Criminal Law

I. POLICY for the creation & punishment of crimes
   A. Individual freedom <VS> Protection of person & property
   B. Preset Rules / absolute equality before the law <VS> Judicial discretion / Flexibility of the law
      1. Can the law be codified?
      2. If not, does such ambiguity create uncertainty for consequences of alleged criminal acts?
   C. Victim’s interest <VS> public/society’s interest
      1. Should certain conduct constitute a crime?
         a) **Tort**
            i) private wrong against an individual
            ii) purpose - make the victim whole through monetary compensation
         b) **Crime**
            i) public wrong against society
            ii) purpose - without regard to making the victim whole, but rather, to vindicate society and punish transgressors
      2. If so, how much should the transgressor be punished? (‘grading’)
   D. How much proof Needed before conviction?
      1. Policy/societal decision with regard to how much proof is required before conviction is that courts need to be closer to absolute certainty
II. Sources of Crimes

A. Common Law Crimes
   A crime enforced by the judiciary court in the absence of a statute
   1. Permits flexibility in the discretion of the court
      a) Can punish bad people to allow for societal changes
      b) Plug loopholes legislature forgets
   2. But may create uncertainty in lawfulness of conduct if no precedent
      a) No notice about how to act
      b) Allows judges to act as legislature
   3. No Federal common law crimes
      Federal criminal law is governed entirely by statute with the exception of Washington DC
   4. Majority – retain common law crimes
   5. Minority – abolished common law crimes

B. Statutory Crimes
   Many state legislatures have enacted statutes as the primary source of criminal law either to codify the common law or to replace it but are limited by (all elements)
   1. State Constitution
   2. US Constitution
      The US Constitution prohibits (all elements)
      a) Ex post facto legislation Article 1, §§ 9 & 10
         A law may not operate retroactively to (any element)
         i) Make criminal an act that when done was not criminal
         ii) Aggravate a crime or increase the punishment for it
         iii) Change the rules of evidence to the detriment of the criminal defendant in a case
         iv) Alter the law of criminal procedure to deprive a defendant of a substantive right
      b) Excessive bail or fines
      c) Deprivation of life, liberty, or property without due process of law 5th & 14th Amend.
      d) Bills of attainder
         A legislative act may not inflict punishment or deny a privilege without a judicial trial
      e) Cruel and unusual punishment 8th Amend.
         i) Elements
            Punishment violates the Constitution under cruel and unusual punishment if (all elements)
            a) Purposeless and needless imposition of pain and suffering
            b) Excessive length or severity disproportionate to the offense charged
         2. i) 3 strikes law
            Ewing v CA (sentence of 25 years to life for shoplifting 3 golf clubs under 3 strikes rule not violation of 8th Amendment because doesn’t require strict proportionality between crime and sentence, but rather only prohibits extreme sentences that are grossly disproportionate to the crime)
            1) BUT isn’t this grossly disproportionate?
            2) Defer to the legislative sentencing guidelines
         iii) Capital Punishment
            1) IS Constitutional
               Gregg v. Georgia (GA statute designed in response to Furman v. GA, where Supreme Court overturned death sentences deemed to be arbitrary,
capricious, and discriminatory. Court upheld the new statute). To avoid being excessive under the 8th Amendment, the death penalty law must:
   a. Conform to contemporary societal standards of decency;
   b. Accord with the dignity of a human being;
   c. Must not be excessive
   1. Achieve a legitimate purpose of punishment
   2. Not grossly out of proportion with crime
   d. Penological reasons for the DP
      1. Retribution – Valid expression of society’s moral outrage
      2. Deterrence – Unclear, defer to legislature

2) Evidence - General Discriminatory Effect
McClesky v. Kemp (Statistical study that shows general risk of racially discriminatory death sentencing held not sufficient to prove that a specific sentence violates the 8th or 14th Amendment)
   a. Controversial 5-4 vote. Powell later acknowledges regret.
   b. “test of constitutionality can’t require perfection”
   c. Better addressed by the local legislature.

3) Evidence - Victim Impact
Payne v. Tennessee (SC overrules itself to allow victim impact evidence at capital sentencing during the penalty phase)
   a. If D can prevent evidence to mitigate penalty, then prosecution should be able to present evidence about the special qualities of the victim that are not relevant to the D’s blameworthiness.
   b. Controversial on three grounds
      1. Only foreseeable harm has been considered as relevant in the past, no unforeseeable impact on family.
      2. Evidence of specific harm supports the idea that some victim’s lives were more valuable than others.
      3. Dissent suggests this is a political decision for legislatures, not the Court, to decide.

4) Sentencing – Allow Evidence about D’s background
Lockett Rule (Death penalty structure violates the 8th Amendment if it keep the jury from considering any evidence regarding D’s character and the circumstances of crime that are relevant to sentencing).

5) Jury - Aggravating Circumstance
Ring v. AZ (Jury must find each element of the crime beyond a reasonable doubt. In most jurisdictions, there needs to be an aggravating circumstance to apply death penalty. The JURY, not a judge, must determine the aggravating circumstance beyond a reasonable doubt.)
   a. MPC §216.6 – provides for a post-conviction hearing at which the parties may introduce evidence of statutory aggravating & mitigating factors relating to the murder and the defendant.

6) Mens Rea – Major Participation is Enough
Tison v. Arizona (after brothers help father and cell-mate escape from prison, they waited down a family of four. To their surprise, their dad and cell-mate shot and killed the family).
   a. Major participation in the felony, combined with reckless indifference to human life is enough to supply the culpability necessary to constitutionally impose the death penalty.
      1. Controversial 5-4 decision.
i. Intent to kill is not the only consideration
ii. Non-participants can be sentenced to death if they are aware that their actions are likely to result in someone's death AND they were centrally involved in the events leading up to the deaths.

b. Dissent: the state's ultimate sanction must be reserved for those whose culpability is greatest.

7) NO death for adult rape
   Coker v Georgia (felon wrongfully sentenced to death after escaping from prison, breaking into a house, raping a wife, and stealing their car)
   a. BUT may be better left to the states
   b. Other exceptions:
      1. Mentally retarded individual at the time of the crime
      2. A person younger than 16 at the time of the crime

2). Death for adult rape excessive
   Coker v Georgia (felon wrongfully sentenced to death after escaping from prison, breaking into a house, raping a wife, and stealing their car)
   a. BUT may be better left to the states
   2 NOT 3 strikes law
   Ewing v CA (sentence of 25 years to life for shoplifting 3 golf clubs under 3 strikes rule not violation of 8th Amendment because doesn't require strict proportionality between crime and sentence, but rather only prohibits extreme sentences that are grossly disproportionate to the crime)
   a. BUT isn't this grossly disproportionate?
   b. Defer to the legislative sentencing guidelines

d) Excessive bail or fines

c) Deprivation of life, liberty, or property without due process of law 5th & 14th Amend.

C. Constitutional Crimes
   1. Treason
      The US Constitution defines treason as a crime IF (any element)
      a) Levying war against the US
      b) Adhering to enemies against the US
      c) Giving enemies against the US aid and comfort
      Two witnesses must testify to the same overt act OR the person must confess

D. Administrative Crimes
   An administrative agency may have the power, if given such by the legislature, to prescribe rules that may be punishable as a crime if violated, BUT the legislature may NOT (all elements)
   1. delegate the power to determine which regulations carry criminal penalties
   2. delegate the power of determining guilt or innocence

E. Model Penal Code
   Although it is NOT a source of law, it was a scholarly endeavor to compile a comprehensive and coherent body of criminal law. Some states have adopted much of the MPC into state statutes.

