CRIMINAL LAW OUTLINE

I. Justification of Punishment
   A. Two categories
      i. Retributive – punishment is justified b/c people deserve it (backward-looking)
      ii. Utilitarian – justification for punishment lies in the useful purpose it serves (forward-looking)
         1. Prevention
         2. Rehabilitation
         3. Incapacitation
   B. Forms of Punishment
      i. Fine, probation, imprisonment, death penalty
      ii. Carries with it social stigma, barrier to future employment, and risk of enhanced punishment in the event of a future offense.
      iii. Intermediate sanctions – home detention, mandated community service
   C. Principles Limiting the Distribution of Punishment
      i. Culpability – "to safeguard conduct that is without fault from condemnation as criminal."
      ii. Proportionality – "to differentiate on reasonable grounds b/w serious and minor offenses"
      iii. Legality – "to give fair warning of the nature of the conduct declared to constitute an offense"
   D. Theories of Criminal Justice / Punishment
      i. **Retribution** – State-sanctioned punishment done to vent society's sense of outrage and need for revenge; deserves to be separated from the rest of society.
      ii. **Rehabilitation** – Separate person to correct them; teach them what is acceptable so that upon their return to society, will conform behavior to societal norms.
      iii. **Restraint / Incapacitation**– Incarcerate to prevent them from causing harm during time of their incarceration.
      iv. **General Deterrence** – Punishment to deter persons *other than the criminal* from committing similar crimes for fear of incurring the same punishment.
      v. **Specific Deterrence** – To punish the specific individual and deter *the specific individual* from committing future crimes.
      vi. **Public Education** – Publicity attending the trial, conviction, and punishment of some criminals serves to educate the public to distinguish good and bad conduct and to develop respect for the law.
   E. General theory in America: If there is no harm or danger, there is no crime. America deals with crime in a regulatory sense.
   F. ***Regina v. Dudley and Stephens*** (Cannibalism on High Seas case) → Defense of necessity failed, because choosing of who to kill was not democratic. Court used this case as example because cannibalism was recurring issue on high seas. *One cannot consent to be killed b/c it is an offense against the state, not the individual.*

i. Consent to a serious physical assault is, likewise, uniformly held to constitute no defense. Defense to assault is only allowable in a restricted class of cases, such as necessary surgery and regulated sports. Looks at whether assault involves *aberrant behavior or conduct with no apparent social utility*.

II. Procedural Aspect of Criminal Law
- A. Burden of proof in criminal case – beyond a reasonable doubt (hardest standard to prove)
- B. Jail used for D prior to sentencing and for very short sentences.
- C. In criminal case, D has a right to attorney at government's expense if D cannot afford one.
- D. Government brings case and presents evidence. Prosecutor *does not* represent the victim, thus he decides whether to pursue charges or to accept a guilty plea.
- E. Jury typically must be comprised of 12 members, and their decision is required to be unanimous.
- F. Question to be answered: To what extent has D, if at all, transgressed society?
- G. Starting point for criminal analysis → statute.
- H. It is perfectly acceptable to be charged with a higher charge but convicted on a lower charge.

III. Elements of a Crime
- A. Three Required Elements
  - i. Actus reus (guilty act) – a physical act (or unlawful omission by the D.
  - ii. Mens rea (guilty mind) – the state of mind or intent of the D at the time of his act.
  - iii. Concurrence in Time – the physical act and the mental state must exist at the same time.
- B. Absence of an "act" precludes culpability because thought alone is not punishable.
- C. Blackstone: There must be a will *and* an act. Require an *overt act* or some open evidence of an intended crime.
- D. Actus Reus: The Physical Act
  - i. For criminal liability to exist, D must have either:
    1. Performed a voluntary physical act OR
    2. Failed to act under circumstances imposing a legal duty to act.
  - ii. Committal of a crime requires a physical act; bad thoughts alone cannot constitute a crime (although speech, unlike thought, is an act that can cause liability (e.g., perjury, solicitation)).
  - iii. Act must be voluntary – conscious exercise of the will
    1. Acts considered involuntary:
       - a. Conduct that is not the product of the actor's determination (e.g., A shoves B into C and C dies. B not criminally liable.)
       - b. Reflexive or convulsive acts (i.e., epileptic fit)
       - c. Acts performed while D was either unconscious or asleep

i. Exception: If D knows of likelihood that involuntary act will occur and places herself in that, then criminally liable (e.g., epileptic drives w/o taking medication).

2. ***Bratty v. Attorney General*** → No act is punishable if it is done involuntarily. An act is not to be regarded as involuntary just because the doer doesn't remember it nor simply b/c he couldn't control his impulse to do it. Defense of "I couldn't help myself" is not a defense in itself.
3. **Habit** → MPC expressly declares that habitual action done w/o thought is to be treated as a *voluntary* action.
4. **Possession** → MPC says that possession is only an act if the person is *aware she has the thing* she is charged with possessing. *Requires knowledge*. Some courts hold, particularly where penalty is not severe, that it is sufficient the D should have known.
5. **Hypnosis** → MPC says acts of a hypnotized subject are *not voluntary*. His dependency and helplessness are too pronounced.

iv. ***Martin v. State*** (Drunk while on a public highway) → If there is no voluntary act, you don't have an actus reus. Without actus reus, here is no crime. As such, without a voluntary act, there can be no crime. Court looked at word "appeared" in statute and found he did not appear drunk on public highway voluntarily. Holding was based on common sense – if you allow police to take someone to public place and then say he appeared there, anyone could be convicted.

v. ***People v. Newton*** (Shot in stomach created involuntary act of shooting) → Need to have actus reus in order to have a crime. No actus reus, no crime. Actus reus requires a voluntary act, something may be involuntary due to external forces. Ct held Newton was unconscious and it was a convulsion. *Cannot have actus reus without a voluntary muscle reaction.*

vi. Epileptic Problem – driving car with knowledge that one is subject to an attack or other disorder which could render unconsciousness for a considerable period of time is culpably negligent in that he consciously undertakes to and does operate a car on a public highway. *Deliberate taking of a chance by making a conscious choice of a course of action in disregard of the consequences, which might follow from that act results in criminal negligence.*

1. Exception: Sudden sleeping spells, unexpected heart attacks without any prior knowledge or warning.

vii. Difference b/w Legal Insanity and Involuntary Act

1. Burden of Proof – since the presence of a voluntary act is a necessary element of a crime, the prosecution bears the burden of proof *beyond a reasonable doubt.* Burden of proving legal insanity, however, may and often is placed upon the D.
2. Disposition – Involuntary act results in an immediate discharge w/o further supervision over conduct. Legal insanity results in commitment or other protective or therapeutic protocols.

viii. Omission as an Act

1. Elements:
    a. Rule of law based on proposition that the duty neglected *must be a legal duty and not a mere moral obligation*.
    b. Omission to perform the duty *must be the immediate and direct cause of death*.
2. Failure to assist or come to aid will result in criminal liability if three requirements are satisfied:
    a. Legal Duty to Act
        i. Statute (e.g., filing tax return or reporting an accident; person involved in car accident must stop and give assistance – if fails to do so and person dies, may be liable)
        ii. Contract (e.g., lifeguard, nurse, doctor, babysitter)
        iii. Status Relationship b/w D and victim, which may be sufficiently close to create a duty (e.g., parent or spouse).
        iv. Voluntary assumption of care (e.g., though no common law duty to help someone in distress, once aid is rendered, good Samaritan can be held criminally liable for failure to satisfy reasonable standard of care) and so secludes the helpless person as to prevent others from rendering aid.
        v. Creation of peril by D (e.g., car accident ex. above).
    b. Knowledge of Facts giving rise to Duty
        i. General rule: parental duty to remain vigilant – no excuse where parent is unaware of danger (e.g., babysitter duty to watch child – gets drunk and fails to carryout duty to discover dangers).
            1. Exception - Needs to know child is drowning before can be criminally liable for failure to rescue so long as danger could not have been prevented but for her negligence.
    c. Reasonably Possible to Perform (e.g., if parent is unable to swim herself, under no legal duty to attempt to save).
3. ***Jones v. U.S.*** (Failure to provide food and medical care for child) → Involuntary manslaughter upheld b/c D was paid for services and had ample means of providing for child. Voluntarily assumed the duty.
    a. Where *affirmative performance* is required, cannot be met simply by showing any step at all towards preventing harm, however incomplete or ineffectual. The person charged with the duty of care is required to take steps that are *reasonably calculated to achieve success under the meaning of "duty of care."*

4. Most cases where there is liability for failure to act are cases of involuntary manslaughter, but could be considered murder if D intentionally refused aid with the intention of achieving death, or with full knowledge of great risk that death would result.
5. Bystander Indifference – If there was a law making it criminal, it would "give legal effect to a moral principle that we are our brother's keeper."
6. A person who is not a child's parent, guardian, or caretaker ordinarily cannot be convicted on the basis of failure to protect the child from 3rd party abuse. But mother has been convicted of child abuse or homicide when she fails to protect child from battering or sexual assault by male member of household.

ix. Possession as an Act
1. Statutes that penalize possession of contraband generally require only that the D have *control* of the item for a long enough period to have had an opportunity to terminate the possession.
2. D must be aware of his possession of the object, however, he *does not need to be aware of its illegality.*

E. Mens Rea – The Mental State
i. Purpose of Mens Rea
1. Distinguish b/w inadvertent or accidental acts and act performed with a "guilty mind," which is more blameworthy and capable of being deterred.
2. Certain crimes require specific mental state (intent); for other crimes, criminal negligence or recklessness will suffice.

ii. Common sense view – Blame and punishment are inappropriate and unjust in the absence of choice.

iii. Mens rea refers only to mental state required by definition of the offense to accompany the act. Asks "what did D intend, know, or should have known when he acted?"
1. Some mens rea though doesn't have a state of mind at all, e.g., Negligence or recklessness.

iv. Think of mens rea as Degree of Culpability – determines what level of crime we have.

v. Required Mental State
1. Two types of jurisdictions:
a. Assign labels – use terms "purposefully, knowingly, etc."
b. Specific Intent/General Intent Classification of Offenses
i. Relevant in only two situations (otherwise don't need to know if crime is general/specific intent):
1. Defense of Mistake
2. Defense of Intoxication

vi. Specific Intent v. General Intent
1. General Intent
a. Generally, all crimes require "general intent," which is an awareness of all factors constituting the crime.

b. Attempt to commit the actus reus. Simply an attempt to commit a forbidden act. In some cases, can be satisfied by recklessness or negligence.
c. D can be convicted if he did what in ordinary speech we would call an intentional action, e.g., trespass, battery. Does not require proof that he desired any particular further consequence.
    i. D must be aware that he is acting in the proscribed way and that any attendant circumstances required by the crime are present. The D is not required to be aware that these circumstances exist; it is sufficient to be aware that there is a high likelihood that they exist.
d. The proscribed mens rea is the mens rea to commit the particular act; the mens rea that attaches to the actus reus.
    i. Ex: Criminal trespass – it is the intent to trespass on someone's property.
    ii. Ex: Assault – it is the intent to commit a harm against a person.
e. Determining General Intent
    i. Inference of Intent from the Act
        1. *Jury can infer the required general intent merely from the doing of the act.* It is not necessary to produce evidence that specifically provides the general intent.
    ii. Transferred Intent
        1. If D intended a harmful result to a particular person or object and, in trying to carry out that intent, caused a similar harmful result to another person or object, his intent will be transferred from the intended person or object to the one actually harmed.
            a. Defenses that could have been asserted against the intended victim (self-defense, provocation) will also be transferred.
        2. Most commonly applies to homicide, battery, and arson.
        3. Does *not apply* to attempt.
        4. HYPO: If A shoots at B but misses and hits C, A is guilty of C's murder b/c intent to kill is transferred to C and may also be guilty of attempted murder of B as well.
        5. COMPARISON HYPO: If A shoots at B intending to kill him and hits C, but only wounds him, A may be guilty of attempting

to murder B but not attempting to murder C because transferred intent does not apply to attempt.

