause of the death.
   i. California, for instance, does not apply the felony-murder doctrine in any situation where the fatal shot comes from the gun of a person other than the robber.
   ii. In other states, the result might depend on whether the robber fired the first shot, so that if the first shot was fired by the victim and struck a bystander, the robber would not be guilty
   d. **Robber dies, shot by victim, police officer or other felon:** Where the person who dies is *one of the robbers*, and the fatal shot is fired by another robber, the robbery victim or by police officers, courts are even more reluctant to apply the felony-murder doctrine.
      a. Some courts hold that the felony-murder doctrine is intended to protect only innocent persons, so it should not apply where a robber is killed. Where a robber is killed not by one of his cohorts but by the robbery victim or the police, the case for applying the felony murder rule is the weakest of all

b. **COMMON LAW FELONY MURDER**
   i. Under the common law, any felony, although now most states will list felonies and apply limitations.
   ii. Most courts restrict the application of the FM rule to certain felonies
c. **LIMITATIONS TO THE FELONY MURDER RULE**
   i. **Inherently Dangerous Felonies (Courts are split)**
      1. Look to crime in abstract – NARROW view of FM
         a. Does the crime in and of itself create a risk of death or GBH
            a. *People v. Phillips* – chiropractor – child with cancer, fraud was the felony and court rejected b/c not inherently dang. in the abstract
            b. *Ppl. v. Satchell* – Felony considered in the abstract to give FM the narrowest application possible
      2. Consider crime based on the facts of the case – BROADER view of FM
         a. Does the crime under these circumstances create a risk of death of GBH
            1. *Ppl. v. Stewart* – felony should be considered by the trier of fact and the circumstances of the part. case to determine if the felony was dangerous in the *manner and circumstances* in which it was committed.
   ii. **Merger Doctrine**
      1. **Felony must be independent of the killing:**
         a. For application of the felony-murder doctrine, the felony must be *independent* of the killing. This prevents the felony-murder rule from turning virtually any attack that culminates in death into automatic murder
         b. *Ppl. vs. Smith* – Felony child abuse cannot be the underlying felony to apply FM because the assault is an integral part of the crime
            a. This is so as not to allow every assault to be elevated to felony murder
            b. NOTE: Burglary w/ intent to assault is usually sufficient for FM
         c. *Ppl v. Hansen* – Δ shot into a home- court rejected Smith rule and allowed all inh. dangerous felonies to suff. for FM as long as it would not elevate all assaults to murder or otherwise subvert the leg. intent to deter negligent or accidental killings
iii. Killing "not in the furtherance of the Felony"

1. Courts Split – Two theories
   a. **Agency Theory**
      a. FM rule is only applied if the felony is done by co-felon or one acting in agency. Δ is not liable unless committed by his own hand or by the hand of a co-felon
      b. WHO does the murder MATTERS b/c it must be Δ or co-felon w/ common purpose
      c. **EXCEPTION** → Shield Cases – Δ is liable
   d. **State v. Canola**
      1. No person can be held guilty of homicide unless the act is either actually or constructively his (by Δ or someone acting in concert with him in the furtherance of common object), so Δ not liable for death of co-felon by an intended victim
   b. **Proximate Cause Theory**
      a. Central issue is the killing, no matter WHO does it. (i.e police officer, and Δ can still be liable under this theory)
      b. Δ may be liable for any death resulting from felony as long as prox. cause of felony

2. What about killings by other Felons – Accomplice Liability for FM
   a. if two or more people work together to commit a felony, and one of them commits a killing during the felony, the others may also be guilty of felony-murder.
      a. **Intentional Killing**
         1. if committed in furtherance of felony, otherwise, prob. an intervening action that was not the "natural and probable result"
      b. **Accidental Killing**
         1. If in the furtherance of the felony and
         2. natural and probable result of the felony

3. **Felony Murder vs. Vicarious Liability**
   a. For vicarious liability – only need to show the killing was done in the furtherance of the felony = then liable b/c acting in concert toward a common purpose
   b. **Taylor** – under agency theory, cannot get Δ for killing done by victim, but under vicarious liability b/c the co-felon started the gun battle which ended in the death, so Δ liable for death of co-felon by victim under vic. liab. through other co-felon