III. Classification of Crimes
   A crime may be either (any element)
A. Felony
   In most states, all crimes punishable by death or imprisonment exceeding 1 year – at common law the only felonies were murder, manslaughter, rape, sodomy, mayhem, robbery, larceny, arson and burglary

B. Misdemeanor
   In most states, all crimes punishable by imprisonment for less than 1 year or by a fine only
IV. Requirements of all crimes
In substantive criminal law, the relation between the legislature’s creation of statutory crimes and the court’s enforcement of those crimes are governed by the (all elements)

A. Principle of Legality
The Principle of Legality requires that punishment be only (all elements)

1. To the extent the law allows

2. For violation of previously defined conduct / law
The Constitution prohibits (all elements)

   a) Retroactive legislative lawmaking
      New legislation and legislative expansion of existing statutes are prohibited
      Ex Post Facto

   b) Retroactive judicial lawmaking
      Unambiguous and clear statutes created by the legislature must be (all elements)
      i) Interpreted within their plain meaning / intent to include only those offenses
         coming clearly within their import of their language
         Courts cannot create an offense by (any element)
         1) Enlarging a statute
         2) Inserting or deleting words
         3) Giving the terms used false or unusual meanings
            Keeler v Superior Court (killing of fetus, when “human being” used in statute)

   c) The analogy principle
      A person may NOT be convicted and punished despite the absence of any defined
      criminal behavior, even if the actions of the accused are perceived to be inimical to the
      socio-political order
      Commonwealth v Mochan (principle no longer followed – ‘receptor statutes’ convicted
      for common law misdemeanor not codified expressly as an offense for telephoning a
      woman and making lewd and obscene comments to her)

B. Void for Vagueness Doctrine
Wholesale legislative delegation of lawmaking authority to the courts is forbidden such that statutes
created by the legislatures must be (all elements)

1. Clear and not Void for Vagueness
   A statute must be sufficiently definite to a reasonable degree of certainty to (all elements)
   a) Give notice of prohibited conduct
      Notice must be given of the required conduct with sufficient definiteness that ordinary
      people can understand what conduct is prohibited
   b) Guide enforcement of the law
      The law must establish guidelines to prevent arbitrary and discriminator enforcement
   c) Guide the judge in its application
   d) Guide the lawyer defending the one charged with violation
      City of Chicago v Morales (statute prohibiting loitering of criminal street gang members
      unconstitutionally vague because its arbitrary standard of people remaining in one place for
      no “apparent purpose” provided insufficient limits on the enforcement discretion of the
      police and insufficient notice to the public of what conduct what prohibited)
      In Re Banks (peeping tom statute sustained challenge to it for vagueness)
2. **Interpreted to give effect to the legislative intent**
   - a) Purpose of statute as a whole
   - b) Phraseology
   - c) Words ordinary or technical
   - d) Common law before the statute
   - e) Mischief to be remedied
   - f) The remedy / end to be accomplished
   - g) Preamble, title, etc.
   - h) Legislative history of an act
   - i) Earlier statutes
   - j) Previous interpretations of same / similar statutes

Words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute in harmony with its purpose.

C. **Rule of strict construction**
   Courts must resolve uncertainties of penal statutes in favor of the accused

   **1. Tie-Breaker – Lenity doctrine**
   When all other interpretive means leave the court unable to determine the meaning of the statute, it will be construed strictly against the government.

   *US v Foster* (court defers to the rule of lenity and holds that a drug trafficker who had a gun in a plastic bag in his truck bed was not guilty of ‘carrying’ a firearm)

   a) *Issue of how one frames a statutory interpretation issue*

D. **POLICY**
   These doctrines ensure *(all elements)*
   **1. Fair Warning / Notice**
   A statute must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, *while at the same time capturing the nature of the crime*
   **2. Protection against arbitrary and discriminatory enforcement**
   A statute must not encourage arbitrary and erratic arrests and convictions.
   **3. Exercise of basic freedoms**
V. Procedure for punishment of crimes
   A. Pre-Trial
      Before trial, the accused is entitled to *(all elements)*
      1. Probable cause before arrest
         A person cannot be arrested unless there is a substantial chance that they have committed the
         offense under investigation [Illinois v Gates, US Constitution](#).

      2. Possible preliminary hearing for justified arrest
         In many states, a person arrested is entitled to a preliminary hearing within two weeks to
determine whether the arrest was justified.

      3. Possible indictment by a Grand Jury
         In most states and in the federal system, a grand jury is presented with evidence against the
         accused and determines if such is enough to prosecute the accused.

      4. Issuance of an information or indictment
         Document that sets out the formal charges against the accused and the basic facts relating to such

   B. Trial
      During trial, the accused is entitled to *(all elements)*
      1. Speedy and public trial
         The Constitution guarantees the accused a speedy and public trial [6th Amend.](#).

      2. Trial by jury
         The Constitution guarantees the accused a trial by jury composed of [6th Amend.](#).
         a) At least 6 jurors
            i) [Williams v Florida, Ballew v Georgia](#)
            ii) The federal system and most states consist of 12 jurors

         b) At least a substantial majority for verdict
            i) [Johnson v Louisiana](#) (9-3 verdict upheld)
            ii) The federal system and most states consist of unanimous verdicts

         c) A fair cross-section of the community
            i) [Taylor v Louisiana](#)
            ii) A large distinctive group of persons must not be systematically excluded from the
                jury pool for illegitimate reasons

         d) Impartial jurors
            i) A juror’s state of mind in reference to the issues or parties involved in the case
               MUST NOT substantially impair her performance as a juror in accordance with
               the court’s instructions on the law. [Adams v Texas](#)
            ii) A juror may be dismissed upon examination by either
                1) [Voir dire](#) (for cause) – dismissed for partiality
                2) [Peremptory](#) – dismissed because believed to be biased, but whose
                   partiality was not adequately proven through voir dire.
                   Jurors cannot be dismissed based solely on
                   a. Race
                   b. Gender
                   [14th Amend.](#)
3. **Proof beyond a reasonable doubt**

Society has decided that the factfinder must be persuaded beyond a reasonable doubt of every fact necessary to constitute the crime charged. Due Process Clause of 14th Amendment

| Wild guess | Preponderance | Clear & convincing | Beyond reasonable doubt | 100% certainty |

a) **Defined**
   i) Subjective state of near certitude of guilt *Jackson v Virginia*
   ii) Not quantifiable

b) **Purpose**

   The reasonable doubt standard is a *policy decision* that serves to *(all elements)*
   i) Lessen the chance of convicting an innocent person
      1) Reflect society’s decision to chance releasing a guilty person in exchange for attempting to ensure that no innocent person is punished
   ii) Heavy burden protects citizens from the power of the state

c) **Instructions to jury**

   The Constitution neither prohibits an instruction nor requires it *Victor v Nebraska*
   i) **IF instruct the jury**
      1) No particular words or form must be used
      2) BUT there must be no reasonable likelihood that an instruction as a whole would allow a conviction insufficient to meet the standard
         *Victor v Nebraska*

4. **Presumption of innocence**

   **a) Circumstantial Evidence**

   Circumstantial evidence *alone* is not enough to convict a defendant
   i) **EXCEPTIONS**
      1) Totality of the circumstances are inconsistent with any reasonable hypothesis of innocence
         *Owens v State* (drunk driving conviction upheld, despite based entirely on circumstantial evidence: passed out in running, parked car in a driveway not his own with beer cans)

   **b) Jury Nullification**

   A jury has the ultimate power to render any verdict, and judges cannot force a jury to render a certain verdict, but can only dismiss a case for legal insufficiency
   i) **Discouraged**
      The power of the jury to acquit despite not only overwhelming proof of guilt but despite the jury’s belief, beyond a reasonable doubt, of guilt, is merely a power that is unavoidable and is undesirable, such that it should not be advertised
      *State v Ragland* (convicted felon charged with possession of a weapon - his contention that the judge erred in instructing the jury that they ‘must’ convict, because it conflicting with the jury’s nullification power, not upheld)
   ii) **Purpose**
      1) Protection against governmental oppression
      2) Conscience of the community protects against socially undesirable convictions
      3) *BUT also permits a group of lay persons to make a decision based on reasons other than the law*
         a. Based on a whim
b. *Based on bias*

**iii) Factors considered by a jury**

Jurors consider

1) Personal characteristics of the defendant
2) Degree of harm caused
3) Contributory fault
4) Morality of the law violated
5) Sufficient punishment or harshness of punishment
6) Improper bringing of the case by police or prosecutor
VI. Rationale for punishment of crimes

A. Punishment Defined
   Punishment is (all elements)
   1. A judgment of condemnation
   2. Involving harmful or unpleasant consequences
   3. Imposed by one who has authority to do so
   4. Directed at agents who are responsible
   5. For a breach of some established rule of behavior

B. Methods of punishment
   1. Death
   2. Imprisonment
   3. Shaming
      a) Stigmatizing publicity – publicize offense (ad in paper)
      b) Direct Stigmatization – individual publication of offense (affix sign to car)
      c) Public Contrition – individual apologies (steps of city hall and apologize)
      d) Self debasement – individual dirty work – (clean manure)
      e) Public humiliation (wearing dresses)