2. Specific Intent
    a. Where the definition of a crime requires not only the doing of an act, but the doing of it with a specific intent or objective. Requires proof of some further (specific) purpose to commit a crime, e.g., assault with intent to kill.
    b. There is mens rea over and above that attaches to the actus reus.
        i. Ex: Burglary – burglary is breaking and entering the structure of another with the intent to commit a crime therein. *Double mens rea required* – first mens rea to break and enter; and then a further mens rea to commit a crime therein, another actus reus.
            1. ***Key words for specific intent: "with the intent to" or "for the purpose of"***
    c. Significance:
        i. Need for Proof - Prosecution must produce evidence tending to prove the existence of the specific intent of a crime.
        ii. Applicability of certain defenses – certain defenses, such as voluntary intoxication and unreasonable mistake of fact, apply only to specific intent crimes.
    d. Major specific intent crimes:
        i. Solicitation – requires intent to have the person solicited commit the crime.
        ii. Attempt – requires intent to complete the crime.
        iii. Conspiracy – requires intent to have the crime completed.
        iv. First Degree Premeditated Murder – requires premeditated intent to kill.
        v. Assault – requires intent to commit a battery
        vi. Larceny and Robbery – requires intent to permanently deprive another of his interest in the property taken.
        vii. Burglary – Requires intent at the time of entry to commit a felony in the dwelling of another.
        viii. Forgery – Requires intent to defraud.
        ix. False Pretenses – Requires intent to defraud.
        x. Embezzlement – Requires intent to defraud.
3. General Tip-Off Words for General/Specific Intent:
    a. Recklessness and Negligence → tends to be general intent crimes.
    b. Purposefully and Knowingly → tends to be specific intent crimes.

vii. Mens Rea words: Acting intentionally, knowingly, fraudulently, willfully, maliciously, corruptly, designedly (knowingly), wantonly, recklessly, unlawfully, negligently, carelessly, purposefully, with scienter (with knowledge), feloniously, larcenously.

viii. Examples of Mens Rea Defenses: Involuntary act, duress, legal insanity, accident, mistake

ix. ***Regina v. Cunningham*** (Stealing of Gas Meter case) → Maliciousness had to be proven within statutory meaning – nature of mens rea required was that D intended to do the particular kind of harm done or must have foreseen that the harm may occur yet nevertheless continue recklessly to do the act. Court held that jury was instructed incorrectly that they were to define maliciousness as vague definition of wickedness. Different types of wickedness:
    1. Purposeful – wanted gas inhaled so he could inherit money
    2. Knowing – hoped by some miracle she wouldn't inhale gas but knew it was virtually certain she would
    3. Reckless – did not know for certain but considered the possibility and went ahead anyway.
    4. Negligent – did not think of the possibility, but had he done so, he would have realized the risk.
    5. Strict Wickedness – did not realize the risk and probably could not have done so nor could a reasonable person have realized it.

x. ***Regina v. Faulkner*** (Sailor stealing rum w/ match case) → Maliciousness means recklessness or higher. Recklessness is subjective, while negligence is objective.

xi. Distinction b/w Acting Purposefully and Knowingly in Defining Culpability:
    1. Knowledge that the requisite external circumstances exist is a common element.
    2. *Purposefully*: it is actor's conscious object to engage in certain conduct or cause a certain result, e.g., burglary.
    3. *Knowingly*: One acts knowingly with respect to the *nature of his conduct* when he is aware that his conduct is of that nature or that certain circumstances exist. Acts knowingly with respect to the result of his conduct when he knows that his conduct will necessarily or very likely cause such a result.
        a. *Conduct performed knowingly also satisfies the mental state of a statute that requires willful conduct*.
        b. MPC requires for "knowingly:" actor must be "practically certain" his conduct will cause the result.
        c. Can be defined less strictly for certain purposes though, such as where knowledge of "high probability" is made enough, so long as the actor actually believes the circumstance does not exist.
    4. *Recklessness*: Consciously disregards a substantial or unjustifiable risk that circumstances exist or that a prohibited result will follow,

and this disregard constitutes a *gross deviation from the standard of care a reasonable person* would exercise in the situation.

a. An act performed recklessly is also performed wantonly.
b. Recklessness involves conscious risk creation. Requires that the actor take unjustifiable risk and that he know of and consciously disregard the risk. *Mere realization of the risk is not enough.*
c. Distinguishing *knowingly*: For "recklessness," he must know that injury *might* result; if he knows that it is *certain* to result, he acts *knowingly*.
d. No set standard – jury must evaluate the actor's conduct and determine whether it should be condemned.
    i. Involves both objective ("unjustifiable risk") and subjective ("awareness") elements.

5. *Negligence*: Fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a *substantial deviation from the standard of care* that a reasonable person would exercise under the circumstances.
    a. Does not involve a state of awareness, unlike purposeful, knowing or reckless action.
    b. Standard – Applies objective standard. D must have taken a *very unreasonable risk* in light of the usefulness of his conduct, his knowledge of the facts, and the nature and extent of the harm that may be caused.
        i. Must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned.

xii. Comparing Negligence and Recklessness:
1. Negligence is less culpable than recklessness b/c actor only acts inadvertently. The actor should have been aware of the danger but he was not. The fault is inattentiveness.
2. Recklessness is more culpable b/c the actor was aware of the danger but acted anyway. The fault is choosing to run the risk.
    a. MPC seems to indicate that the actor must be aware (1) that there is a risk, (2) that the risk is substantial, and (3) that the risk is unjustifiable.
    b. A person may be convinced of his own skill and yet on rare (perhaps very rare) occasions, it may fail him.
3. The crucial distinguishing factor is awareness.

xiii. Purpose, Knowledge, Intent, and Motive – "The consequence need not be desired as an end in itself; it may be desired as a means to another end… there may be a series of ends, each a link in a chain of purpose. Every link in the chain, where it happens is an intended consequence of the original act."
1. Intent v. Motive
    a. Intent is legally relevant – goes towards the definition

b. Motive is legally irrelevant, except perhaps in relation to sentence.
c. Examples of where law actually does make motive relevant to criminal liability – crimes defined in terms of doing an act with some *further intention (specific intent)* turn on the motive of the action, in the sense that the reason for the action is relevant to whether the crime was committed.
i. Breaking into the dwelling is not burglary unless it is done for the purpose of (with the motive of) committing a felony within the dwelling. So also with defenses based on the rationale of justification, insofar as they require that the D has acted with a proper motive, e.g., self-defense.
ii. Particular statutes may make motive determinative of criminality or punishment, e.g., hate crimes legislation.

xiv. Distinguishing Motive from Intent
1. Motive – reason or explanation underlying the offense.
a. Motive is generally *immaterial* to substantive criminal law.
b. A good motive will *not* excuse a criminal act.
i. On the other hand, a lawful act done with bad motive will not be punished.

xv. ***U.S. v. Jewell*** (Purposeful not knowing of marijuana case) → Dealt with mens rea of "knowingly" where D said he avoided knowing – area of law known as ostrich instruction, willful blindness, deliberate or studied ignorance. *Willful ignorance constitutes knowledge. Not knowing in certain circumstances is the equivalent of knowing.* Here, awareness made positive knowledge not required.
1. *"Should have known" is a negligence standard, but conscious disregard is recklessness.* Court said deliberate ignorance is equated with knowledge.
a. Sometimes knowledge isn't just actual knowledge, but the avoidance of knowledge as well. *Deliberate ignorance and positive knowledge are equally culpable.*

F. Strict Liability Offenses
i. Definition: Does not require that D have a particular mental state – need not be aware of all of the factors constituting the crime; eliminates mens rea requirement.
1. Conviction only requires proof of the actus reus.
2. Liability is imposed without any demonstrated culpability, not even negligence.
3. Objective – typically for some social betterment rather than punishment of crimes as in cases of mala in se.
4. Purpose – ascertain at your peril whether that which you sell comes within the inhibition of the statute.
5. Penalties serve as effective means of regulation.

ii. Major significance: Certain defenses, such as mistake of fact, are not available.
iii. Includes: Public welfare crimes/offenses; Regulatory crimes; Malum Prohibitum crimes (bad because a statute prohibits them); and Civil Crimes – just on the other side of the line of what is criminal and what is not.
    1. Public welfare offense categorization (key is that each was passed for the safety, health or well-being of the community):
        a. Illegal sales of intoxicating liquor
        b. Sales of impure or adulterated food or drugs
        c. Sales of misbranded articles
        d. Violations of anti-narcotic Acts
        e. Criminal nuisances
        f. Violations of traffic regulations
        g. Violations of motor-vehicle laws
        h. Violations of general police regulations
iv. Generally involve a relatively low penalty and are not regarded by the community as involving a significant moral impropriety.
v. Every jurisdiction has strict liability crimes. For these crimes, will not find mens rea terms. But just b/c statute doesn't have a mens rea term doesn't mean that court won't read one into the statute.
vi. ***Sweet v. Parsley*** → *Just b/c legislation doesn't have mens rea indicated in its language does not mean that it will necessarily be construed as strict liability* – if so, court could read into it mens rea terms.
vii. Test for Strict Liability:
    1. Look at statutory language – if it has mens rea words in it, then no strict liability. However, if it has no mens rea words though, not necessarily strict liability and move on to other determinative hints.
    2. Look at the legislative history – look to see the extent to which the court's discretion is being channeled or controlled.
    3. Look at the penalty. The more severe, the greater the chance it will have a mens rea requirement.
        a. Once over 2-3 yrs as max penalty, almost certainly will not be treated as strict liability.
viii. ***U.S. v. Dotterweich*** (Rx drug packing) → company repackaged drugs and shipped them to dr's with their own labels, but twice mislabeled them. Statute req'd no mens rea at all as to whether those charged knew or should have known the shipment was mislabeled. Court held that Congress balanced relative hardships and decided to place burden upon those who have at least the opportunity of informing themselves of existence of conditions imposed for consumer protection rather than placing burden on innocent public who is wholly helpless.
ix. ***Morisette v. U.S.*** (conversion of unknown gov't property) → D defended a knowingly converting government property charge by saying he didn't know it was government property, i.e., mistake of legal status. Court held that "knowingly" connotes that it is not strict liability. Case resembled

common law larceny, which is a specific intent crime – did not want to take a specific intent crime and treat it as strict liability case w/o believing that was legislative intent.

x. ***State v. Baker*** (cruise control) → cruise control got stuck and arrested for speeding. D said it was malfunction but Ct said strictly liable b/c not an essential component of car operation – held that in turning on control, D was agent in controlling the car.

xi. Example:

1. Federal legislation prohibiting the transfer of unregistered firearms. Not a defense that D was ignorant of the fact that a firearm was not registered. Awareness of the fact that nonregistration is not necessary, but it is necessary that the D have been aware of the fact that she was possessing a firearm.
    a. Compare: federal legislation requires registration of any fully automatic machinegun, but statute is silent on the question of mental state – 10 yr possible sentence. Holding: D may assert as a defense that he was not aware that weapon in his possession was automatic. *Type of statute and harsh penalty indicate Congress didn't intend to dispense with mens rea requirement*.

xii. Way to defeat strict liability → Argue actus reus.