**d. MODEL PENAL CODE ON FELONY MURDER**

i. § 210 – If homicide is committed during the commission of a felony, creates a presumption of reckless indifference (mens rea for murder)
   1. Δ can overcome the presumption was not acting with reckless indifference
   2. The Model Penal Code does **not** adopt the felony-murder rule *per se*. Instead, the MPC establishes a *rebuttable presumption* of “recklessness...manifesting extreme indifference to the value of life” where D is engaged in or an accomplice to robbery, rape, arson, burglary, kidnapping or felonious escape. Thus if an unintentional killing occurs during one of these crimes, the prosecution gets to the jury on the issue of “depraved heart” murder. But D is free to *rebut* the presumption that he acted with reckless indifference to the value of human life. The MPC provision is thus quite different from the usual felony-murder provision, by which D is *automatically* guilty of murder even if he can show that he was not reckless with respect to the risk of death
UNIT VI – THE SIGNIFICANCE OF HARM

The pros. must show that the Δ acts reas was the cause of the harm in both actual and prox. cause sense

1) Two ways the causation issue comes up
   a) Intended Death, but not intended manner
   b) Not intended but occurs in unlikely way
      i) **Reckless and negligent crimes:** Proximate cause issues are most common in cases where the mens rea for the crime is intent. But similar problems also arise where the mental state is recklessness or negligence

2) Cause in Fact – ACTUAL CAUSE
   a) will suffice if a but for cause
   b) or substantial factor
   c) Basically – ANALYZE
      i) Would the result have happened anyway if Δ had not acted
      ii) For Δ to be cause of death, victim must have been alive at the time
      iii) Does not need to be the sole cause of the harm

3) PROXIMATE CAUSE
   a) Unintended Victim
      i) **Transferred Intent**
         (1) It will not generally be a defense that the actual victim of D’s act was not the intended victim. Instead, courts apply the doctrine of “transferred intent,” under which D’s intent is “transferred” from the actual to the intended victim
         (2) Probably applies even when the danger to the actual victim was completely unforeseeable.
         (3) Mistaken ID is not a defense
         (4) When crimes are reckless or negligent
            a) might require a tighter link than intentional for the unforeseeable victim b/c the transferred intent of recklessness or negligence may not create a risk of harm to that person.
   b) Unintended Manner
      i) Generally –
         (1) if Δ harms intended victim in unintended manner, but same general type of harm, Δ will only be absolved if the harm is completely unforeseeable, and bizarre.
      ii) Foreseeability
         (1) Ind. is criminally liable if his conduct was a sufficiently direct cause of death and the ultimate harm is something which should have been foreseen as being reasonably related to his acts
            a) Ppl. v. Acosta – Δ acts of running from police created a suff. foreseeable risk of harm of two helicopters crashing, even though it never happened, but Δ not guilty of murder bc cannot find malice
            b) Ppl. Arzon – two fires, Δ started one but other was also cause, court held Δ was liable b/c the Δ acts started a chain of events which led to death so Δ can be held liable, and death to FF was foreseeable result of starting a fire
      iii) Direct Causes
         (1) a) Ppl. v. Lambert – no liability for explosion even though Δ warned b/c court cannot find that Δ actions were a sufficiently direct cause of the death (BUT Cf. State v. Welansky)
         b) State v. Lane – take your victim as you find him – alchoholic brain swells after fall from punch
**Intervening Acts**

1. **Dependent Acts**
   - (a) i.e. Medical tx. etc – Δ is still liable for negligent medical tx, death of FF, etc
   - (b) BUT – if Dr. strangles the victim – that is intervening human act which prob. breaks chain of causation
   - (c) vs. Independent Acts
     - (i) If so remote and unforeseeable, the intervening act will usually break off the chain of causations
     - (ii) If something that would have occurred anyway if Δ had not acted, (i.e. a car accident) it may break off the chain of causation