C. Theories of Punishment
   1. Utilitarianism / forward-looking
      Punishment is justified because of supposed benefits that will accrue from its imposition
      a) General deterrence
         Other persons, contemplating committing crimes, and learning of the threatened punishment, will decide not to commit crimes
         The benefits of general deterrence depends on
         i) Criminal’s perceived risk of arrest, detection, and conviction
         ii) Nature of crime
         iii) Nature of punishment
         iv) Type of offender (repeat, etc.)
         US v Jackson (life sentence permissible after robbed bank day after prison release)
         1) BUT no specific deterrence because just robbed bank again
      b) Individual/Specific deterrence
         The defendant himself will decide not to commit future crimes
         i) BUT some crimes can’t be deterred – impulse/accidents, insanity, drunkenness
            People v Superior Court (Du) (liquor store owner convicted of voluntary manslaughter after [allegedly accidentally] shooting a shoplifter in back of head, only given probation because imprisonment unnecessary to accomplish utilitarian ends and lack the criminal sophistication for retributive ends)
         1) Utilitarian – is it possible to deter accidental crimes?
         2) Retributivism – is the owner deserving of punishment?
      c) Incapacitation
         The imprisoned or dead perpetrators are physically prevented from committing additional crimes if released
         i) BUT could argue ‘replacement phenomenon’ whereby putting one criminal in jail merely frees the criminal market up for another criminal
      d) Reform
         Punishment of criminals operates to rehabilitate them
         i) BUT past efforts generally unsuccessful
e) Denunciation
Punishment operates to denounce behaviors considered to be criminal

f) **BUT may fail in extreme circumstances, leaving only moral issues**
   
   *Queen v Dudley* (men stranded on a boat eat the weakest to survive)

   i) Can the law handle such a situation??

2. **Retributivism / backward-looking**

   Punishment is justified *only* because people who commit crimes deserve punishment, such that moral culpability is a sufficient reason for society to punish culpable wrongdoers.

   a) **Negative vs. Positive – punishment of the innocent**
      
      i) **Negative**
      
      1) Morally wrong to punish the innocent *even if society would benefit*

      ii) **Positive**
      
      1) The innocent must *never* be punished
      
      2) The guilty must *always* be punished

   b) **Assaultive vs. Protective – rights of criminals**
      
      i) **Assaultive**
      
      1) Criminals have no rights at all
      
      2) Death is a justifiable penalty for some offenses

      ii) **Protective**
      
      1) Criminals have a right to be punished
      
      2) Punishment is a way for the wrongdoer to pay his debt to the community and return it to moral equilibrium

   c) **Normative theory – how things should be**

   d) **Responds to empirical uncertainties of utilitarianism – how do you know deters, etc?**

---

**VII. Social Harm**

**A.Result Element / Result Crimes**

The law punishes for an unwanted outcome

**B.Conduct Element / Conduct Crimes**

The law punishes specific dangerous behavior

**C.Attendant Circumstances**

A condition that must be present in conjunction with the prohibited conduct or result, in order to constitute the crime
Elements of a Crime

VIII. VII. Elements of a Crime

A crime which serves as the basis for a criminal offense requires (all elements)

A. Actus Reus

A guilty act has been committed by a defendant IF he (any element)

1. Voluntarily acted

The defendant’s act must be voluntary such that it must be a conscious exercise of free will, beyond mere thought so that society is willing to hold the defendant liable because of the present or potential harm he poses to society

a) Purposes of requiring voluntary act
   i) Must harm society
   ii) Moral accountability
   iii) No method to deter
   iv) Identifiable occurrence to minimize multiple prosecutions.

Martin v State (drunk man involuntarily and forcibly taken to highway)

1.2. NOT involuntary acts

An act will NOT be the basis for criminal liability IF it is (any element)

a) Reflexive or convulsive
b) Hypnosis
c) Unconscious or asleep

d) Conduct that is not the product of the actor’s determination

Martin v State (drunk man involuntarily and forcibly taken to the highway by police officers, so not guilty of public drunkenness because must act for each element of crime)

d) Mere thought

Society does not punish people for mere bad thoughts until and unless they turn into acts because (all elements)

e) i) Difficult / impossible to prove
   ii) Scope of liability would be dramatically increased
   iii) Would result in arbitrary and discriminatory enforcement
   iv) No harm has occurred
   v) BUT could be a strong deterrent to continuing through with crime and would increase the safety of the public

e) Conduct that is not the product of the actor’s determination
f) Exceptions
   i) Defendant knows it may occur

People v Decina (defendant knew subject to epileptic seizures, so the voluntary act of getting into the car and driving satisfies the voluntary act of the crime)

ii) Induced Voluntarily

State v Utter (drunken, trained in combat dad stabs son, such that his unconsciousness was induced voluntarily – but not enough evidence to convict)
Identifiable occurrence to minimize multiple prosecutions

2.3. Failed to act

An omission of an act will serve as a basis for criminal liability if a defendant (all elements)

a) Knows or should know of facts giving rise to

A defendant must be aware of the facts creating a duty to act, or in some situations, the law may impose a duty to act (lifeguard)

A legal duty is owed by one individual to another. A legal duty to act

b) A legal duty may be imposed by (any element)

Statute

a. Reporting an accident
b. Filing an income tax return

Status relationship

a. Husband – wife
b. Parent – child

c. Master – seaman

Contractual duty

a. Lifeguard
b. Nurse

Voluntary assumption of care for another

A moral duty will not be sufficient

Creation of a risk of harm to another

Otherwise, slippery slope

Examples

a. Hughes v State (bystander effect when 38 people heard victim scream, but no one called the police)
b. Teenager watches friend rape and murder a girl in a bathroom, walks out and does not report it

BUT Kuntz v State (woman had duty when she returned to dying man she stabbed in self defense and drove off)

People v Beardsley (intoxicated male not liable for the death of his female friend who took morphine pills while she was drunk because reluctant to find legal duty not defined by statute)

Barber v Superior Court (doctor not liable for death of his patient when he removed ‘heroic’ life support because removal of life support equipment from a comatose patient, unlikely to recover, is not an affirmative act, but an omission in accord with the patient’s wishes)

The cessation of “heroic” life support measures is not an affirmative act but rather a withdrawal or omission of further treatment
• Reasons why it isn't a crime for an omission
  • Ambiguity
  • Line-drawing cases
  • Bystanders often make things worse
  • Freedom

3.4 Possession as an “Act”
A person may possess something if they have the defendant (any element)

a) Knowingly procured or received the thing possessed
b) Exercised control for a sufficient period to have been able to terminate possession
c) Regardless of the awareness of the illegality of possession

i) Possession is an act, within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

d) Possession can be joint or concurrent
B. Mens Rea

1. **Purpose of requiring mens rea**
   Mens Rea is usually required in order to distinguish between
   a) Acts performed incidentally or accidentally
   b) Acts performed by one with a guilty mind
      i) **Retributive**
         1) More blameworthy – one is morally culpable and subject to punishment only if he had a *real choice* in his conduct
      ii) **Utilitarian**
         1) Rehabilitation of the offender possible for persons who *know* they need treatment
         2) Deterrence possible for persons who are *thinking about* the possible penalties

2. **Definitions**
   A defendant has a guilty mind if he has the appropriate fault required under either
   a) Common law

i) **Specific Intent**
   It is necessary to identify specific intent because *(all elements)*

   a) **Need for Proof**
      The prosecution must produce evidence tending to prove the existence of the specific intent as it cannot be inferred from the doing of the act.

   b) **Applicability of certain defenses**
      Some defenses, such as voluntary intoxication and unreasonable mistake of fact, apply only to specific intent crimes.

      a) **Common Law**
         Depending on jurisdiction, specific intent may exist if the offense requires *(any element)*
         i) **A specific mental state**
            1) Elemental meaning of mens rea – not guilty of an offense, even if have culpable state of mind, if lack mental state specified in definition of crime
         ii) **A more culpable mental state**
            1) Intentionally / Purposefully
            2) Knowingly
         iii) **A special mental element beyond the requirement for the actus reus**
            A special mental element may exist if the offense requires *(any element)*
            1) An intention by the actor to commit some future act, separate from the *actus reus* *(e.g. possession with intent to sell)*
            2) A special motive or purpose for committing the *actus reus* *(e.g. offensive contract with intent to cause humiliation)*
            3) Awareness of an attendant circumstance *(e.g. Intentional sale to a person known to be under 18)*

      b) **MPC**
         Specific intent may exist if the offense requires *(any element)*
         i) **Intentionally / Purposefully**
            A person acts purposefully if he acts with a *conscious objective* or desire to achieve the result anticipated.
            1) **Subjective Standard**
ii) Knowingly
Person acts knowingly that result with be achieved IF he possesses (any element)

1) Actual Knowledge
2) Awareness of practical certainty (high probability)