G. Mens Rea and Mistake (including Mens Rea of Rape)

i. Defense of Mistake (in context of general intent, specific intent, and strict liability)

1. Mistake of Fact – something you can tell with the five senses
    a. Mistake must negate state of mind.
        i. Will affect criminal guilt only if it shows that the D did not have the state of mind required for the crime.
    b. Requirement that mistake be reasonable.
        i. Malice and General Intent crimes – Reasonableness is not required.
        ii. Specific Intent crimes – Reasonableness is not required. *Any* mistake of fact, reasonable or unreasonable, is a defense to a specific intent crime.
    c. Mistake is not a defense to Strict Liability crimes since they require no state of mind to begin with.
2. Mistake of Law (Pure Legal Mistake)
    a. General Rule – Not a good defense, even if the mistake was reasonable. Ignorance of the law is not a good defense.
    b. Mistake of Law may negate intent.
        i. If the mental state of a crime requires a certain belief concerning a collateral aspect of the law, mistake as to an aspect of the law will negate the requisite state of mind. This situation involves

ignorance of some aspect of the law *other than* the existence of the statute making the act criminal.

c. Exceptions where it may be a good defense: Only for crimes of omission and only if a reasonable person would not have been on notice for existence of the crime (*Lambert* – ex-felon registry statute). Characteristics of such a mistake:
    i. Statute not published or made reasonably available prior to conduct.
    ii. If D acts in reasonable reliance on a statute or judicial decision, even if statute is later declared unconst'l or decision overruled. Strongest when decision relied upon made by highest ct in juris.
    iii. Reliance on a statement obtained from one "charged by law with responsibility for the interpretation, administration, or enforcement of the law."
        1. Typically, reliance on atty's advice is not a good defense, unless the atty negates an otherwise necessary mental state element (e.g., knowingly violating the law).

3. Mistake of Legal Status (a/k/a Mixed Fact-Law Mistake):
    a. Same rules for purposes of general and specific intent. Ignorance of fact or legal status is a good defense where it negates existence of a mental state of crime charged.
        i. Strategic Approach:
            1. Ask whether defense negates mental state.
                a. E.g., if someone believes property is her own and takes it, negates intent to deprive. Depends on jurisdiction.
            2. Specific Intent Crimes - Defense of mistake of fact or legal status will be a good defense, whether mistake is reasonable or unreasonable (will still be a good defense for a specific intent crime).
                a. E.g., larceny, robbery, burglary.
            3. General Intent crimes – mistake of fact or legal status will be good defense only if mistake was reasonable. If unreasonable, not a good defense.
    b. Strict Liability Crimes – mistake of fact or legal status is not a good defense b/c goes towards mens rea and mens rea isn't relevant for SL crimes.

ii. ***Regina v. Prince*** (Taking of unmarried girl across state lines) → Legal Wrong/Moral Wrong Doctrine (a/k/a Corrupt Motive Doctrine): if he's doing something that is really immoral, court will also treat it as immoral.

Court says he was doing something wrong, so its going to be illegal and there are no defenses.

iii. ***Commonwealth v. Sherry (& v. Fisher)*** (rape cases) → For rape cases, must look at mens rea subjectively, and compare it to a reasonable standard. Mens rea here for rape is 'nonconsensual.' *As long as D honestly and reasonably believed that the victim consented, then there is no rape.*

IV. Proportionality and Legality

A. Ex Post Facto
   i. Art. I, § 9, cl. 3 and Art. I, §10, cl. 1.
   ii. No person may be punished under a law that was not in existence at time crime was committed – cannot have retroactivity.
   iii. Also prohibits increasing the penalty for a crime after its commission.
   iv. Theory: People account for the law when they act, and this assumes they calculate the risk of the laws on the books.

B. A law is unconstitutional under Due Process Clause (5th & 14th Amendments) if it is *unduly vague or overbroad.*
   i. Criminal statute must clearly inform a person of ordinary intelligence of the conduct that is being proscribed. Reasons:
      1. *Fair Notice* - Put people on notice as to what behavior is criminal in the country.
      2. Avoid arbitrary and discriminatory enforcement by police.
   ii. Void for Vagueness doctrine – requires particular scrutiny of criminal statutes capable of reaching speech protected by the First Amendment
      1. Do not allow acts to be criminal when doctrine is applied.

C. Many vagabond laws are still on the books – allows police to pick you up for arbitrary reasons.

D. Cruel and Unusual Punishment
   i. 8th Amendment applicable to states through 14th Amendment.
   ii. Arises in Status crimes and in terms of Proportionality.
   iii. Status Crimes – unconstitutional in US (e.g., crimes that proscribe that is criminal to <u>be</u> an alcoholic, a drug addict, Jewish, etc.) Can convict, though, for acts that go towards status, such as drinking while driving, taking drugs.
   iv. Proportionality – Eye for an eye
      1. Immanuel Kant – *categorical imperative*
      2. One issue where there is debate: 3 strikes laws. Where 3rd strike is for a nominal crime (e.g., small theft) and result is then life in prison, courts have said not disproportional, though there have been dissents in those cases.

V. Homicide

A. General Definition: Death of a human being caused by another human being.

B. Elements:
   i. Death of a human being

1. Shooting of a dead person is not a homicide b/c the death must be caused by D (could be destruction of a corpse → if believe person is alive though and shoot to kill, possibly attempted murder).

ii. Caused by another
1. Suicide is not homicide.

C. Classification of Homicides:
i. Justifiable homicide
1. Perfect defense → those commanded or authorized by law
a. D is soldier during time of war
b. D, officer, shoots and kills felon during bank robbery
c. D, non-officer, kills someone in self-defense or defense of others.

ii. Excusable homicide
1. Catch-all category → those for which there was a defense to criminal liability, though not a perfect defense.
a. D kills victim but has defense of insanity
b. D kills victim believing he has right to do so but doesn't b/c defense of mistake → imperfect self-defense (could be VM rather than murder)

iii. Criminal homicide
1. Murder:
a. First Degree
b. Second Degree
2. Manslaughter
a. Voluntary
b. Involuntary

iv. To separate all murder from all manslaughter, look at four things. Each only gets you to 2nd degree murder; more is required to elevate to 1st deg.
1. Intent to Kill
a. If person intends to kill another and not heat of passion or a justifiable situation of self-defense, then qualifies for murder charge (at least 2nd deg, could become 1st).
2. Intent to Cause Grievous Bodily Harm
a. General Rule – person who acts or fails to act where duty exists without intent to kill but with intent to cause bodily injury and does cause that, is guilty of 2nd deg murder.
i. The intent req for murder conviction → intent to cause *grievous* bodily harm (injury likely to be attended by fatal or dangerous consequences).
3. Recklessness-Plus
a. To get into murder, requires recklessness - a conscious disregard of a substantial and unjustifiable risk that death will occur *under circumstances manifesting an extreme indifference to human life*. Mere recklessness (or negligence) will not suffice.
4. Intent to Perpetrate a dangerous felony – Felony Murder

D. Common law Criminal Homicide – subdivided into three offenses
    i. Murder – Unlawful killing of a human being with malice aforethought.
        1. Malice aforethought (NEVER USE WORDS MALICE AFORETHOUGHT ON EXAM. USE INTENT TO KILL, INTENT TO INJURE, RECKLESS, ETC.)
            a. Definition: Either killing of another by an act done with an intent to commit a felony *or* an act done with the knowledge that the act will probably cause the death of some person.
            b. May be express or implied.
            c. In the absence of facts excusing the homicide or reducing it to voluntary manslaughter, malice aforethought exists if the D has any of the following states of mind (ii, iii, or iv are implied malice):
                i. Intent to kill (express malice)
                ii. Intent to inflict bodily injury
                iii. Reckless indifference to an unjustifiably high risk to human life ("abandoned and malignant heart")
                iv. Intent to commit a felony (felony murder doctrine)
        2. Deadly Weapon Rule
            a. Intentional use of a deadly weapon authorizes a permissive inference of intent to kill.
            b. A deadly weapon is any instrument – or in limited circumstances, any part of the body – used in a manner calculated or likely to produce death or serious bodily injury.
            c. Examples:
                i. Driving a speedboat through a group of swimmers
                ii. Firing a bullet into a crowded room
                iii. Professional boxer beating up and killing belligerent tavern owner.
        3. Situations Qualifying as Murder (vs. manslaughter or invol. Manslaughter)
            a. If one person kills another with intent to do so, without provocation or slight provocation, although there is no premeditation in the ordinary sense of the word.
            b. If one person is killed by an act intended to kill another.
            c. If a person is killed by an act intended to kill, although not intended to kill any particular individual, as if a man throws a bomb into a crowd of people.
            d. If death results from an act which is intended to do no more than cause grievous bodily harm.
            e. If one person kills another by an intentional act which he knows to be likely to kill or to cause grievous bodily harm, although he may not intend to kill or to cause grievous bodily harm and may either be recklessly indifferent as to

the result of his act or may even desire that no harm should be caused by it.

4. Malice Aforethought: Premeditation and Deliberation
    a. Deliberation defined: a cool mind that is capable of reflection
        i. pondering committing the crime; weighing the pros and cons (reflection) and ultimately, deciding to go ahead with it. Contains an element of choice.
    b. Premeditation defined: the one with the cool mind did in fact reflect at least for a short period of time before killing
        i. Forethought, thinking in advance
        ii. Timing in criminal law is crucial.
        iii. Premeditation only requires a second before act.
    c. How Premeditation and Deliberation tie into mens rea:
        i. 'Intentional" and "with premeditation and deliberation" are the mens rea for crime of murder.
        ii. If intent is present at the time of killing, then there is concurrence of mens rea and actus reus.
5. Possible Defenses to Murder:
    a. Negate either premeditation or deliberation
    b. Psychiatrist to testify that act was an "impulsive, automatic reflex" - actor didn't choose to do it, was not in his control nor intentional, thus no actus reus, e.g., *Newton* case
6. ***Commonwealth v. Carroll*** (shoot wife in back of head) → Specific intent to kill is necessary to constitute murder in the first degree. It may be found from a D's words or conduct or from the attendant circumstances together with all reasonable inferences, and may be inferred from the intentional use of a deadly weapon on a vital part of another's body.
7. Categorization of Types of Evidence When Examining Premeditation or Deliberation – Inferences may be drawn by a trier of fact from any of the three categories:
    a. Planning Activity – facts about how and what D did prior to the actual killing
        i. Includes prior possession of murder weapon, surreptitious approach of victim, taking victim to place where others are unlikely to intrude
        ii. The more planning activity P can show, the more likely premeditation can be proven; can convict on strong planning activity (only one of the three that doesn't require a combination of the others)
    b. Motive – facts about D's prior relationship and conduct with the victim
        i. Includes prior threats by D to do violence to victim, plans or desires of D which would be facilitated by

victim's death, and prior conduct of victim known to have angered D.

c. Manner of Killing – nature of killing was so particular and exacting that D must have intentionally killed according to a preconceived design.
    i. Includes manner of killing (based on examination of victim's body) showing wounds were deliberately placed at vital areas of the body. However, many wounds is not dispositive as could have been impulsive still and post-murder conduct not obvious since concerned with prior thought.