2. **Human Acts**
   - (a) Intervening Intentional Human Actions usually break chain of causation
     - (i) *Ppl. v. Campbell* – hope alone is not enough for murder – (Δ gave victim gun)
     - (ii) *Ppl. v. Kevorkian* – humans actually "gave last blow" so Δ not guilty of murder. Δ not guilty of murder.
     - (iii) WHY – FREE WILL – HUMANS HAVE CHOICES AND CANNOT HOLD PPL. RESP. FOR THE ACTS OF OTHERS
   - (b) Subsequent Act by Victim:
     - (i) Sometimes the victim herself will take an action that is possibly a superseding intervening cause. Acts by victims are generally taken in direct response to D’s act, so they will not be superseding unless they are “abnormal” (not merely “unforeseeable
       - 1. *Stephenson v. State* – Victim killed herself after rapes, etc. Δ was guilty
     - (ii) V subjects self to danger: Suppose D urges or encourages V to expose himself to danger. V’s voluntary participation will not generally supersede, and D will be held to be a proximate cause of the result

3. **Acts creating a reckless risk of harm**
   - (a) Courts Split
     - (i) *State v. Root* – drag race and Δ not guilty for death of other b/c victim choice to race
     - (ii) *State v. McFadden* – here Δ was guilty b/c court said should have foreseen risk
     - (iii) *Kern* – skinheads – guilty – moral culpability & really more of an unintended manner

4. **MODEL PENAL CODE § 2.03**
   - a) as long as the result is not too remote or accidental in its occurrence to have a just bearing on the actor's liability or gravity of offense
     - i) excludes consequences which are "highly extraordinary"
1) COMMON LAW

a) Two Requirements – Mens Rea & Overt Act
   i) Mens Rea
      (a) D must have had a mental state which would have been enough to satisfy the mens rea requirement of the substantive crime itself.
      (b) Typically, D will intend to commit the crime. But if a mental state less than intent (e.g., recklessness) suffices for the substantive crime, there may be instances where this same less-than-intent mental state will suffice for attempted commission of that crime. This is discussed further below.
   (c) Intent Required
      (i) must intend to do acts which, if they had been carried out, would result in commission of crime
      1. i.e. if Δ hits V intended to harm him slightly, and V is severely injured, Δ not liable for att. murder b/c he did not have the mens rea required for murder.
      2. So – if recklessness would have sufficed to charge with murder if V had dies, for attempt, the Δ MUST have the INTENT TO KILL (or commit the specific crime)
         a. Smallwood v. State – Δ w./ hiv not guilty of murder b/c only intended to rape
      (d) Knowledge of Likely Consequence
         (i) Δ must know that the results are "substantially certain to occur:
         (e) Usually there can be no attempt for crimes defined by reckless or negligence
   ii) Overt Act
      (a) some act "in furtherance" is required
      (b) different tests – See below
      (c) The main issue is Attempt vs. Mere Preparation

b) VARYING TESTS for Actus Reas Requirement
   i) "Dangerous Proximity Test"
      (1) majority
      (2) How close did Δ come to completing the crime
      (3) Most courts require a "dangerous proximity"
         (a) Ppl. v. Rizzo
         (i) driving around to find a victim that did not exist is not enough
   ii) "Equivocality Test"
      (1) concentrating not on how close D came to success, but on whether D’s conduct unequivocally manifested his criminal intent.
      (2) Under this “equivocality” approach, if D’s conduct could indicate either a non-criminal intent or a criminal one, it is not sufficient – but if it does unequivocally manifest criminal intent, it suffices even though completion of the plan is many steps away

c) Punishment
   i) Most jurisdictions make the punishment less than the crime

d) Defenses
   i) Some jur's allow renunciation or abandonment to suffice as a defense
      (1) must be voluntary
      (2) Δ must manifest a "voluntary and complete renunciation of the criminal purpose"

2) MODEL PENAL CODE
a) MPC’s “substantial step” test:
   i) The MPC incorporates aspects of both the “proximity” test and the “equivocality” test.
   ii) Almost any conduct meeting any of the variations of either of these tests would be sufficient under the Code.
   iii) Under the MPC, conduct meets the act requirement if, under the circumstances as D believes them to be:
      (1) there occurs “an act or omission constituting a substantial step in a course of conduct planned to culminate in Δ commission of the crime”; and
      (2) the act is “strongly corroborative” of the actor’s criminal purpose.
         (a) EXAMPLES:
         (i) lying in wait, searching for intended victim with a gun, unlawful entry where the crime is to be committed
   b) Punishment
      i) same as for the crime except for cases in which punishment is death or life imprisonment
      (1) This is b/c the MPC views that Δ is equally culpable and just lucky that could not finish
      (2) Minority of State adopt this view
UNIT VII – GROUP CRIMINALITY