State v Nations (club owner not convicted of crime when hired 16 year old
to dance in her club because applicable code required actually knowledge,
BUT would have been convicted under MPC since high probability)

3) Willful Blindness of learning of such knowledge

US v Jewell (defendant's willful blindness of learning what was in a secret
compartment found equivalent to knowledge)

4) EXCEPTION - IF he actually believes otherwise
5) Subjective Standard

3. General Intent
Generally, all crimes require 'general intent,' which is an awareness of all factors constituting the
crime (aware that acting in the proscribed way and that any attendant circumstances required by
the crime are present)

a) Common Law

2) Existence
Depending on the jurisdiction, specific intent may exist IF the offense requires (any
element)

a. A specific mental state
1. Elemental – not guilty of an offense, even if have a culpable state of mind, if
lack the mental state specified in the definition of the crime

b. A more culpable mental state
1. Intentionally / Purposefully
2. Knowingly

c. A special mental element beyond the requirement for the actus reus
The special mental elements required may exist if the offense requires (any
element)
1. An intention by the actor to commit some future act, separate from the actus
reus
   i. possession with intent to sell
2. A special motive or purpose for committing the actus reus
   i. offensive contract with intent to cause humiliation
3. Awareness of an attendant circumstance
   i. Intentional sale to a person known to be under 18

ii) General Intent

4) Existence
Depending on the jurisdiction, general intent may exist IF the offense requires (any
element)

a) No specific mental state
1. Culpability meaning of mens rea – guilty of a crime if commit the
social harm of the offense with any morally blameworthy state of mind

b) A less culpable mental state
1. Recklessness
2. Negligence
c.iii) Any mental state solely relating to the actus reus

b) MPC

General intent may exist IF the offense requires (any element)

i) Recklessly

A person acts recklessly if he consciously disregards a substantial and unjustifiable risk that the result anticipated will be achieved, such that the disregard is a gross deviation from the standard of conduct.

1. Objective Standard with regard to unjustifiable risk
2. Subjective Standard with regard to conscious disregard

ii) Negligently

A person acts negligently if he should be aware of a substantial and unjustifiable risk that the result anticipated will be achieved, such that it is a gross deviation from the standard of conduct.

1. Objective Standard with regard to unjustifiable risk
2. Objective Standard with regard to should have been aware
3. NOT merely reasonable person standard used in torts – must have taken a very unreasonable risk in light of usefulness of conduct, knowledge of facts, and nature and extent of harm may be caused

4. Inference of intent from act

Intent may be inferred merely from the doing of the act

People v Conley (reasonable inference of intent to cause permanent disability from action of hitting another in the face with a wine bottle, causing extensive injuries)

ba) NOT presumption that a person intends the ordinary/natural and probable consequences of voluntary acts

It is unconstitutional for a judge to assume such because it would relieve the prosecution from its obligation to prove every element of a crime beyond a reasonable doubt

5. Transferred intent

Intent may be transferred from an intended object to the one actually harmed

e)a) BUT may be merely a legal fiction because the law speaks in terms of an unlawful intent to harm a object, not the object intended

6. Interpreting intent

a) Common Law

A mens rea term placed at the beginning of a statute modifies all phrases

b) MPC

A single mens rea term in a statute modifies each actus rea element of the offense

i) Exceptions

1. The legislature plainly indicates a contrary purpose
2. The actus reus term is an attending circumstance
   a. E.g. intentionally breaking and entering the dwelling house of another = intended to break and enter, but not indeed the structure to be a dwelling house
3. Punctuation sets off the phrase containing the mens rea term from the rest

US v Morrison (Statute construed as Congress intending the mens rea requirement to modify the access phrase, but not the damages phrase, such that a computer hacker who intentionally unleashed a worm virus onto the
4.7 Motive Distinguished NOT Motive

The general intent to commit a crime is distinguished from the motive for a crime, which is merely the reason or explanation underlying the offense.

a) A good motive will not excuse a criminal act
b) A lawful act done with a bad motive will not be punished

8. Malice Distinguished NOT Malice

No ill-will or wickedness towards the object of the crime is required, BUT it may provide evidence towards the intent

Regina v Cunningham (thief who stole a gas meter causing a leak which asphyxiated a woman not convicted based on the jury instructions which mis-instructed on ‘malice’)

EXCEPTION - STRICT LIABILITY

A strict liability offense does not require awareness of all the factors constituting the crime and are traditionally disfavored such that some indication of legislative intent is required to dispense with mens rea as an element of a crime

Assume that mens rea is required for a crime, even if statute is silent IF has a large punishment and based on common law / legislative history

9.

a) Public Welfare Offenses

Criminal liability may attach without regard to mens rea if it involves (all elements)

i) Regulatory Offenses

1) Liquor laws
2) Pure food laws
3) Antinarcotics laws
4) Traffic laws
5) Sanitary, building, and factory laws

ii) Light penalties or fines

Strict liability for public welfare offenses generally involve light penalties, requiring small fines and no imprisonment.

Staples v US (violation of statute requiring registration of automatic weapons found not to be strict liability because harsh penalty inconsistent with such, despite finding a modified AR-15 civilian rifle in home)

b) Statutory Rape

Statutory rape is a strict liability offense

Garnett v State (Mentally challenged man held liable for statutory rape with a 13 year old whom he believed to be 16 – mistake of age no defense to strict liability of statutory rape)

c) If statute silent - Framework

If a statute is silent on mens rea, to determine if a crime is a strict liability offense

i) Is a crime a strict liability crime under common law?

ii) If yes, did the legislature deviate from the common law?

1) If no (silent) ➔ strict liability
2) If yes (mens rea) ➔ not strict liability

d) POLICY ARGUMENTS

i) Argument for strict liability
1. Eases prosecution’s proof/burden
2. Lessens court burden to promote social compliance w/ regulatory schemes

ii) **Argument against strict liability**

1. Conviction of people lacking intent to commit crime / knowledge of illegal conduct
2. Undermines notion that criminal justice system punishes only those who perform acts with sufficiently culpable mental states
3. Strict liability legislation does not deter

10. **Mistake of Fact**

A mistake of fact is a defense to an offense **IF** it negates the relevant mens rea required for conviction of that offense, such that it is a defense to an offense that requires (any element)

a) **Specific Intent**

An defense to an offense that requires specific intent exists **IF** a mistake is (all elements)

i) **Honest**

ii) **Regardless of reasonableness**

People v Navarro (man not guilty of theft as he had no specific intent to steal four wooden beams from a construction site because he thought they were abandoned, even though such a belief may have been unreasonable)

b) **General Intent**

An defense to an offense that requires general intent exists **IF** a mistake is (all elements)

i) **Honest**

ii) **Reasonable**

Reasonableness is necessary because general intent crimes only require a morally blameworthy state of mind rather than a specific mental state

iii) **EXCEPTIONS**

1) **Legal Wrong Doctrine - Controversial**

An actor’s intentional commission of an illegal act, based on facts as he reasonably believed them to be, constitutes a crime such that he may be convicted of the more serious offense of which he is factually guilty (e.g. transporting a person under 18 across state line for purposes of prostitution – if reasonably believe over 18, but actually 17, guilty of more serious crime instead of over 18 crime)

2) **Moral Wrong Doctrine - Controversial**

Even if an actor’s mistake is reasonable, his intentional commission of an immoral act serves as the requisite blameworthiness to justify conviction Regina v Prince (man convicted of kidnapping a minor when took an unmarried 14 year old girl, even though reasonable to believe she was 18, because act of kidnapping a girl, even if 18, immoral and as such does so at his own risk of her turning out to be under 16)