8. Most common motives for criminal activity → Sex, money, hate, and revenge.
9. Approaches to Prosecution and Defense of Murder:
    a. Act-oriented – preferred by prosecution
    b. Person-oriented – preferred by defense

ii. **Felony Murder Doctrine**: When death occurs during commission or attempted commission of an independent and dangerous felony, those committing felony possess requisite mens rea for murder even though they don't intend to kill. *Requires that death be a foreseeable consequence of such felonious conduct.*

1. Applies *Transferred Intent* – intent to commit underlying felony transfers to the actual killing.
2. Requires the underlying felony first.
3. By and large, results in murder in the first degree.
4. *In the course of committing some type of felony, if someone dies of natural causes then D could be found guilty of murder – take victim as you find them.*
5. ***Regina v. Serne*** (Insurance fraud house-fire) → If crime committed by an act done with intent to commit a felony, the setting of the house on fire in order to cheat the insurance company, or by conduct which to their knowledge was likely to cause death and was, therefore, eminently dangerous in itself – in either of these cases, guilty of willful murder in the plain meaning of the word.
6. Limitations on the Felony Murder Doctrine:
    a. Requires an inherently dangerous felony in the abstract (BREAKRSS of an attempt to commit one of these felonies)
    b. Requirement that underlying felony has an *independent* felonious purpose (other than to cause injury or perhaps death) → Merger Doctrine
    c. Proximate cause – Death must be proximately caused by commission or attempt .
        i. *Redline* exception – *Liability for murder cannot be based upon the death of a co-felon* from resistance

by the victim or police pursuit. However, D can be liable for felony murder in many states when resistance by the victim or police results in the death of a 3rd party bystander who is not a cofelon. If cop kills one of felons in ***State v. Canola*** jewelry robbery, other felon is not liable in an agency state. Would be liable in proximate cause state, unless state follows *Redline* exception, which says you can't bootstrap Felony Murder onto "justifiable killing."

1. If cannot get them for felony murder under this scenario, can still get them for recklessness-plus 2nd degree murder. MPC treats felony murder as recklessness-plus. MPC doesn't like strict liability in criminal law.

d. Agency – opposite of proximate cause (depends on jurisdiction); says can't have a felony murder if killing is done by someone other than the felon. If there is an agency limitation on felony murder, the killing must have been committed by one of the co-felons. *Agency jurisdiction requires killing be by one of the felons.*
e. The time period between which felony and death occurs
f. Affirmative defense

7. Deaths caused while fleeing from the crime are still considered felony murder if the crime otherwise qualifies. Fact that felony was technically completed before death was caused does not prevent the killing from being felony murder.
    a. Limitation: Once the felon has reach a *place of "temporary safety,"* the impact of the felony murder rule ceases and deaths subsequently caused are not felony murder.
8. Inherently Dangerous Felony Limitation
    a. ***People v. Phillips*** (chiropractor/cancer patient murder) → *In order to have felony murder, felony must be inherently dangerous to human life. Killing can be accidental.* Evidence in case that although D made false representations re: his ability to cure, he believed the proposed treatment would be successful.
        i. Some jurisdictions require looking to see if felony is inherently dangerous to human life *in the abstract*. Don't focus on the specific facts, but instead, look at *genus* of crimes known as felonies and see if *any crime within that genus* is an act inherently dangerous to human life which as such justifies the extreme consequence (imputed malice) which the doctrine demands.

ii. Others have enumerated crimes (e.g., rape, robbery, kidnapping, arson, burglary, escape, sodomy, other serious sex crimes, or an attempt to commit any of these) – easier for P to get conviction under felony-murder than under premeditated and deliberate intent to kill b/c need not prove vague concepts of premeditation and deliberation in addition to intent to kill.

9. Potential Felony Murder Statutory Language may include "if the death of anyone *ensues from* the committing or attempting to commit any such crime or act." Possible options which may qualify as *ensues from*:
    a. Someone killed by another felon in the course of carrying out the felony
    b. Felon kills victim
    c. Victim kills one of the felons
    d. Victim kills third party
    e. Felon kills innocent bystander
    f. Innocent bystander seeing crime, pulls gun and kills any one of the parties.
10. Strategy behind Felony Murder Charge → Prosecution goes for FM b/c carries 1st degree conviction (harsher penalty). In 2nd degree, must show intent. In FM, only have to show mens rea for underlying felony and then killing is treated as strict liability.
11. Merger Doctrine
    a. Cannot have FM if only purpose of felony is to cause death – must be independent (e.g., felony of maiming or disfiguring would not be chargeable under FM if death results).
    b. ***People v. Smith*** (child abuse felony murder) → on the facts of this case the crime of felony child abuse was an integral part of and included in fact within the homicide and hence that it merged into the latter under the rule of *People v. Ireland*. Otherwise, would be to allow for bootstrapping. Many homicides result from a felonious assault. Doubly punishing in a way.

iii. Second Degree Murder
1. Difference between First and Second Degrees:
    a. First Degree – Requires premeditation and deliberation
    b. If only one or neither, then Second Degree.
2. Four types of Second Degree Murder:
    a. Intent to Kill 2nd Degree – has intent to kill but does not have premeditation and deliberation.
    b. Recklessness-plus 2nd degree (unintentional)
    c. Intent to injure where death results (does not matter if this intent to injure is premeditated or not)

i. Element that gets us into intent to injure 2nd degree murder is "enormous or grievous bodily harm." If injury was not enormous or grievous bodily harm, then not 2nd degree. What qualifies is decided on a case by case basis.

d. If you do something reckless but death does not result, there is reckless endangerment.
   i. MPC: A person commits a misdemeanor if he recklessly engages in conduct which places or may place another in danger of death or serious bodily injury. *Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.*
      1. Reckless endangerment is a catch-all within Invol. Manslaughter if no one dies. Involuntary manslaughter is the catch-all if someone does die.

e. Recklessness-Plus
   i. Used to go from Involuntary Manslaughter to 2nd degree murder. IM conviction results from recklessness or gross negligence theory (Need something more than ordinary negligence.).
   ii. Definition:
      1. Recklessness – conscious disregard for a substantial and unjustifiable risk that someone might be killed.
      2. Plus – Under circumstances manifesting extreme indifference to the value of human life.
   iii. Example: Russian poker case (Malone); Firing gun over someone's head; and Man shooting gun into ceiling of train station w/o intent to kill (if it is 4:30am, then IM; if it is 4:30pm, then recklessness-plus and gets you 2nd degree murder).

f. If intent to inure (cause grievous or enormous bodily harm) and victim dies, then 2nd degree murder.

E. Manslaughter: Homicide is manslaughter when it is committed recklessly.
   i. A person acts recklessly with respect to the death of another when he consciously disregards a substantial and unjustifiable risk that his conduct will cause that result.
      1. Disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

F. Voluntary Manslaughter
   i. Intentional killing distinguishable from murder by the existence of adequate provocation (i.e., killing in the heat of passion).

ii. Three types of voluntary manslaughter:
    1. Heat of passion provocation
    2. Mistaken justification (Imperfect self-defense)
    3. Diminished Capacity – not as popular today
iii. Certain types of provocation are enough for case to go to jury for decision whether to mitigate murder to manslaughter – Traditional Circumstances:
    1. Extreme assault or battery upon D (or threat of *deadly force*)
    2. Mutual combat
    3. D's illegal arrest
    4. Injury or serious abuse of close relative of D
    5. Sudden discovery of a spouse's adultery
        a. Must find out how D found out about it. If spouse *sees* adultery personally, can get voluntary manslaughter charge possibly (not first degree murder). When it is heard about, more difficult to get alternate jury charge.
iv. Two types of Voluntary Manslaughter Jurisdictions:
    1. Those that require legally sufficient provocation
        a. What satisfies can be found in statute or case law.
    2. Those that do not require legally sufficient provocation
        a. No such list. Everything goes to jury. Recognizes the frailty of human nature.
v. Heat of Passion provocation
vi. Elements of Adequate Provocation – Common Law Four-Part Test:
    1. Provocation must have been one that would arouse *sudden and intense passion* in mind of an *ordinary person* such as to cause him to lose self-control.
    2. D must have *in fact* been *provoked.*
    3. *Must not have been sufficient time* b/w provocation and killing for passion of a reasonable person to cool.
        a. Factual question that depends upon the nature of the provocation and attendant circumstances, including any earlier altercations b/w D and victim).
    4. D *in fact* did *not cool off* b/w provocation and the killing.
vii. Provocation is inadequate as a matter of law when the provocation is *mere words*. Will still typically go to the jury with question of whether "mere words" or similar matters constitute adequate provocation.
viii. Imperfect Self-Defense sometimes allowed in jurisdictions to reduce murder to manslaughter even though:
    1. D was himself at fault in starting the altercation.
    2. D unreasonably but honestly believed in the necessity of responding with deadly force.

G. Involuntary Manslaughter
i. An unintentional killing can either warrant involuntary manslaughter or 2nd degree murder.
ii. Requires either (1) ordinary negligence with a dangerous instrumentality or (2) the mens rea must have a greater recklessness or negligent

component (conscious disregard of a substantial and unjustifiable risk that someone would be killed).

iii. Two types:
    1. Criminal Negligence
        a. Requires recklessness – a *conscious* disregard of a substantial and unjustifiable risk that a death will occur.
            i. Distinguished from negligence where D *should have* been aware.
        b. If negligence proximately causes death of the victim, D is guilty of statutory manslaughter.
    2. Unlawful Act Manslaughter
        a. Misdemeanor-Manslaughter Rule – killing in the course of the commission of a misdemeanor is manslaughter although most courts would require either that the misdemeanor be malum in se, or if malum prohibitum, that the death be the foreseeable or natural consequence of the unlawful conduct.
        b. Felonies not included in Felony Murder – if a killing was caused during the commission of a felony but does not qualify as a felony murder case

iv. Mens rea for IM → Wanton or reckless disregard (Actus reus is the killing)
    1. To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and D must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm.
    2. ***Commonwealth v. Welansky*** (Bar fire kills 400+) → There is a duty of care for the safety of business visitors invited to premises which the D controlled. Wanton or reckless conduct may consist of intentional failure to take such care in disregard of probable harmful consequences to them or of their right to care.

v. Awareness of the risk is required for manslaughter, but a person who is unaware of the risk may be punished for the crime of negligent homicide.
    1. Measurement:
        a. Did the accused fail to take those precautions, which any reasonable man with normal capacities would under the circumstances have taken?
        b. Could the accused, given his mental and physical capacities, have taken those precautions?
    2. ***Commonwealth v. Malone*** (Russian Roulette) → Court held 2nd degree murder and rejected IM applying recklessness-plus. The mens rea that elevates IM to 2nd deg murder is *recklessness under circumstances manifesting extreme indifference to the value of human life.* Rejected IM because the game was done intentionally, but the killing was not. Mens rea of this type of 2nd degree murder – recklessness.