Complicity (Accomplice Liability) 603-639

1) Common Law
   a) Old Common Law:
      i) Principal in 2 degrees
         (1) 1\textsuperscript{st} Degree – Actor
         (2) 2\textsuperscript{nd} Degree – Present (Aiding and Abetting)
         (3) Accessory – before or after the fact – not present
   b) Modern Common Law
      i) \textbf{Punishment is SAME AS FOR THE crime accomplice to***************}
      ii) Accessories can be convicted before the principal is convicted – but THERE MUST be a crime committed
         (1) vs. Conspiracy where no crime needs to be committed
      iii) \textbf{ACT}
         (a) must commit an overt act that aids, encourages, abets
         (i) \textit{State v. Gladstone}
        1. \( \Delta \) did not actually contact the marijuana seller, just sent the buyer there and not enough b/c did not have the intent for selling (maybe intent to commit "buying")
      iv) \textbf{MENTAL STATE}
         (1) INTENT
         (a) must intend to assist in the commission of the crime
         (b) If intend to assist in commission of murder, and another crime is committed, \( \Delta \) may not be liable, unless it is the natural and probable results
         (2) Knowledge, but not intent, \textbf{as to criminal result}:
         (a) The most important thing to watch out for regarding the mental state for accomplice is the situation where \( D \) \textit{knows} that his conduct will encourage or assist another person in committing a crime, but \( D \) does not intend or desire to bring about that criminal result.
         (i) Most courts do not find this to be sufficient.
         (3) Requires that the \( \Delta \) must aid or encourage to commit the crime, mere presence is not enough even with a criminal intent, \( \Delta \) must have the specific intent to further the commission of the crime AND act on it
         (a) \textit{Hicks} – must show \( \Delta \) had specific intent to further the commission of the crime "agent provocateur" – must show aid, encouragement or abet OR a prior conspiracy to commit, although verbal encouragement is an act
      v) Liability for Additional Crimes Committed beyond the Target Crimes – COURTS SPLIT
         (1) Some court – \( \Delta \) is liable for all crimes that are the \textbf{natural and probable result of the intended crime} but that are not themselves intended
         (a) The accomplice will be liable for these additional crimes if:
            (i) the additional offenses are the \textit{natural and probable consequences} of the conduct that \( D \) did intend to assist (even though \( D \) did not intend these additional offenses); \textbf{and}
            (ii) the principal committed the additional crimes \textit{in furtherance of the original criminal objective} that \( D \) was trying to assist.
            (iii) \textit{Ppl. v. Luparello} – only require that the \textit{reasonable foreseeability} that other crime will be committed – \( \Delta \) hired thugs to find ex-girlfriend & they murder someone
            (iv) \textit{Roy v. US} – \( \Delta \) sent \( V \) to a gun salesman who robbed him – \( \Delta \) not guilty b/c not reasonably foreseeable
      vi) Attendant Circumstances
         (1) \textit{Xavier} – gave gun to ex-felon and claims did not know – Court requires gov't to find that \( \Delta \) had purpose as to all att. circ. of the crime, incl. knowledge that other party was ex-felon.
      vii) Actions of Feigned Accomplices
         (1) Seems that courts say no accomplice if principal did not have intent \textit{Hayes}
         (a) Exception in the case of law enforcement \textit{Vaden}
a) Liability for Conduct of Another

i) **MENS REA**
   (1) Actual Intention of Some kind must exist
       (a) Acting with the culpability sufficient for the commission of the offense

ii) **ACT**
   (1) acting with the purpose of promoting the commission of the offense
       (a) solicits another, aids in planning, fails in legal duty to prevent
   (2) act of joining a conspiracy is *not, by itself, enough* to make one an accomplice to all crimes
       carried out by any conspirator in furtherance of the conspiracy.
       (a) Even in courts following this modern view, membership in the conspiracy will be strong
           *evidence* that D gave the other conspirators the required assistance or encouragement in the
           commission of the crimes that were the object of the conspiracy.
   (3) May be convicted before actual perpetrator is convicted