11. **Mistake / Ignorance of Law**

A mistaken belief that conduct does not constitute a criminal offense is (all elements)

a) **NOT a defense**

Ignorance of the law is no defense to a crime

People v Marrero (federal prison guard unable to raise defense of mistake of law which he believed gave him a right to carry a gun as a ‘peace officer’)

i) **POLICY**
1) Discourages the mistake of law as offense
2) Encourages societal benefit of knowledge of and respect for the law
   a. Will take reasonable steps to learn the law when the expected benefit of having legal information exceeds expected cost of obtaining it
3) Encourages legislators to be more clear with laws
4) Does not sacrifice the individual for the sake of society at large

b) EXCEPTIONS

i) Reasonable Reliance
   Mistake reasonably based upon official statement of the law, afterward determined to be invalid or erroneous, contained in (any element)
   1) A statute or other enactment
   2) Interpretation officially made by a (any element)
      a. Public Servant
      b. Agency
      c. Body legally charged or empowered with responsibility or privilege of administering, enforcing, or interpreting such statute or law (e.g. a court)
      i. NOT a district or private attorney
         State v Hopkins (minister convicted of erecting an illegal sign after relied upon advice of county attorney)

ii) Specific Intent Negated
    Where specific intent is an element of an offense, which is negated by a mistaken belief about conduct being illegal, mistake of law is a defense
    Cheek v US (man not charged with willful tax evasion for not filing his tax returns because mistake of law, reasonable or unreasonable, will be a defense to a crime if it negates the specific intent required for conviction)
    1) BUT may encourage taxpayers to cling to frivolous views of the law

iii) Due process violated
    Due Process requires notice where a penalty or forfeiture might be suffered for mere failure to act
    Lambert v CA (woman unaware of requirement of convicted felons to register in the city and able to raise defense of ignorance of the law because must have notice before convicted for mere failure to act)
    1) Only cases involving ignorance of local ordinance imposing a duty to act

b) Model Penal Code

<table>
<thead>
<tr>
<th>Defense IF mistake is</th>
<th>Intent required</th>
<th>MPC equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Honest, even if unreasonable</td>
<td>Specific intent</td>
<td>Purpose, knowledge</td>
</tr>
<tr>
<td>Honest and reasonable (note with mistake of law – only reasonable if based on official statement)</td>
<td>General intent</td>
<td>Recklessly, negligently</td>
</tr>
<tr>
<td>No mistake</td>
<td>Strict Liability</td>
<td>Strict liability</td>
</tr>
</tbody>
</table>

- Model Penal Code (MPC) equivalent
- Intent required
- Defense IF mistake is

- Honest, even if unreasonable
- Specific intent
- Purpose, knowledge

- Honest and reasonable (note with mistake of law – only reasonable if based on official statement)
- General intent
- Recklessly, negligently

- No mistake
- Strict Liability
- Strict liability

- Model Penal Code (MPC) equivalent
- Intent required
- Defense IF mistake is

- Honest, even if unreasonable
- Specific intent
- Purpose, knowledge

- Honest and reasonable (note with mistake of law – only reasonable if based on official statement)
- General intent
- Recklessly, negligently

- No mistake
- Strict Liability
- Strict liability
C. Concurrence

The defendant must have (all elements)

1. The intent necessary for the crime
2. Which prompted the act

5. At the time of constituting the crime

State v Rose (acquitted of negligent homicide because medical testimony unable to discern whether the victim was killed by a direct hit of the car or from being lodged and drug)

C-D. Causation

When a crime requires a specified result (as opposed to merely conduct), the defendant’s conduct in relation to that result must be both (all elements)

1. Cause in fact
   A defendant’s conduct is the cause in fact of a prohibited result IF (any element)
   a) But For Test
      The result must not have occurred when it occurred but for the defendant’s conduct
      i) Acceleration – bringing about a prohibited result at an earlier time than it would
         be expected to occur satisfies but for causation
         Oxedine v State (conviction of lesser offense than manslaughter because not
         medically certain proof of acceleration when beat his 6 year old child who had
         earlier been injured when pushed into a bathtub by the father’s girlfriend)
   b) EXCEPTIONS
      i) Substantial Factor Test
         The defendant’s conduct is a cause in fact of a prohibited result IF (all elements)
         1) Two defendants, acting independently and not in concert with one another,
            commit two separate acts, each of which alone is sufficient to bring about
            the prohibited result
         2) A defendant’s conduct was a substantial factor in bringing about a result
      ii) Year and a day rule
         The defendant’s conduct is a cause in fact of a victim’s death only if the death
         occurred within one year and one day from the infliction of injury or wound, even
         if it can be shown that but for the defendant’s actions, the victim would not have
         died as he did and when he did
         1) Strongly criticized in US and most states have abolished

2. Proximate cause
   A defendant’s conduct is a proximate cause of a prohibited result IF it is a (all elements)
   a) Natural and probable consequence of his conduct
   b) EXCEPTIONS
      i) Intervening acts
         An intervening act will shield a defendant from liability IF (all elements)
         1) NOT foreseeable
            If the intervening act is outside the foreseeable scope of risk created by the
            defendant’s act
            Velazquez v State (drag racer, after the race had finished, turned around
            and kept going, crashed, and died, such that opponent not liable for death
            even though usually hold him liable because race over)
            Kibbe v Hinderson (convicted of 2nd degree murder after abandoning an
            intoxicated man on a two-lane highway who was run over by a pick up truck)
D.E. Harmful Result

1. Result Element / Result Crimes
   The law punishes for an unwanted outcome

2. Conduct Element / Conduct Crimes
   The law punishes specific dangerous behavior

3. Attendant Circumstances
   A condition that must be present in conjunction with the prohibited conduct or result, in order to constitute the crime
Inchoate Offenses

Inchoate offenses are complete offenses committed prior to and in preparation of what may be a more serious offense.

VIII. POLICY

1. Timeline of intervention and prevention

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Conceive</td>
<td>Think</td>
<td>Decide to do it</td>
<td>Prepare</td>
<td>Begin</td>
</tr>
<tr>
<td>--------------------</td>
<td>-----------------------</td>
<td>----------------------</td>
<td>----------------</td>
<td>---------------------</td>
</tr>
</tbody>
</table>

a) Arguments for pushing back (punish when closer to conceiving)
   i) Endangers the public
   ii) Prevention of crime
   iii) Deterrence of crime
   iv) Intent-based Retributivism
      1) Both incomplete and complete attempts should be punished because liable for what intended to do, not according to what actually did/didn’t do as a symbolic counter-balance for one’s voluntarily breaking of the law

b) Arguments for pushing forward (punish when closer to completion)
   i) Give people time to change their minds
   ii) Freedom of thought and zone of privacy
   iii) Decreases risk of mistaken enforcement
   iv) Efficiency
   v) Moral appropriateness
   vi) No social harm committed yet
      1) Harm-based Retributivism
         a. Only complete attempts should be punished \( \rightarrow \) dangerousness, despite the interposing of chance to fail their attempt

IX. Punishment

A. Solicitation

1. Merger
   A person convicted of a completed offense cannot be convicted of an solicitation to commit it because solicitation merges into the completed offense (attempt, conspiracy, offense)

2. Relation to attempt
   Two views regarding whether a person convicted of solicitation also attempt
   a) Yes, if go beyond mere preparation and planned to commit himself
   b) No, because never planned to commit himself

B. Attempt

1. Merger
   A person convicted of a completed offense cannot be convicted of an attempt to commit it because attempt merges into the completed offense.

2. Common Law
   Most states punish attempt less severely than the crime attempted, as opposed to the traditional common law which did not punish attempt (misdemeanor)

3. MPC
   Attempt is graded and punished less severely than the completed offense, but may be punished to the same extent as the completed crime, except for felonies

C. Conspiracy

1. NO MERGER
   If the conspirators are successful, they can be convicted of both criminal conspiracy and the crime they committed pursuant to the conspiracy
X. Solicitation

Solicitation has been committed if an actor (all elements)

1. (Attempts or actually does) entice, induce, or counsel another
   a) Common Law
      i) ATTEMPT to entice, induce, or counsel = attempted solicitation
   b) Modern Statutes (if adopted)
      i) ATTEMPT to entice, induce, or counsel = full solicitation
         State v Cotton (no solicitation to intimidate a witness because the state had not
         adopted law permitting conviction despite only attempted solicitation, as the
         letters from the inmate never got to his wife)
   c) MPC
      i) ATTEMPT to entice, induce, or counsel = full solicitation
         Because acted with the purpose of enticing, inducing another – concerned with
         individuals who have demonstrated their dangerous mens rea, not skill
   d) NO OVERT ACT REQUIRED above actus reus

2. To commit any CRIME/FELONY, depending on statute

3. With specific intent that the person (ACTUALLY KNOWN) commit the crime
   a) NO AGREEMENT REQUIRED, but general approval is insufficient
   b) IMPOSSIBILITY NO DEFENSE
      Even if the person solicited is undercover, because look at facts as believed them to be
   c) WITHDRAWAL / RENUNCIATION
      i) Common Law – NO DEFENSE
      ii) MPC – Defense IF
         Under the MPC withdrawal and renunciation is a defense to solicitation IF
         1) Fully Voluntary
         2) Complete abandonment

4. EXCEPTIONS
   a) Legislative exemption from intended crime
      If the solicitor would not be guilty of the intended crime because of a legislative intent to
      exempt her, a defense exists.
      People v Thousand (a minor cannot be guilty of solicitation of statutory rape by urging a
      man to have intercourse with her because she could not be guilty of the completed crime)