3. ***State v. Williams*** (Baby toothache/Welfare fear) → D was sufficiently put on notice to baby's apparent condition. Negligence is sufficient for statutory manslaughter. Breach had to amt to more than ordinary or simple negligence, which describes a failure to exercise the ordinary caution necessary to make out an excuse defense. *If negligence proximately causes victim's death, D is guilty of statutory manslaughter.* No evidence here that D was physically or financially unable to obtain medical assistance.
    a. Ordinary caution defined → caution that a reasonable person of prudence would exercise under the same or similar conditions
4. ***State v. Everhart*** (low IQ bedroom birth) → Thought the baby had been born dead, wrapped it head to foot in a blanket; ended up smothering the baby. Reversed conviction for IM.

VI. Causation
- A. Whether the D's act caused the result.
- B. Where crime is defined without any regard to result of D's conduct (e.g., attempt, conspiracy, burglary), there is no need to face the issue of causation.
- C. Requirements:
    - i. Cause-in-fact – result would not have occurred "but for" D's conduct.
        1. Common Law Requirement – "Year and a Day Rule" – death of victim must occur within one year and one day from infliction of injury or wound. If not within this time, can be no prosecution for homicide, even if it can be shown that "but for" D's actions, victim would not have died as and when he did. Many states have abolished this rule.
    - ii. Proximate cause – question is whether the difference in the way death was intended or anticipated and the way in which it actually occurred breaks the chain of "proximate causation."
        1. All "natural and probable" results are proximately caused, even if D did not anticipate the precise manner in which results would occur.
        2. Chain is broken only by intervention of a "superseding factor."
- D. Rules of Causation
    - i. Hastening Inevitable Result – an act that hastens an inevitable result is nevertheless a legal cause of that result.
    - ii. Simultaneous Acts – simultaneous acts by two or more persons may be considered independently sufficient causes off a single result.
    - iii. Preexisting Condition – victim's preexisting condition that makes him more susceptible to death does not break the chain of causation (D takes victim as he find him)
- E. Intervening acts generally will shield D from liability if act is a mere coincidence or is outside the foreseeable sphere of risk created by D's act.
    - i. Examples:

1. Act of nature (e.g., A is driving negligently. To avoid A's swerving car, B takes unaccustomed route home and gets struck by lightning, killing B. Cannot be charged with manslaughter.)
2. Act by third party (e.g., A intending to kill B, merely wounds him. B receives negligent medical treatment and dies – A can be held liable because negligent care is a foreseeable risk. Contrary result though if B died due to gross negligence or intentional mistreatment.)
3. Acts by the victim (e.g., if A intending to kill B, merely wounds him, and B refuses medical treatment that could have saved him for religious purposes and dies) – most jurisdictions find this to be a foreseeable risk (including even if out of pain, victim acts affirmatively to harm himself such as by committing suicide) and held A liable.

VII. Analytical Approach to Homicide Situation
- A. Did D have any of the *states of mind* sufficient to constitute malice aforethought?
- B. If answer to (A) is yes, is there proof of anything that will, under any applicable statute, raise the homicide to *first degree murder*?
- C. If the answer to (A) is yes, is there evidence to reduce the killing to *voluntary manslaughter*, i.e., adequate provocation?
- D. If the answer to (A) is no, is there a sufficient basis for holding the crime to be *involuntary manslaughter*, i.e., criminal negligence or misdemeanor manslaughter?
- E. Is there *adequate causation* b/w D's acts and victim's death? Did the victim *die within a year and one day*? Was D's act the *factual cause* of death? Is there anything to break the chain of *proximate causation* b/w D's act and victim's death?

VIII. Attempt
- A. Attempt has both actus reus and mens rea like all other crimes.
  - i. Mens rea is almost always easy, but actus reus is always perplexing with regard to attempt crimes. Opposite of actually committed crimes.
  - ii. *Mens rea of attempt → specific intent to commit the crime.*
    1. The mens rea of <u>all inchoate crimes</u> is specific intent.
- B. Elements:
  - i. Specific Intent to commit the crime (mens rea)
    1. Example: Attempted murder requires specific intent to kill another person, even though mens rea for murder itself ode s not necessarily require a specific intent to kill.
    2. *Result of attempt, if achieved, must constitute a crime.*
    3. Attempt to commit negligent crimes is logically impossible – if there were an intent to cause such a result, the appropriate offense would be attempt to intentionally commit the crime rather than attempt to negligently cause the harm.

4. Attempt to commit strict liability crimes requires intent – although strict liability crime does not require criminal intent, to attempt a strict liability crime, D must tact with the intent to bring about the proscribed result.

ii. Overt act in furtherance of the crime – an act beyond mere preparation for the offense (actus reus)

C. ***Cannot convict someone of both attempting the target crime and the committal of the actual crime. Attempt merges in the consummated crime***.

D. Tests for Attempt:

i. Proximity Test - What D has done toward accomplishment of his criminal purpose and what remains to be done.

1. Typically requires an act that is dangerously close to success.
2. Example: Pointing loaded gun at intended victim and pulling trigger is sufficient under Proximity Test, but going to store to purchase bullets or even driving to victim's house is insufficient.

ii. Equivocality Test – Act by itself must demonstrate the D had an unequivocal intent to commit the crime (a/k/a res ipsa loquitor test). Followed by a few courts.

iii. Model Penal Code Test – Requires that act or omission constitute a "substantial step in a course of conduct planned to culminate in the commission of the crime." In addition, an act will not qualify as a substantial step unless it is strong corroboration of the actor's criminal purpose.

iv. Extent to which D's criminal intent has been manifested

v. Seriousness of the crime contemplated (the more serious the crime, the further back in time a court may reach in order to find an attempt).

vi. Opportunity remaining to desist (if such opportunity (locus poenitentiae) still remains, a court is less likely to find an attempt).

vii. Proximity in time and space to the crime contemplated

viii. Likelihood of crime's being committed

E. Conviction on attempt depends on jurisdiction's test for proving attempt.

F. Most jurisdictions begin analysis of actus reus – if in realm of preparation, we don't have attempt. *If we are in realm of perpetration, then we have attempt*. No distinct line though between the two realms.

G. ***People v. Rizzo*** (Looking to rob man but never find him) → Court held there can be no attempt to rob man because they never found him, though it conceded once they would have seen man, robbery would have occurred. Test employed by court looked for the last substantial step to be taken to find guilty of attempt. MPC – *substantial step strongly collaborative of actor's criminal purpose*.

H. Criminalizing Specific Attempt Crimes → Don't want to make law of attempt so elastic that it would apply to virtually any situation. Examples:

i. Burglary as an Attempt Crime – burglary is a crime in a nature of an attempt. Breaking and entering not in and of itself but for the purpose of larceny. Burglary thus becomes an attempt to attempt.

ii. Solicitation as an Attempt Crime – Like an attempted conspiracy.

1. Mens rea is specific intent.

2. Actus reus is requesting, urging, or commanding someone to commit a crime.
3. Can have attempted solicitation.
    a. A mails to B a letter to solicit him to kill K. Letter gets intercepted and thus never received. Not solicitation because ask never officially occurred.

I. Abandonment as a Potential Defense to Attempted Conspiracy → must be voluntary and complete.
    i. Majority of jurisdictions say that if target harm is committed, then the abandonment is not complete.
    ii. Other jurisdictions say must make best efforts to thwart the crime's committal when abandoned.

J. Strategy on Attempt →If you don't get someone for attempted murder or attempted bombing, you can get him for reckless endangerment (intentionally create dangerous circumstances with substantial and unjustifiable risk) – question is whether you can get higher than that.

K. Affirmative Defenses against Attempt: (1) Impossibility and (2) Abandonment
    i. Even if all elements of a crime are fulfilled, if all of the elements of an affirmative defense are present, crime has not been committed, i.e., acquittal.
    ii. Impossibility
        1. Pure Factual Impossibility
            a. If D did everything intended to do factually, and those facts could not bring about commission of the target crime.
            b. *Not a good defense unless it is inherent impossible – for that, there is a subcategory.*
                i. Inherent Impossibility (a/k/a patent impossibility)
                1. Same as above, but for purely physical reasons, the crime could not have been committed.
                2. Test: Asks whether under the circumstances as a reasonable person would have reasonably believed, would the means have been effective? Means clearly must be ineffective.
                3. Example: voodoo case – mens rea may be present; he has done everything he *thought* he needed to do; he did intend to kill; whether it was possible to kill though is debatable – thus, result is inherent impossibility and good defense.
                4. Example: Man goes into yard while mad at wife and believing she is on a plane. He fires bow and arrow towards plan several thousand feet in the air. Inherently impossible because means he chose to do

the act would clearly not accomplish the act. A reasonable person would never believe this would be successful. Thus, good defense.

5. Example: Man is charged with attempting to manufacture crack cocaine. Thought that the way to make it was by mixing molasses with Nutrasweet. Lawyer raised defense of inherent impossibility.

ii. Difference b/w Factual and Inherent Impossibility – D used means that were so *obviously* not going to be effective to not accomplish the criminal purpose.

c. Factual impossibility measured by five senses.

d. Example: Opening up office door quickly and believing intended victim is in there, but he ends up not being there. This is a pure factual defense and not a good defense – won't work.

e. Example: D thinks books left outside an office are still prof's possession when really being thrown out. Nonetheless, D takes them intending to deprive. Possible attempted larceny charge.

f. ***People v. Jaffe*** (Stolen goods sting operation) → D believed cloth was stolen and purchases it. But the good had lost its states and been restored to the rightful owners at the time of sale. Charged with attempt to receive stolen property. Not factually impossible b/c (1) he has a good defense and (2) you cannot tell with your senses if the cloth is stolen. D's act is mixed fact/law, which is a good defense.

2. Pure Legal Impossibility

a. Occurs where D is not guilty b/c had he accomplished what he believed was being done there is no crime on the books that covers that activity. Attempting to do that which is not a crime is not attempting to commit a crime.

i. Requires mens rea of specifically intending to commit the crime.

b. Pure legal impossibility is always a good defense.

c. Ex Post Facto – cannot be convicted for attempting to do something that is not criminal at the time you attempt to commit crime.

3. Factual Impossibility of Legal Status (Mixed Fact/Law)

a. Pure factual is bad defense and pure legal is good defense, but Mixed F/L is a matter of policy. MPC says not a good defense, but some case law says it is a good defense.

iii. Abandonment

1. General rule: *Abandonment is never a good defense.*

2. MPC says withdrawal will be a defense but only if:
    a. It is *fully voluntary* and not made because of the difficulty of completing the crime or because of an increased risk of apprehension; AND
    b. It is a *complete abandonment* of the plan made under circumstances manifesting a renunciation of criminal purpose, not just a decision to postpone committing it or to find another victim.

L. Punishment for Attempt
    i. Most common statutory scheme – permits penalty up to one-half the maximum penalty for the complete crime, with a specific maximum set for attempt to commit crimes punishable by death or life imprisonment.
    ii. MPC (and some state statutes) say an attempt may be punished to the same extent as the completed crime, except for capital crimes and the most serious felonies.