(4) **MPC rejects extended liability:** The Model Penal Code rejects even the basic principle
    allowing an accomplice to be held liable for “natural and probable” crimes beyond those which
    he intended to aid or encourage.
    (a) Under the MPC, only those crimes that D *intended* to aid or encourage

iii) **ATTENDANT CIRCUMSTANCES**
    (1) no view – leaves to courts to decide

iv) **DEFENSES**
   (1) Victim
   (2) Terminates before commission of the crime
   (3) gives warning to law enforcement
1) Common Law
   a) **An agreement between two or more persons to do either unlawful or a lawful act by unlawful means.**
   b) At common law, the prosecution must show the following:
      i) **Agreement**: An agreement between two or more persons, all that is needed is parties comm. to each other in someway an intention to pursue a joint objective.
      ii) **Objective**: To carry out an act which is either unlawful or which is lawful but to be accomplished by unlawful means; and
      iii) **Mens rea**: A culpable intent on the part of the defendant
         (1) Procedural Benefits
            (a) jointly tried, allow in hearsay "in the furtherance of" conspiracy (Krulewich)
            (b) **Proof by circumstantial evidence**:  
                (i) The prosecution may prove agreement by circumstantial evidence. That is, the prosecution can show that the parties committed acts in circumstances strongly suggesting that there must have been a common plan
        iv) **OVERT ACT**
            (1) Courts Split – but Modern COURTS agree with MPC
            (2) Need an overt ACT in the furtherance of the conspiracy – overt act of one attributable to all.
   c) **Accomplice vs. Conspirator**
      i) For accomplice, crime must be committed 
         (1) requires proof that the second party intended to promote or facilitate
   d) **Co-Conspirator Liability for Substantive Crimes of other Conspirators**
      i) Maj – MPC – Conspirators are only liable for the substantive crimes of co-conspirators where ACCOMPLICE liability can be found (intent to commit the substantive crime or reasonably foresee)
         (1) Here – If reasonably foreseeable – can usually find that Δ aided and abetted.
      ii) MIN - Δ are liable for ALL objectively foreseeable actions of the co-conspirators in furtherance (Pinkerton)
   e) **Aiding and abetting**:
      i) Suppose that A and B conspire to commit a crime (let’s call the crime “X”). C then “aids and abets” A and B in the commission of crime X, but never reaches explicit agreement with A and B that he is helping them. It is clear that C will be liable for X if A and B actually commit X.
      ii) But if A and B never commit X, courts are split about whether C, as a mere aider and abettor, is also liable for conspiracy to commit X.
      iii) The MPC holds that a person does not become a co-conspirator merely by aiding and abetting the conspirators, if he himself does not reach agreement with them.

2) **MODEL PENAL CODE § 5.03 – Conspiracy**
   i) Purposely agree to aid or engage in crime with another
   ii) Joint liability with co-conspirators even if not known
   iii) Require an overt act EXCEPT when the crime is Felony of 1st degree or 2nd degree
   iv) The MPC holds that a person does not become a co-conspirator merely by aiding and abetting the conspirators, if he himself does not reach agreement with them.
COMMON LAW Requirements of Self Defense

- must be resisting *unlawful and imminent threat* where Δ belief is objectively reasonable that the force is necessary to protect self from imminent harm
- Degree of Force
  - Only use as much force as necessary, & must end when the threat ends
  - for DF – must be protect self from death or GBH

1) Retreat
   a) Some Jur's and the MPC require retreat IF able to do with complete safety at the time
      i) NEVER have to retreat from your dwelling and NEVER have to retreat before non-deadly force

2) Reasonableness
   a) *Goetz* – objectively reasonable – does not have to be correct, but must be reasonable to a ord. person in the Δ situation

3) USE of Deadly Force in Self-Defense
   a) only if it reasonably appears necc. to prevent imminent death or GBH or the prevention of a serious felony involving risk to human life
      i) MAY not use if Δ is the aggressor
      ii) Retreat
         1) Maj say only if can do so in complete safety than there is a duty
         2) NEVER have to retreat from dwelling

4) THREAT MUST BE IMMINENT

5) EFFECT OF MISTAKE
   a) reasonable mistake – SD is still a defense
   b) Unreasonable – judged by objective standard, so if unreasonable-SD should not be a defense