XI. Attempt

A. Types of Attempt

1. Incomplete Attempt
   An actor attempts a crime, but either (1) desists or (2) is prevented from continuing

2. Complete Attempt
   An actor attempts a crime, but is unsuccessful in producing the intended result

B. Elements of Attempt

An attempt has been committed IF an actor (all elements)

1. Possesses specific intent to commit a crime
   An actor must have the specific intent to perform an act and obtain a result that, if achieved,
   would constitute a crime
   a) If specific intent crime, must have that specific intent
   b) If general intent crime, must have specific intent to achieve result
      i) Attempted murder (general intent) requires specific intent to kill
          Intent to do bodily harm, or knowledge that the consequence may result in death
          is not enough because the actor must specifically intend to kill
People v Gentry (improper jury instruction including above intentions when actor poured gasoline on his girlfriend)

ii) **Attempt to commit voluntary manslaughter**  
Intent to kill exists in the heat of passion

iii) **NO attempt to commit involuntary manslaughter**  
No intent to kill exists – can’t attempt to do an unintentional crime

iv) **NO attempt to commit felony murder**  
Because a conviction for felony murder requires no specific intent to kill, attempted felony murder is not a crime

v) **NO attempt to commit negligent crimes**  
A crime defined as the negligent production of a result cannot be attempted, because 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.

vi) **BUT WITHOUT SUCH EVIDENCE, A JURY IS FREE TO CONCLUDE THAT THE DEFENDANT ‘INTENDED’ THE RESULT**

c) **If strict liability crime, must have intent to achieve result**  
No attempt to commit a strict liability crime.

2. **Overtly acts in furtherance of the crime**
An actor must have committed an act beyond mere preparation depending on (any element)

a) **Traditional Tests**
  Traditional tests focuses on how close the person came to completing the crime

  i) **Physical / dangerous proximity test**  
  Attempt requires an act that is dangerously close to success  
  People v Rizzo (no attempt because specific, intended victim could not be found)

  ii) **Probable desistance test**  
  In the ordinary and natural course of things a crime would result  
  1) **BUT what standard to apply for predicting if desistance possible?**

  iii) **Abnormal step approach**  
  Step towards a crime beyond the point where the normal citizen would cease  
  1) **BUT any step toward the crime is departure from conduct of normal**

  iv) **Unequivocality test**  
  Attempt is committed when the actor’s conduct alone manifests an intent to commit a crime, such that it is reasonably certain that he is committed to the crime instead of merely contemplating the future commission of the crime  
  People v Miller (no attempt when man wandered into a field and loaded his weapon after threats to kill, but handed it to someone else instead of firing because no consideration of any statements, only conduct)

b) **MPC**
  The modern trend instead focuses on how much the person has already done, allowing the state to intervene earlier than the traditional tests, throwing more to the jury, and requiring that the act constitute (all elements)

  i) **Substantial step toward commission of the crime**

  ii) **Corroboration of the actor’s criminal purpose**
  State v Reeves (girls found attempted murder when substantial step by having rat poison nearby homeroom teacher’s purse because a jury is entitled, but not required, to find substantial step where (1) Actor possesses materials used in commission of a crime, (2) Can serve no lawful purpose, and (3) At or near the scene of the crime)
3. EXCEPTIONS / DEFENSES

a) Legal Impossibility

Legal impossibility is a defense to attempt when the actor does or intends to do an act that he believes is a crime, but does not actually constitute a crime.

i) NOT Factual Impossibility

Factual impossibility is NOT a defense when a person intends to commit a crime, but fails to consummate it because of a factual circumstance unknown to her and beyond her control.

People v Thousand (no defense of impossibility when person attempts to distribute obscene material to a 14 year old minor, who is actually an undercover)

b) Abandonment

Traditionally, abandonment was not a defense because the attempt was ‘complete,’ but some jurisdictions and the MPC allow a defense of abandonment IF (all elements)

i) Fully voluntary

The abandonment must be made fully voluntarily, not because of the difficulty in completing the crime or because of an increased risk of apprehension.

ii) Complete abandonment

The abandonment must be complete, such that it renunciates the criminal purpose, as opposed to a postponement or to find another victim.

Commonwealth v McCloskey (prison escapee exonerated from attempted escape on grounds that it was mere preparation, not abandonment because still inside of prison when cut barbed wire, but after this case adopted voluntary abandonment)

1) Negates accused as dangerous
2) Provides motive to desist prior to completion

XII. Conspiracy

1. Policy

a) Punish because increase in danger due to group involvement
b) BUT may not want to establish liability so far back to mental state alone due to the difficulty in defending such an allegation and absence of harm

2. Common Law – bilateral conspiracy

Conspiracy, a specific intent crime, has been committed IF there is an (all elements)

a) Intent to enter into AGREEMENT to commit a crime (NO FELONY REQUIRED)

Traditionally, the object of the agreement needed only to be something ‘unlawful,’ but most jurisdictions today limit conspiracies to agreements to commit crimes, even if the parties to a conspiracy are not aware that their plan is illegal.

i) A single agreement to commit multiple crimes = a single conspiracy

b) Between two or more people (IMPLIcEDLY KNOWN)

Conspiracy involves the ‘meeting of the minds’ of at least two ‘guilty minds’

People v Foster (under common law, could not be convicted of conspiracy because the other party was only feigning the agreement)

i) EVEN if identity of other people unknown

⇒ Chain Relationship = 1 large conspiracy

People who do not know each other can ‘agree’ to commit crime IF (all elements)

1) They know of each other’s existence

The parties know each other exists by the large nature of the conspiracy
2) Have a community of interest
   The success of one member’s part is dependent upon the success of the whole enterprise

ii) Hub and Spoke Relationship = multiple conspiracies
   The common member (hub) of each reasonably independent sub-agreement (spoke) is a member of each conspiracy, whereas the members of each sub-agreement are members of a single conspiracy.
   Kilgore v State (different conspiracies due to ‘wheel’ conspiracy because the parties did not know of each other and no community of interest)

c) With an intent to achieve the objective of the agreement shown by a MINIMAL OVERT ACT toward furthering the crime
   Traditionally, the agreement itself was the actus reus of the offense, but most jurisdictions today require a minimal overt act
   People v Swain (There can be no conspiracy to commit implied malice murder, which requires no intent to kill, because conspiracy requires intent to commit an offense)

   i) Inference of intent from circumstances of crime
      Conspiracy may be inferentially established by showing
      1) Association with alleged conspirators
      2) Knowledge of the commission of the crime
      3) Presence at the scene of the crime
      4) Participation in the object of the conspiracy
      Commonwealth v Azim (driver of the getaway vehicle held to inferred conspiracy because drove perpetrators from the scene)

   ii) LIMITED Inference of intent from knowledge of illegal activity
      Intent may be inferred from knowledge ONLY IF (any element)
      1) Direct evidence that he intends to participate
      2) Indirect evidence / inference that he intends to participate based on
         a. Special interest in the activity
         b. Aggravated nature of the crime itself
      People v Lauria (Intent to further prostitution not inferred from knowledge that phone service was used for such purpose because no elements met)

   iii) Knowledge of attendant circumstances
      Some courts hold that conspiracy cannot be proven unless the parties have knowledge of the attendant circumstances. Other courts believe that if the underlying offense is strict liability as to the attendant circumstances, the same rule should apply to conspiracy to commit that offense.

d) EVEN if only one co-conspirator can actually commit the crime

e) Regardless of accomplice liability
   Proof of participation in a conspiracy is without regard to
   i) Association with a criminal
   ii) Knowledge of illegal activity
   iii) Participation in the offense
      Commonwealth v Cook (no conspiracy because attack was spontaneous, even though accomplice in rape of girl in the alley)
f) Regardless of the completion of the crime – NO MERGER
If the conspirators are successful, they can be convicted of both criminal conspiracy and the crime they committed pursuant to the conspiracy.