IX. Accomplice Liability at Common Law

A. Definitions:
    i. Principal of an Offense
        1. First Degree – at the scene of the crime committing the crime; he is the actor or absolute perpetrator of the crime.
        2. Second Degree – at the scene of the crime but not the one who commits the crime; he who is present, aiding, and abetting the fact to be done. E.g., lookout, getaway car driver.
            a. Need not be immediate standing by. Could be a *constructive presence*, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance.
    ii. Accessory – he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed.
        1. Accessory *before the fact* – involved in the crime and knows about it in advance, but doesn't go to the scene of the crime; one who being absent at the time of the crime committed, but yet has procured, counseled, or commanded another to commit a crime.
            a. Here, absence is necessary to make him an accessory, because had he been present at the scene, he would have been guilty of the crime as a principal.
        2. Accessory *after the fact* – doesn't know about the existence of the crime until after crime was committed; person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.
            a. Generally subject to a lesser punishment. For other modes of complicity, punishment is generally the same. Though typically convicted for lesser punishment, court still may punish accomplices the same as principal.

B. Under modern statute, first and second degree principals as well as accessories before the fact are considered principals, and are thus subject to the same spectrum of culpability. All states have modern statutes except VA, which operates under common law.
    i. ***Modern statutes only have two categories - principals and accessories after the fact.***
        1. Under modern statute, if an accessory at the criminal level, treated as a principal as if he had committed the crime himself.
C. ***Aiding and Abetting*** → actus reus is providing some facilitating service to assist those committing the crime (actually, affirmatively must have committed the crime).
    i. Active participation is not necessary. Mere acquiescence or knowledge is not enough. *Must have specific intent to aid or abet the commission of a crime*.
D. Accessories to a crime can be convicted before the principal is convicted (however, it must be proven that a crime was committed).
E. Not necessary in most states today to chare D with a particular form of complicity – may simply charge him with the substantive crime committed by the person the D aided or encouraged.
F. Conspiracy as a Doctrine of Complicity:
    i. Criminal conspiracy is an agreement or combination by two or more persons to commit a crime. Conspiracy is a substantive crime in itself, but it has the further consequence of making each of the coconspirators criminally responsible for the criminal acts of fellow conspirators committed in furtherance of the planned criminal enterprise, whether or not those particular criminal acts were planned, so long as they were reasonably foreseeable.

X. Conspiracy
A. Conspiracy Defined
    i. Partnership in crime [or criminal purpose].
        1. Must have more than one person.
    ii. General Federal conspiracy statute – 18 USC § 371.
B. Functions in the Legal System
    i. As an inchoate crime, it complements the provisions dealing with attempt and solicitation in reaching preparatory conduct before it has matured into commission of a substantive offense.
        1. Inchoateness allows Prosecution to reach back in time and get people on a path towards criminality. Don't have to wait until the crime is committed.
    ii. Means of striking against the special dangers incident to group activity.
        1. In group activity, there is a greater likelihood of incidental crimes being carried out.
C. Prosecutors love conspiracy; Defense attorneys hate it. Reasons:
    i. Hearsay Doctrine → though hearsay evidence is generally inapplicable in criminal trial, there is a co-conspirator exception, which allows foor a

conspirator to testify against another co-conspirator. Testimony is admissible despite the rule.

ii. Uneasy seat of codefendants in a conspiracy trial → generally will be evidence of wrongdoing by somebody and it is difficult for one to make his own case stand on its merits in the minds of jurors when they believe that birds of a feather flock together. If one D is silent, he is taken to be admitting involvement. But if codefendants are prodded into accusing or contradicting each other, they can often end up convicting each other.

iii. Increased punishments – sometimes doubles punishment. Does not merge with the completed defense. Does not have to run concurrently, can have convictions run consecutively.

iv. Imposes vicarious liability – Any member of the conspiracy is liable for any crime committed by any other member of the conspiracy so long as foreseeable or in the furtherance of the crime.

v. Procedural ease

1. Joinder – more you can get others charged, the more convictions you will have because they will start talking.
2. Hearsay exception
3. Venue – can bring a conspiracy trial into any jurisdiction in which anything having to do with the conspiracy has taken place.

D. Conspiracy is a felony. In federal criminal law, even if one is conspiring to commit a misdemeanor, the charge is a felony one, even if misdemeanor is never consummated. Not so much the case in states though.

E. Conspiracy and actual attempt or commission can both be charged. While under merger doctrine, can't convict for attempt and commission of an actual crime, there can be two inchoate crimes for the same crime.

F. ***Krulewitch v. U.S.*** (Transport woman across state lines conspiracy) → The statement in question was made after the crime and thus the conspiracy charge. ***Conspiracy officially ends when the target crime is completed.***

G. Extent of Vicarious Liability Under Conspiracy Theory

i. ***Pinkerton v. U.S.*** (moonshine manufacture) → Just b/c one D was in prison doesn't end the conspiracy. Simply because D was incarcerated does provide him opportunity to argue that he was precluded from taking an affirmative act. Rather, ***renunciation (a/k/a abandonment or withdrawal) must be voluntary and complete.***

1. Defining *voluntary* – means for the right reasons, not because you think you're about to be found out.
2. Defining *Complete* – some jurisdictions say you must report to the police, some say you must go to conspirators and say you don't support them.

ii. **Pinkerton's Doctrine** → So long as the partnership in crime continues, the partners act for each other in carrying it forward. *An overt act of one partner may be the act of all without any new agreement specifically directed to that act*.

1. ***Any member of a conspiracy is liable for the substantive crimes committed by any other member so long as the crimes were foreseeable or in furtherance of the target crime.***
2. Pinkerton Doctrine is still good law in federal court, however, ¾ of the states don't follow the doctrine.

H. Mens Rea of Conspiracy

i. ***People v. Lauria*** (Prostitution phone service) → Preliminary Rule: ***To establish agreement, need only show no more than a tacit, mutual understanding b/w co-conspirators to accomplish an unlawful act.*** Court held that Lauria took no direct action to further, encourage, or direct the call girl activities of his codefendants and there are no circumstances from which his special interest in their activities can be inferred.

1. **Rule:** ***Required element of <u>knowledge of illegal use</u> and <u>intent to further that use</u>.***
   a. Knowledge – question of fact
   b. Intent – Requires either direct evidence (e.g., advice from the supplier of legal goods or services to the user of those goods or services on their use for illegal purpose) or circumstantial evidence (e.g., where direct proof of complicity is lacking, intent to further the conspiracy must be derived from the sale itself and its surrounding circumstances in order to establish the supplier's express or tacit agreement to join the conspiracy).
   c. Where Intent can be Inferred from Knowledge (If any of these are present, could argue that supplier had acquired a special interest in the operation of the illegal enterprise. *His intent to participate in the crime of which he has knowledge may be inferred from the existence of his special interest.*):
      i. When the purveyor of legal goods for illegal use has acquired a stake in the venture (e.g., inflated charges).
      ii. When no legitimate use for the goods or services exists.
         1. In *Lauria*, there were other women in legitimate occupations whose employment might cause them to receive a volume of calls at irregular hours so no proof here that could imply performance of illegal activity.
      iii. When the volume of business is grossly disproportionate to any legitimate demand, or when sales for illegal use amount to a high proportion of the seller's total business.
   d. It is possible to find conspiracy through knowledge alone in some instances where special interest is lacking → A supplier who furnishes equipment which he knows will be

used to commit a serious crime may be deemed from that knowledge alone to have intended to produce that result.

i. Exception: For misdemeanors, however, an inference of a supplier's intent to participate in misdemeanors cannot be drawn from knowledge of criminal use.

ii. **SUPPLIER OF GOODS AND SERVICES WITH KNOWLEDGE RULE (from Lauria)** → ***The intent of a supplier who knows of the criminal use to which his suppliers are put to participate in criminal activity connected with the use of his supplies 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 aggravated nature of the crime itself.***

1. The more serious the crime, the easier it is to draw the inference.

iii. Knowledge alone is not sufficient for mens rea of conspiracy. Mens rea is intent (conspiracy is an inchoate crime and mens rea for all inchoate crimes is intent) → intent to agree that the target crime is carried out.

iv. Evidence courts examines for drawing inferences include the volume sold.

1. All articles of commerce may be put to illegal ends, but all do not have inherently the same susceptibility to harmful and illegal use.
    a. Purposes for distinction: (1) makes certain seller knows the buyer's intended illegal use and (2) by sale he intends to further, promote, or cooperate in it. This intent, when given effect by over act, is gist of conspiracy.
        i. Looks for *informed and interested cooperation, stimulation, instigation.* Also looks for *stake in the venture.*

v. ***U.S. v. Feola*** (Fed officer assault conspiracy) → court held that conspiracy to attempt to assault fed officer was permissible even though D didn't know of federal officer status. Found intent to agree to commit an assault was present and as for it being a federal officer, D takes the victim as he finds him.

1. Mens rea for crime of conspiring to assault a federal officer – specific intent to assault a victim regardless of federal status. Incorporates an element of strict liability.
2. Applied the **Powell Corrupt Motive Doctrine** → *applies in federal conspiracy trials.* ***If you have people who agree to commit a crime, we're not going to give the benefit of the nuances of technicality that would have otherwise helped them.***

I. Actus Reus of Conspiracy

i. Actus reus of conspiracy is the agreement itself under the definition of conspiracy as an agreement by two or more persons to commit a crime.

ii. Applicable standard:

1. Not necessary for the gov't to prove an express agreement b/w alleged conspirators to go forth and violate the law.

2. Proof by the very nature of the crime, must be circumstantial and thus, inferential to an extent varying with the conditions under which the crime may be consummated.
3. Knowledge by D of all details or phases of a conspiracy is not required. It is enough that he knows the essential nature of it.
4. BLACKLETTER LAW: ***All participants in a conspiracy need not know each other; all that is necessary is that each know that it has a scope and that for its success it requires an organization wider than may be disclosed by his personal participation.***

iii. ***U.S. v. Alvarez*** (marijuana import case) → ***Government not required to prove knowledge of all of the details a conspiracy or each of its members to convict one member of a conspiracy, provided that it can establish he had knew essence of the conspiracy.*** Should have been obvious to D that criminal activity was afoot based on prior planning and concerted action necessary to carry out his role at that place at that time.
1. ***D cannot escape criminal responsibility on grounds that he did not join the conspiracy until well after its inception or because he plays only a minor role in the total scheme.***
2. ***Must be an AGREEMENT for ALL members of the conspiracy.***

iv. Overt Act Requirement
1. In some instances, conspiracy is punishable without any overt act at all.
2. Liability without an overt act:
   a. At common law, sole actus reus was conspiracy itself.
   b. Conspiracy consists not merely in the intention of two or more people, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. *So long as a design rests in intention only, it is not indictable.*
      i. Proof – matter of inference deduced from certain criminal acts of the parties accused.
3. Statutes requiring an overt act:
   a. American laws typically require an overt act, but not unusual to dispense of that requirement where conspiracy is to commit a serious offense.
   b. General Rule: Need an overt act except in extreme circumstances.
   c. Rationale for requiring overt act – manifest that the conspiracy is at work and is neither a project still resting solely in mind nor a fully completed operation no longer in existence.
      i. ***Even when an overt act is required, generally can be satisfied by acts that would be considered equivocal or merely preparatory in the law of attempts.***
4. *Whether the object of a single agreement is to commit one or many crimes it is in either case that agreement itself which constitutes*

the conspiracy which the statute punishes. The one agreement cannot be taken as several agreements for several conspiracy charges.

a. From a defense perspective, want to fit more crimes into one conspiratorial agreement.
b. Exception: If one agreement violates more than one conspiracy law though, you can be found to violate two distinct conspiracy laws.