MODEL PENAL CODE: § 3.04

c) when the actor *believes*
   i) *NOTE*: the absence of the word reasonable.
d) Requires retreat if available
e) Reasonableness
   i) Objective – BUT – reasonable person in the actor's situation at the time – takes into account actor's beliefs
f) Imminence – MORE LIBERAL THAN COMMON LAW
   i) D may use force to protect himself against unlawful force that will be used “on the present occasion"
g) EFFECT OF MISTAKE:
   i) MPC/minority view: Even an *unreasonable* (but genuine) mistake as to the need for self-defense will protect D. This is, in a sense, the more “modern” view.
   ii) But if the crime is one that can be committed by a “reckless” or “negligent” state of mind, even under the MPC D’s reckless or negligent mistake as to the need for self-defense will not absolve him.
Battered Women Self Defense

1) Where a woman *kills her spouse* because she believes this is the only way she can protect herself against ongoing *battering* by him, courts normally do not change the generally-applicable rules of self-defense.
   a) **Standard for “reasonableness”**: 
      i) Most courts make the test, What would a reasonable woman do in the defendant’s situation, taking into account the prior history of abuse, but not taking into account the particular psychology of the woman herself (e.g., that she is unusually depressed, or aggressive, or otherwise different)?
         (1) *State v. Kelly* – evidence allowed in, opinion of psych is not allowed in
   b) **Imminence of danger**: 
      i) Nearly all courts continue to require in battered-woman cases, as in other cases, that self-defense be used only where the danger is *imminent*.
      ii) Courts have not modified the traditional requirement of imminent danger to cover situations where the woman’s counter-strike *does not come during a physical confrontation*. Thus D would probably be convicted of murder for killing her abusing husband, V, in any of the following situations: 
         (1) V, after abusing D, has *gone to sleep*, and D shoots him in the head while he sleeps;
             (a) *State v. Norman* – still require imminence
         (2) D *waits* for V to return home, and kills him immediately, before any kind of argument has arisen;
         (3) D *arranges with someone else* (at the most extreme, a hired killer) to kill V.
         (4) But if the absence of confrontation is merely a *momentary lull* in the attack — e.g., V’s back is temporarily turned, but D reasonably believes that the attack will resume any moment — then the requirement of imminence is typically found to be satisfied.
   c) **NOTE:** Under the MPC BWS could be considered proof of EED and therefore mitigate murder to manslaughter

Protection of Property

1) **Common Law**
   a) Cannot defense property with device calculated to cause death or GBH → indiscriminate and disproportionate *Ceballos*
   b) Generally: A person has a limited right to use force to *defend his or her property* against a wrongful taking.
      i) **Non-deadly force**: Non-deadly force may be used to prevent a wrongful entry on one’s real property, and the wrongful taking of one’s personal property.
      ii) **Reasonable degree**: The degree of force used must not be *more than appears reasonably necessary* to prevent the taking. For instance, if one in D’s position should believe that a *request to desist* would be sufficient, force may not be used.
      iii) **Subsequent use of deadly force**: If D begins by using a reasonable degree of non-deadly force, and the wrongdoer responds with a personal attack, then the rules governing self-defense come into play. It may then become permissible for D to use deadly force to protect himself.
   c) **Deadly force**: In general, one may *not use deadly force* to defend personal property or real estate.
      i) **Dwelling**: However, in limited circumstances, one may be able to use deadly force to defend *one’s dwelling*.
         (1) **Modern view requires violent felony**: Under the modern view, deadly force may be used *only where the intrusion appears to pose a danger of a violent felony*.
         (2) Under this view, a homeowner may *not* shoot a *suspected burglar*, unless the owner believes the burglar to be *armed* or *dangerous to the safety of the inhabitants*.
   2) **MODEL PENAL CODE § 3.06**
      a) Only non-deadly force may be used
      b) Use of force must appear reasonably imminent
      c) Deadly force allowed if the intruder is using force (i.e. has a gun)
         i) So – can use DF if necc. to protect self from harm
Law Enforcement