3. MPC – unilateral conspiracy
Under the MPC’s unilateral conspiracy, conspiracy has been committed if (all elements)
   a) A single person (IMPIEDLY KNOWN)
   b) SUBJECTIVELY ‘AGREES’ with another to commit a crime
      i) REGARDLESS of whether the other person shared in that commitment
         People v Foster (under MPC, could be convicted of conspiracy even though the other party was only feigning the agreement)
         1) Punish because guilty mind
         2) BUT doesn’t meet goal of
            a. punishing dangers inherent in group criminal activity
            b. permitting preventive steps via attempt
   c) MINIMAL OVERT ACT REQUIRED IF NON-FELONY
   d) NO MINIMAL OVERT ACT REQUIRED IF FELONY

4. Accomplice Liability for co-conspirators – Pinkerton Rule
Each co-conspirator may be liable for the crimes of all other conspirators if (all elements)
   a) Crimes committed in furtherance of the objectives of the conspiracy
      Commonwealth v Azim (getaway driver liable for assault / robbery of co-conspirators)
   b) Crimes were foreseeable
   c) EXCEPTION – crime frolic of co-conspirator alone
Liability for the Conduct of Another

AFTER THE POINT OF EXECUTION OF THE CRIME

IX.XIII. Accomplice Liability

A. Theoretical Foundation

Accessorial liability is not a distinct crime, but only a means by which a substantive crime is committed.

1. Derivative liability

A party’s liability is dependent on a violation of the law by the primary actor, which that party has actively contributed to by association with the criminal venture, making it appropriate to blame him for what the primary actor does.

A-B. Common Law

1. Principal

a) 1st Degree

A principal in the 1st degree is one who (all elements)

i) Actually commits the crime

b) 2nd Degree

A principal in the 2nd degree is one who (all elements)

i) (Attempts to or actually) any aided, counselled, commanded, or encouraged the commission of the crime

ii) In the presence, actual or constructive

1) of the 1st degree principal

2) At the moment of perpetration

iii) Causation required

iib) May be tried and convicted prior to the trial of the 1st degree principal

iv) May be convicted of a higher or lower crime than the 1st degree principal

2. Accessory

a) Before the fact

An accessory before the fact is one who (all elements)

i) (Attempts to or actually) aids, counsels, or encourages commission of crime

ii) NOT in the presence, actual or constructive

1) of the 1st degree principal

2) At the moment of perpetration

iii) Causation required

iib) May NOT be tried and convicted prior to the trial of the 1st degree principal

v) Exceptions

a. Consent

An accessory may consent to trial before the principal, BUT judgment must not be rendered until trial of the principal

b. Joint trial

An accessory may be tried jointly with the principal, BUT the guilt of the principal must be found prior to consideration of guilt of the accessory

ia) MUST be prosecuted in the jurisdiction in which the accessorial acts took place

ia) May NOT be convicted of a higher or lower crime than the 1st degree principal
b) After the fact
An accessory after the fact is one who (all elements)
   i) Possesses knowledge of another’s guilt
   ii) Renders assistance to the guilty party
       1) With intent to hinder his detection, arrest, trial, or punishment
   iii) May NOT be tried and convicted prior to the trial of the 1st degree principal
       1) Exceptions
          a. Consent
             An accessory may consent to trial before the principal, BUT
             judgment must not be rendered until trial of the principal
          b. Joint trial
             An accessory may be tried jointly with the principal, BUT the
guilt of the principal must be found prior to consideration of
guilt of the accessory
   iv) MUST be prosecuted in the jurisdiction in which the accessorial acts took place
   v) May NOT be convicted of a higher or lower crime than the 1st degree principal

B.C. Model Penal Code
Statutes
Most jurisdictions have abolished the common law distinctions, such that all “parties to the crime” can
be found guilty of the criminal offense (but treats accessories after the fact separately)

1. Principal
   A principal is one who (all elements)
   a) Possesses the requisite mental state
   b) Actually engages in the act or omission that causes the criminal result
      i) Even if effects a criminal act through an innocent agent (Duress?)
         Bailey v Commonwealth (actor convicted of principal for manslaughter when
neighbor shot by police responding to reports regarding his neighbor’s behavior
because cannot be considered accomplice to the police)

2. Accomplice
   An accomplice is one who (all elements)
   a) (Attempts to or actually) provides any Possesses the intent that the crime be
      committed
      a) Aids, counsels, or encourages, OR fails to prevent (especially if legal-
duty) aiding a principal before or during the’s commission of the crime
         Acts Reus - An accomplice must in some way associate himself with the criminal
venture and participate in it as something that he wishes to bring about and succeed
      i) Crime must in fact exist and be committed
         It is legally impossible to aid and abet a crime which was never committed
         People v Genoa (gap in legislation prevented an actor from being charged w/
aiding and abetting for giving money to an undercover agent to buy cocaine)
         1) NOT entrapment
            Entrapment is a defense IF (any element)
            a. Subjective Test
               Entrapment prevents conviction of aiding and abetting IF a
government agent induces an innocent person, not predisposed
to commit the type of offense charged, to violate the law
            b. Objective Test
               Entrapment prevents conviction of aiding and abetting IF police
conduct falls below acceptable standards (likely to
induce the commission of a crime by those who would normally avoid crime) but for test.

ii) Regardless of the principal’s knowledge of accomplice’s actus reus
There is no requirement that the principal know he is being assisted.

iii) Regardless of causation
But for causation is not required, but suffices if merely facilitates it.

iv) Corroborated by independent testimony attaching defendant
Accomplice testimony must be corroborated by independent evidence in order to sustain a defendant’s conviction.

1) NOT merely showing commission of the offense
   State v Helmenstein (a store owner’s testimony merely that a robbery took place was insufficient to attach the actor as an accomplice).

2) NOT mere presence
   Someone who is merely present, such as accompaniment or observation, but has not attached themselves to the crime, has not sufficiently constituted an affirmative act to satisfy the actus reus.
   1. Undisclosed intent to render aid if needed.
   2. Mental approval.
   3. Mere presence plus flight.
   State v Vaillancourt (man merely present when stood by companion and talked to him while he tried to pry open a window).

4) BUT mere presence equated with aiding and abetting IF (any element)
   a. Facilitates the unlawful deed
   b. Stimulates others to render assistance to crime
   c. Designedly encourages the perpetrator.
   Wilcox v Jeffery (convicted for aiding and abetting after paid for and attended an illegal jazz concert to report on it for his jazz magazine because presence encouraged activity).

b) With the intent that the crime be committed (merely providing info vs purpose)
   State v Hoselton (a lookout’s testimony that ‘you could say’ he was a lookout, standing alone, did not establish that he was an aider and abettor participating in, and wishing to bring about the crime, because must also possess the intent that the crime be committed).

i) Knowledge in limited circumstances
   Intent may be inferred from mere knowledge IF (any element).
   1) Direct evidence that he intend to participate.
   2) Inference that he intended to participate based on (any element)
      a. Special interest / stake in the activity
      b. Felonious nature / severity of the crime itself
      c. No legitimate use of goods
      d. Large part of business used for illegality.

3) NOT mere knowledge of crime
   Mere knowledge that a crime would result from the aid provided is insufficient for accomplice liability, at least where the aid involves the sale of ordinary goods at ordinary prices.
   People v Lauria (insufficient proof from knowledge that prostitutes used his telephone service to commit prostitution).
a. People otherwise lawfully conducting their affairs should not be constrained by fear of liability for what their customers do or for what they may make more probable.

b. BUT may be convicted solely based on knowledge that they are contributing to a criminal enterprise.

ii) Intent to do the conduct, not results, that cause the resulting harm

When it may not be possible to prove that the perpetrator intended the result of the actus reus, proving that the perpetrator purposefully assisted / attached and intended to do the conduct that caused the resulting harm may serve as the basis for liability.

Riley v State (two men fired shots into a crowd, but it was unknown as to who was the principal and accomplice, still held liable as accomplices because only had to show mens rea for underlying substantive conduct, not result).

iii) PURE mens rea model

The intent to commit the crime is established purely by purposefully aiding the principal in carrying out the activity that became the crime.

iv) NO accomplice to negligent result

As someone may not intentionally aid in a crime that a principal did not know he was negligently committing, one cannot be an accomplice to such a crime.

1) BUT may be for reckless result

v) EXCEPTION - Natural and Probable Consequences Doctrine

An exception to requiring the mens rea intent of an actor that a secondary crime be committed if (all elements)

1) Principal committed the primary crime
2) Actor was an accomplice to the primary crime
3) Principal committed a secondary crime
4) Commission of the secondary crime was a ‘foreseeable consequence’ of the actor’s participation in the primary crime

State v Linscott (actor convicted of murder under objective standard of accomplice liability because such secondary crime was a foreseeable consequence of the primary crime of robbery, even though the actor didn’t possess the culpable subjective mental state for murder).

c) MAY be guilty of a greater offense than the actual principal

Once an accomplice intentionally joins a crime, each party’s mens rea evaluated separately.

People v McCoy (tried for murder from drive-by, but principal claimed self defense).

d) EXCEPTIONS

i) Membership of the protected class

If the statute is intended to protect members of a limited class from exploitation or overbearing, members of that class are presumed to be immune from liability, even if participate in the crime in a manner that would otherwise make them liable.