5. ***Williams v. U.S.*** – Web of the Spider case → when all strands of apparent web are taken together with interrelations and connections formed, they form a complete web resembling a conspiracy. It "defies credulity" that all of these things can happen without an agreement.
6. ***Kotteakos v. U.S. → Pinkerton Liability says that you can be held liable for every other act committed if convicted as part of a conspiracy.***

v. Chain Conspiracy v. Wheel Conspiracy

1. Chain Conspiracy
   a. Series of agreements, all of which are regarded as part of a single large scheme in which all of the parties to the subagreements are interested. Subagreements are characterized as "links" in the overall "chain" relationship.
   b. Example: Flow of a commodity
2. Wheel Conspiracy
   a. Larger conspiracy among many participants - the success of the venture rests on the entire group
   b. ***U.S. v. Bruno*** → If D had knowledge or believed that his seller was selling him all that he possessed and had no reason to believe that there is a larger conspiracy, then he is only chargeable for the one conspiracy.
      i. However, if that is not the case then he is considered *on notice* and can be held liable for part in larger conspiracy.
   c. Example: Common center working with multiple retailers. Each retailer has individual dealing with common center.
3. Compare with: Other multiple conspiracies
   a. One participant may enter into a number of conspiracies, each involving *different persons*. All of the agreements are similar in that they have *one common member*.
4. Elements for Conspiracy (To be applied to EACH DEFENDANT):
   a. Each party (or spoke) *must know that other parties* (spokes) *exist*, even though not necessarily their precise identity, AND
   b. There must be a *community of interest* among the participants.

5. Even within a wheel conspiracy you can have a chain, and vice versa.

vi. Agreement with Member of Protected Class (Immunity)

1. ***Gebardi v. U.S.*** (Mann Act transportation) → *If protected for the substantive crime under a statute or through diplomatic immunity, etc., cannot be charged with the crime nor a conspiracy to commit that crime.*
    a. *If only two parties originally charged with conspiracy and one has a valid immunity defense, then conspiracy charge must be dismissed as well because there is no one else with whom D can be charged.*
2. ***Wharton Rule*** → Where two or more people are necessary for the commission of the substantive offense (e.g., adultery, incest, receipt of stolen property), *there can be no crime of conspiracy unless more parties participate in the agreement than are necessary for the crime.*
    a. Exception – if the crime requires two people, and there are more than two people, then Wharton rule doesn't apply.

vii. Effect of Acquittal of Other Conspirators

1. In most courts, the acquittal of *all* persons with whom D is alleged to have conspired precludes conviction of the remaining D.
    a. Exception: Rule does not apply where other parties are not apprehended, are charged with lesser offenses, or are no longer being prosecuted.
2. ***Garcia v. State*** (undercover cop murder-for-hire conspiracy) → held that statutory language determines whether conspiracy determination will be made using a bilateral approach (which requires "meeting of the minds") or a unilateral approach (which examines only the D's state of mind at time he communicated with another in furtherance of the felony).
    a. **Bilateral conspiracy** – requires two or more persons agreeing to commit a crime, each with intent to do so. In cases where person with whom D conspired only feigned his acquiescence in the plan, courts generally have held neither person can be convicted of conspiracy b/c no "conspiratorial agreement."
    b. **Unilateral conspiracy** – Addresses problem under *Gebardi*. If other person is below age of consent, has diplomatic immunity or valid defense, or is acquitted, there is no group criminality theoretically. However, 36 states have adopted a unilateral approach.
    c. *Where no new statute in state, traditional bilateral approach remains the law.*

J. Racketeer Influenced and Corrupt Organization Act (RICO)

XI. Exculpation (Criminal Law Defenses

A. Two General Categories
    i. Justification – if successful, means no crime has been committed (perfect defense when all elements are fulfilled)
    ii. Excuse – if successful, not acquitted but less severe punishment
B. Answers the question of who's not blameworthy and who's not culpable.
C. Classification of Possible Defenses:
    i. Defenses involving protection of competing interests where society would justify crime in protection of something society would justify:
        1. Self-Defense, Defense of others
    ii. Defense to commit a crime to avoid a crime
        1. Necessity, Duress, (potentially battered spouse issues)
    iii. Disproving existence of one or more elements of crime charged
    iv. Defenses of ignorance of the law
        1. Mistake
    v. Intoxication
    vi. Insanity

A. Self-Defense
    vii. Elements – Need all five for perfect self-defense:
        1. D must have been resisting the present or imminent use of unlawful force.
        2. D must have used no more force than was reasonably necessary to defend against the threatened harm.
            a. Can resist deadly force with deadly force
        3. Force used by D may not be deadly unless the force being resisted is deadly force.
            a. Refined by some jurisdictions (incl. NY) to allow deadly force to repel nondeadly sexual attack involving penetration.
        4. D must not have been the initial aggressor, unless (a/k/a right of aggressor to use self-defense):
            a. D was a nondeadly aggressor confronted with the unexpected use of deadly force, OR
            b. D withdrew after his initial aggression and the other party continued to attack.
        5. D must not have been in a position from which he could have retreated with complete safety, unless:
            a. D was at home (no duty to retreat in your own home) and sometimes at one's place of employment (depending on jurisdiction).
    viii. Can take the law into your own hands in only limited circumstances.
        1. Not all use of force is criminal, but must prove all five elements.
        2. Majority Rule – No duty to retreat. Person can use self-defense even if this could be avoided by retreating.
    ix. Imperfect Self-Defense → If all five elements *cannot* be satisfied, can still have an Imperfect Self-Defense, which results in a ***mistaken justification voluntary manslaughter***.

1. Often it is the 2nd element that fails.

x. ***People v. Goetz*** → Highest NY court applied a hybrid reasonableness test for determining if killing in self-defense was justified: *Objective reasonableness in someone who is in D's situation.*

B. Defense of Others

xi. Have a right to come to the defense of another depending upon situation.

xii. Two types of jurisdictions

1. "Stands in the shoes of" jurisdiction
    a. Much like self-defense. A can come to aid B to repel an attack by C if B would have had perfect self-defense himself in that situation. Then A who comes to B's aid stands in B's shoes.
2. "Reasonableness" jurisdiction
    a. Examined on a case-by-case basis. Can come to the aid of another and have a perfect defense when it is reasonable to do so. Typically employs the same test as self-defense.
        i. D may use defense of defense of others only if he reasonably believed that the person he assisted had the legal right to use force in his own defense. Even if the person aided had no such legal right, D still has a good defense b/c standard is a *reasonable appearance of the right to use force.*

xiii. Majority Rule: No special relationship is required to exist b/w person aided and D. Force in defense of anyone else may be used when the other requirements of defense are met.

XII. Battered Spouse Syndrome

C. *Learned helplessness* – psychological term assigned to reason wife doesn't leave and pursue other alternatives under battered wife syndrome.

D. Has been called "homicidal self-help."

E. Theory behind Self-defense is that one is protected himself from an imminent harm. Single most important element of a perfect defense is the imminency requirement. If this is accepted as a defense, it relaxes the imminency requirement, turns imperfect self-defense into perfect self-defense, which leads to complete acquittal.

F. ***State v. Norman*** (abusive marriage) → Issue was whether the danger was imminent. Majority said 'inevitable doesn't equate to imminent. May have been certain to occur at some point but not about to occur at this point in time. Majority thought she had other alternatives but she did not pursue them. Dissent argued that the question wasn't whether the threat was factually imminent, butt rather, whether D's belief in the impending nature of the threat, given the circumstances as she saw them, it reasonable in the mind of a person of ordinary fairness.

XIII. Rape

A. Basic definition → (1) sexual intercourse (2a) by force or (2b) threat of force *and* (3) without consent.

B. Model Penal Code definition:

i. A male who has sexual intercourse with a female not his wife is guilty of rape if:

1. He compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
2. He has substantially impaired her power to apprise or control her conduct by administering or employing without her knowledge drugs, intoxicants, or other means for the purpose of preventing resistance; or
3. The female is unconscious, or
4. The female is less than 10 yrs old.

ii. Rape is a 2nd degree felony.

1. Elevated to a 1st degree felony if (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties.

iii. Sexual intercourse is penetration, however slight; emission is not required.

C. ***People v. Evans*** (Airport pickup rape) → Important question in rape is not whether the victim consented, but rather it is whether the D *reasonably believed* the victim consented. ***Controlling state of mind for determination of rape is mind of the Defendant***.

D. Absence of marital relationship

i. At common law, woman must not have been married to the man who committed the act. Today, however, most states have either dropped this requirement where the parties are estranged or separated, or abolished it entirely.

E. Consent, even if given, may be ineffective in several situations.

i. *Intercourse accomplished by threats* → the failure of the victim to "resist to the utmost" does not prevent the intercourse from being rape if resistance is prevented by such threats.

ii. *Woman incapable of consenting* → If victim is incapable of consenting, intercourse is rape. Inability to consent may be caused by unconsciousness, by the effect of drugs or intoxicating substances, or by the victim's mental condition. If the victim is so insane or retarded as to be incapable of giving consent, intercourse with her constitutes rape.

iii. *Consent obtained by Fraud* → only limited circumstances

1. If victim is fraudulently caused to believe that the act is not sexual intercourse, the act of intercourse constitutes rape.
   a. E.g., D persuaded V that what was actually an act of intercourse was medical treatment accomplished by surgical instruments. D guilty of rape.

2. Fraud as to whether D is Victim's Husband (mock wedding) typically not considered rape, because there was consent.

F. Statutory Rape
   i. Victim below age of consent – crime of carnal knowledge of a female under the age of consent, even if the female willingly participated because the consent is irrelevant. Age of consent varies from state to state.
   ii. Mistake as to age – Statutory rape is a strict liability crime and thus even if D reasonably mistook the victim's age, that does not prevent liability. May, however, allow for a defense that a reasonable mistake as to age will prevent conviction if D reasonably believes the victim was old enough to give an effective consent.