1) COMMON LAW RULES
   a) DEADLY FORCE
      i) Generally, the limit for deadly force is use for dangerous felons or commission of dangerous felony
      ii) *Tennessee v Garner* – Cannot use deadly force to stop a fleeing suspect unless the suspect poses a threat of serious harm to officer or public.
      iii) DF may be used to prevent a crime if the crime is a serious felony involving risk to human life and the officer has probable cause to know that suspect committed the crime.
   b) Prevent Escape
      i) Officer may use any means necc. to overcome and detain a resisting Δ and can use DF if the person continues to resist and absolutely necc. (if person uses force ag. officer) *Durham*
      ii) Cannot use DF for misdemeanor or non-dangerous felony

2) MODEL PENAL CODE § 3.07:
   a) Use of deadly force is restricted to
      i) felons and
      ii) no risk to public or innocent bystander &
      iii) only when the felon poses danger or that arrest is for a crime which use or threat of DF
   b) Use of Force to prevent Escape
      i) Where the force could reasonably be justifiably have been employed to effect the arrest

Necessity 809-822

1) COMMON LAW
   a) Δ w/o blame reasonably believes that the conduct is necc. to avoid injury greater than the injury reasonably resulting from own conduct *Unger*
   b) Pressure from natural sources or human sources
   c) Test is OBJECTIVE – good faith belief is sufficient
   d) Δ must be WITHOUT FAULT
      i) Δ cannot get himself into the pickle
   e) Death is never justifiable in most cases
   f) Most cases require imminent, severe harm
   g) NOT APPLICABLE to cases of indirect civil disobedience *Schoon*
      i) Elements
         (1) faced with choice and choose lesser evil
         (2) imminent harm
         (3) causal link btw. behavior and harm
         (4) no legal alternatives

2) MODEL PENAL CODE § 3.02 Justification Generally – Choice of Evils
   a) Justifiable if:
      i) choose lesser evil
      ii) no law provides exceptions dealing w. specific situation
      iii) no otherwise clear leg. purpose to exclude justification
      iv) DOES NOT APPLY if actor was reckless or negligent in bringing about the situation
1) COMMON LAW
   a) Human Threat –
      i) must be imminent threat of death or GBH to self or family member
      ii) reasonable fear
      iii) must be immediate
      iv) Δ must not be at fault
         (i) Toscano – imminent, present, pending, able to be carried out and not a defense to murder
   b) Under COMMON LAW generally NOT A DEFENSE TO MURDER

2) MODEL PENAL CODE § 2.09
   a) Affirmative Defense
   b) Does not require imminence, only unlawful force, other person, person of reasonable firmness
   c) Available for homicide unless Δ recklessly places self in the situation
   d) If otherwise justifiable under §3.02, does not preclude this defense

Insanity 875-902
****NOTE* For ALL Insanity Defenses Must be AT THE TIME OF THE COMMISSION OF THE ACT****

1) COMMON LAW
   a) Two Views
      i) Maj – M'Naughten Rule – Cognitive (Most States and the Federal Standard)
         (1) Right from Wrong: Δ must show:
            a) Mental disease or defect:
               i) That he suffered a mental disease causing a defect in his reasoning powers; and
            b) Result:
               i) That as a result, either:
                  1. he did not understand the “nature and quality” of his act; or
                  2. he did not know that his act was wrong.
      ii) Min – "Irresistible Impulse"- Volitional
         (1) second standard by which D can establish his insanity:
            (2) D was unable to control his conduct.
               a) lacked the capacity to control his conduct or conform
      iii) No Defense for Narcotics Addiction
         (1) The general rule is that must be mental, not brought on by affirmative act of Δ
            (a) Blake – Narcotics additiction alone is not sufficient to establish insanity

2) MODEL PENAL CODE
   a) The Model Penal Code (§4.01(1)) allows D to be acquitted if
      i) “as a result of mental disease or defect he lacks substantial capacity either to appreciate the
criminality of his conduct OR
      ii) to conform his conduct to the requirements of the law.” Thus D wins if he can show either that he
didn’t know his conduct was wrong, or that he couldn’t control his conduct.
   b) BASICALLY
   c) D wins if he satisfies either the M’Naghten test or the irresistible impulse test, under the MPC

3) BURDEN OF PROOF
   a) Begins with a presumption of sanity.
   b) Split – Some require Pros. to prove sanity once Δ raises the presumption
   c) Fed and others – Δ prove by clear and convincing evidence