XIV. Justification Defense – Necessity
A. Criminal conduct is considered justified by necessity when D reasonably believes that the conduct was necessary to avoid some harm to society that would exceed the harm caused by the conduct.
B. Measured by an *objective standard*.
   i. A good faith belief in the necessity of one's conduct is insufficient.
C. Prerequisites for a Necessity Defense:
   i. Faced with a choice of evils and chose the lesser evil
   ii. Acted to prevent the imminent harm
   iii. Reasonably anticipated a direct causal relationship b/w conduct and harm to be averted
   iv. Had no legal alternatives to violating the law
D. Elements of Necessity:
   i. Greater Harm Element – harm sought to be avoided must be greater than the harm committed
   ii. There must be no 3rd alternative that would also avoid the harm and which would be less criminal or non-criminal.
   iii. Imminence – harm must be imminent and not merely speculative future harm.
   iv. Situation must not have been caused by D himself through carelessness or recklessness putting himself in a position in which an emergency would arise.
E. Even if all elements of necessity are proven, courts have held that one cannot have a successful necessity defense for taking the life of an innocent person → theory is that it is better to die yourself than kill another who is innocent.
F. Examples of Traditional Necessity:
   i. Prisoners could escape from a burning prison
   ii. Person lost in the woods could steal food from a cabin to survive
   iii. Crew could mutiny where their ship was thought to be unseaworthy
   iv. Property could be destroyed to prevent the spread of fire
G. Economic Necessity is never a good defense.
H. Protest cases
   i. Do not satisfy the elements of necessity. Instead, they are characterized as civil disobedience. Civil disobedience is divided into two categories:

1. Direct – involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow
2. Indirect – involves violating the law or interfering with a government policy that is not, itself, the object of protest.

ii. Where D is arrested for a government protest and arrested for criminal trespass, D cannot rely on a necessity competing harms defense since there is really no harm. This is civil disobedience. The harm D claims is a value judgment that is not shared by the law in classifying it as not being harmful. Legislature has essentially said it is not a harm. Without a harm, no defense.

XV. Justification – Excuse of Duress

A. **Elements of Duress**
   i. Need a threat by a 3rd person
   ii. That produces a reasonable fear in D
   iii. That he will suffer immediate and imminent
   iv. Death and serious bodily injury.

B. Duress is based on *fear*.
   i. Threat must produce a reasonable fear in D
   ii. Also known as Compulsion or Coercion

C. Standard → D ought to be excused when he is the victim of a threat that a person of *reasonable moral strength* could not fairly be expected to resist.
   i. MPC language – *a person of reasonable firmness in his situation would have been unable to resist*

D. Valid defense (except against a homicide charge) if individual performs an otherwise criminal act under the *threat of imminent infliction of death or great bodily harm*, provide that he *reasonably believes death or great bodily harm will be inflicted on him or a member of his immediate family* if he does not perform such conduct.
   i. Threats to harm any third person may suffice to establish a defense of duress.
   ii. Regarding homicide exception – duress is a valid defense to murder if that murder occurs during the commission of a felony (resulting in a charge of felony murder) from which D is excused under a defense of duress. E.g., A compels B at gunpoint to drive to a bank which A intends to rob and during the ensuing robbery A kills bank customer C. B is not guilty of the robbery (excused under duress) and so is not guilty of felony murder of C in commission of robbery.

E. Duress is an excusable defense, not a justifiable one. Distinction reveals that criminal acts performed under duress are condoned by society rather than encouraged.

F. ***State v. Toscano*** (gambler chiropractor fake report) → threat created a "generalized fear of loss of life or injury," and thus no imminency. Should have gone to the jury.

G. Distinguishing Duress v. Necessity

i. Source of the evil
    1. Duress involves a human threat from another, while necessity involves pressure from circumstances such as physical or natural forces, not necessarily attributable to another person.
    2. Necessity essentially is a "duress of circumstances" situation.
ii. Duress is a justification, while necessity is an excuse.
iii. Duress defense does not result in a total outright acquittal – not a perfect defense or justification. Only an excuse.
iv. Self-defense is a perfect defense if you kill the aggressor.

XVI. Excuse Defense: Intoxication
A. May be caused by *any substance* (alcohol, drugs, medicine most frequently cited).
B. May be raised as a defense if the intoxication negates the mens rea that is required of the crime.
C. Employs a subjective standard so it does not matter if intoxication level was reasonable.
D. Voluntary v. Involuntary Intoxication
    i. Voluntary (Self-induced) Intoxication
        1. Intentional taking without duress of a substance known to be intoxicating.
        2. The person need not have intended to become intoxicated.
        3. Relevancy to Specific v. General Intent Crimes
            a. Good defense for Specific Intent crimes.
                i. Evidence submitted to establish that the intoxication prevented D from formulating the requisite intent.
            b. Bad defense for General Intent and Strict Liability crimes.
                i. Where malice, recklessness, or negligence is an element, voluntary intoxication is not a good defense.
                ii. NOTE: Rape is a general intent crime in every American jurisdiction.
    ii. Involuntary Intoxication
        1. Elements:
            a. Taking of an intoxicating substance
                i. Without knowledge of its nature, OR
                ii. Under direct duress imposed by another, OR
                iii. Pursuant to medical advice while unaware of the substance's intoxicating effect.
        2. Two categories for Involuntary Intoxication: Force or Mistake.
        3. Good defense for both Specific Intent and General Intent crimes. A bad defense though for strict liability crimes.
        4. May be treated as a mental illness, in which case D is entitled to acquittal in which case D is entitled to acquittal if, because of the intoxication, he meets the jurisdiction's insanity test.

E. If a specific intent crime, it does not matter whether person became voluntarily or involuntarily intoxicated before commission of crime. Person doesn't have capacity to form intent and thus mens rea.
F. Approach:
    i. In jurisdiction that doesn't characterize, simply look to see whether intoxication or mistake.
    ii. Where you need to categorize voluntariness distinction has effect.
G. Alcoholism – none of the tests apply to alcoholism. Treat that as a long, continued overindulgence as a disease that comes under the test for insanity.

XVII. Insanity Defense
A. Abnormal mental condition at thee time of the crime.
B. Result of a successful insanity defense – individual detained in a mental hospital, perhaps infinitely. Deserves treatment, not punishment.
C. When is the defense relevant?
    i. Insanity at the tie of the commission of the actus reus
    ii. Insane at the time of arraignment
    iii. Insane at the time of trial
    iv. Insane at the time of allocution (point in trial where D has opportunity to say something on his own behalf before sentencing)
    v. Insane at the time of execution of the sentence (i.e., time scheduled to show up to go to prison) or at time to be executed (*Ford v. Wainwright* → made it unconstitutional to execute insane under 8th amendment cruel and unusual punishment).
D. Test for all of the above except for relevancy at time of actus reus:
    i. Does D understand what is happening at that point?
    ii. Is D able to participate at the time of his defense.
E. Four tests for Insanity:
    i. M'Naghten Test
        1. Must be clearly proven that at the time of commission the party accused was laboring under such a defect of reason, from the disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.
        2. Definable Terms:
            a. Mental disease or defect – no agreement on definition. Left to the doctors, but they don't decide on legality of the insanity.
            b. Know or Knowledge – two interpretations:
                i. Strict M'Naghten → whether knowledge means being intellectually or cognitively (strictly) aware of something; ability to reason. Wrong means only a legal wrong.
                ii. Loose M'Naghten (easier for D to win than in strict) → Whether someone fully (emotionally)

appreciates the nature and quality of the act. Wrong means not only legal wrong, but moral wrong also.

c. Nature and quality of the act → assumed to mean the physical consequences of D's behavior
d. Wrong – two interpretations:
    i. Legal wrongfulness → wrong b/c law says its wrong, e.g., killing is against the law.
    ii. Moral wrongfulness → may believe that something is against the law but believes it is justified on this occasion.

3. **Elements of Test under M'Naghten Rule:**
    a. Mental disease or defect
    b. manifested in
    c. the inability to
        i. "know" difference b/w right and wrong OR
        ii. understand the nature and quality of the act.
4. Two most important aspects – knowledge and wrongfulness
5. Application:
    a. D with delusions (false beliefs) – necessary to determine whether actions would have been criminal if the facts had been as he believed them to be.
        i. Example: A, b/c of mental illness, belived B wanted to kill him. A killed B. A is not entitled to an acquittal on insanity ground under M'Naghten b/c even if A's delusion had been accurate, he would not have been legally entitled to kill B simply b/c B wanted to kill him.
    b. Belief that acts are morally right – D is not entitled to an acquittal merely b/c he believes his acts are morally right, unless he has lost the capacity to recognize that they are regarded by society as wrong.
    c. Inability to control oneself – under traditional M'Naghten interpretation, it is irrelevant that D may have been unable to control himself and avoid committing the crime. Loss of control b/c of mental illness is no defense.
6. Criticism of M'Naghten:
    a. Test is too narrow and emphasizes the wrong thing b/c there may be other consequences under which person may not be held blameworthy.
    b. Believes it shouldn't focus on capacity to know difference b/w right and wrong, and instead should look at whether person could control his or her behavior.

ii. Irresistible Impulse Test (II)

1. Every jurisdiction that has II also has M'Naghten. In those jurisdictions, D is entitled to acquittal if he meets either test, thus

easier for D to have II jurisdiction b/c can fulfill either of two elements instead of just one.

2. Elements:
    a. Mental disease or defect
    b. Manifesting itself in an
    c. Inability to
        i. Control one's actions
        ii. Conform one's conduct to the law.
3. Contrary to name, it need not come upon D suddenly.
4. Strict II jurisdictions – policeman at the elbow test (even if cop was standing next to D, he would still have committed the crime).
5. Loose II jurisdictions – need not be a total lack of control
6. Example: If God told him to do it is the excuse, then likely convicted under M'Naghten or II test.

iii. Durham Test

1. Test - An accused is not criminally responsible if his unlawful conduct was the product of a mental disease or defect.
    a. Defining "product of" → if act would not have been committed *but for* the disease.
2. Broader than either the M'Naghten or II tests
    a. Intended primarily to give psychiatrists greater liberty to testify concerning D's mental condition.
    b. Allows for even a slight disease or defect. M'Naghten and II take into account serious disease or defect.
3. Focuses on entire integrated mental state.
4. Law in only a few jurisdictions.

iv. Model Penal Code Test

1. Test – Not criminally responsible if at time of such conduct, as a matter of disease or defect, D lacked *substantial* capacity either to:
    a. Appreciate the criminality [wrongfulness] of his conduct OR
    b. To conform his conduct to the requirements of the law.
2. Definition:
    a. "appreciate" - Not just cognitive knowledge term.
    b. "Criminality [wrongfulness]" - analogous to strict and loose interpretations of M'Naghten. MPC didn't take a position on this, instead bracketing alternative.
3. Tries to broaden II and M'Naghten tests → Uses portions of loose M'Naghten and loose impulse tests.

v. Summary Continuum

1. PRO-GOV'T --- M'N -- II ----- MPC ----------Durham -- PRO-D

F. What do you do when a person doesn't know difference b/w right and wrong?

i. Mistake of law (ignorance of the law) not excusable, unless it is a crime of *omission* which reasonable person would not have known of law's existence.

G. Temporary Insanity – employs the same test elements as jurisdictional test, but must prove that D fulfilled elements at the time of the commission of the crime, but D is sane now. Very difficult – most common example: battered spouse as a compromise.
H. Guilty but Mentally Ill (GBMI) (a/k/a GBI – guilty but insane) → does not exist in the federal system. Simply a change in language to reflect person committed actus reus, but did not possess the requisite mens rea.
    i. Effect – Some jurisdictions just a language change. Others all for a D to get a fully suspended prison sentence but require D to be incarcerated in mental hospital. Should D then be medically cleared and time remains on original sentence, prison sentence is unsuspended and incarcerated in prison.
I. Mental disease or defect is highly relevant because it goes against mens rea.