In Re Meagan R. (girl can’t be convicted of accomplice to statutory rape).

ii) Withdrawal

Withdrawal from the crime before it is committed by the principal relieves the actor from liability IF (any element)

1) Wholly deprives his prior efforts of effectiveness in such commission
2) Gives timely warning to the proper law enforcement officers
3) Otherwise makes proper effort to prevent the commission of the crime

People v Brown (actor unable to establish withdrawal because the offense of breaking into a car dealership to steal a car had occurred before withdrawal)
3. Accessory After the Fact

Hindering apprehension or prosecution

Conviction of hindering apprehension or prosecution is available to the common law as an accessory after the fact and is one who (all elements)

a) Receives, relieves, comforts, or assists another to escape arrest, trial, or conviction

b) With knowledge that he has already committed a felony

c) EXCEPTION – close relatives – BUT may not if knowingly helps avoid apprehension

i) Note - common law only exempted spouse - expected to help avoid conviction

XIV. Vicarious Liability

An employer cannot be imprisoned (but can be fined) under a theory of respondeat superior for the criminal acts of his employees committed on the premises without his presence, participation, or knowledge.

Commonwealth v Koczwara (tavern owner and operator unjustifiably imprisoned for violations of the Liquor Code committed by his employees without his presence, participation, or knowledge because 'a man's liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment')
Inchoate Offenses

Inchoate offenses are complete offenses committed prior to and in preparation of what may be a more serious offense.

X. POLICY

1. Timeline of intervention and prevention

<table>
<thead>
<tr>
<th>Conceive</th>
<th>Think</th>
<th>Decide to do it</th>
<th>Prepare</th>
<th>Begin</th>
<th>Completion</th>
</tr>
</thead>
<tbody>
<tr>
<td>-----------</td>
<td>-------</td>
<td>-----------------</td>
<td>---------</td>
<td>-------</td>
<td>------------</td>
</tr>
</tbody>
</table>

- a) Arguments for pushing back (punish when closer to conceiving)
  - i) Endangers the public
  - ii) Prevention of crime
  - iii) Deterrence of crime
  - iv) Intent-based Retributivism

- b) Arguments for pushing forward (punish when closer to completion)
  - i) Give people time to change their minds
  - ii) Freedom of thought and zone of privacy
  - iii) Decreases risk of mistaken enforcement
  - iv) Efficiency
  - v) Moral appropriateness
  - vi) No social harm committed yet

1. Harm-based Retributivism

a) Only complete attempts should be punished → dangerousness, despite the interposing of chance to fail their attempt.

XI. Punishment

A. Solicitation

1. Merger

A person convicted of a completed offense cannot be convicted of solicitation to commit it because solicitation merges into the completed offense (attempt, conspiracy, offense).

2. Relation to attempt

Two views regarding whether a person convicted of solicitation also attempt

a) Yes, if go beyond mere preparation and planned to commit himself

b) No, because never planned to commit himself

B. Attempt

1. Merger

A person convicted of a completed offense cannot be convicted of an attempt to commit it because attempt merges into the completed offense.

2. Common Law

Most states punish attempt less severely than the crime attempted, as opposed to the traditional common law which did not punish attempt (misdemeanor).

3. MPC

Attempt is graded and punished less severely than the completed offense, but may be punished to the same extent as the completed crime, except for felonies.

C. Conspiracy

1. NO MERGER

If the conspirators are successful, they can be convicted of both criminal conspiracy and the crime they
committed pursuant to the conspiracy

**XII. Solicitation**

Solicitation has been committed if an actor (all elements)

Entices, induces, or counsels another

*State v. Cotton* (no solicitation to intimidate a witness because the state had not adopted law permitting

conviction without the solicitation happening as the letters from the inmate never got to his wife)

2. To commit a felony

a) With specific intent that the person commit the crime

b) EVEN if the person doesn’t agree to

c) EVEN if withdrawal or renunciation

d) EVEN if impossibility

EVEN if the person solicited is an undercover officer

g) General approval or agreement is insufficient

4. EXCEPTIONS

a) Legislative exemption from intended crime

If the solicitor would not be guilty of the intended crime because of a legislative intent to exempt her, a defense

exists.

People v. Thousand (a minor cannot be guilty of solicitation of statutory rape by urging a man to have

intercourse with her because she could not be guilty of the completed crime)

**XIII. Attempt**

A. Types of Attempt

1. Incomplete Attempt

An actor attempts a crime, but either (1) desists or (2) is prevented from continuing

2. Complete Attempt

An actor attempts a crime, but is unsuccessful in producing the intended result

B. Elements of Attempt

An attempt has been committed if an actor (all elements)

1. Possesses specific intent to commit a crime

An actor must have the specific intent to perform an act and obtain a result that, if achieved, would constitute a crime

a) If specific intent crime, must have that specific intent

b) If general intent crime, must have specific intent to achieve result

c) Attempted murder (general intent) requires specific intent to kill

Intent to do bodily harm, or knowledge that the consequence may result in death is not enough because the actor must specifically intend to kill

People v. Gentry (improper jury instruction including above intentions when actor poured gasoline on his girlfriend)

d) Attempt to commit voluntary manslaughter

Intent to kill exists in the heat of passion

e) NO attempt to commit involuntary manslaughter

No intent to kill exists – can’t attempt to do an unintentional crime

f) NO attempt to commit felony murder

Because a conviction for felony murder requires no specific intent to kill, attempted felony murder is not a crime

g) NO attempt to commit negligent crimes

A crime defined as the negligent production of a result cannot be attempted, because 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.

c) If strict liability crime, must have intent to achieve result

Jurisdictions disagree about knowledge of attendant circumstances.

2. Overtly acts in furtherance of the crime

An actor must have committed an act beyond mere preparation depending on (any element)

a) Traditional Tests

Traditional tests focus on how close the person came to completing the crime

i) Physical / dangerous proximity test

Attempt requires an act that is dangerously close to success

People v Rizzo (no attempt because specific, intended victim could not be found)

ii) Probable desistance test

In the ordinary and natural course of things a crime would result

BUT what standard to apply for predicting if desistance possible?

iii) Abnormal step approach

Step towards a crime beyond the point where the normal citizen would cease

BUT any step toward the crime is departure from conduct of normal

iv) Unequivocality test

Attempt is committed when the actor’s conduct alone manifests an intent to commit a crime, such that it is reasonably certain that he is committed to the crime instead of merely contemplating the future commission of the crime

People v Miller (no attempt when man wandered into a field and loaded his weapon after threats to kill, but handed it to someone else instead of firing because no consideration of any statements, only conduct)

b) MPC

The modern trend instead focuses on how much the person has already done, allowing the state to intervene earlier than the traditional tests, throwing more to the jury, and requiring that the act constitute (all elements)

i) Substantial step toward commission of the crime

ii) Corroboration of the actor’s criminal purpose

State v Reeves (girls found attempted murder when substantial step by having rat poison nearby homeroom teacher’s purse because a jury is entitled, but not required, to find substantial step where (1) Actor possesses materials used in commission of a crime, (2) Can serve no lawful purpose, and (3) At or near the scene of the crime)

3. EXCEPTIONS / DEFENSES

a) Legal Impossibility

Legal impossibility is a defense to attempt when the actor does or intends to do an act that he believes is a crime, but does not actually constitute a crime

b) NOT Factual Impossibility

Factual impossibility is NOT a defense when a person intends to commit a crime, but fails to consummate it because of a factual circumstance unknown to her and beyond her control

People v Thousand (no defense of impossibility when person attempts to distribute obscene material to a 14 year old minor, who is actually an undercover)

b) Abandonment

Traditionally, abandonment was not a defense because the attempt was “complete,” but some jurisdictions and the MPC allow a defense of abandonment IF (all elements)

i) Fully voluntary

The abandonment must be made fully voluntarily, not because of the difficulty in completing the crime or because of an increased risk of apprehension

ii) Complete abandonment

The abandonment must be complete, such that it renunciates the criminal purpose, as opposed to a postponement or to find another victim
Commonwealth v McCloskey (prison escapee exonerated from attempted escape on grounds that it was mere preparation, not abandonment because still inside of prison when cut barbed wire, but after this case adopted voluntary abandonment)

1) Negates accused as dangerous
2) Provides motive to desist prior to completion

XIV. Conspiracy

1. Policy
   a) Punish because increase in danger due to group involvement
   b) BUT may not want to establish liability so far back to mental state alone due to the difficulty in defending such an allegation and absence of harm

2. Common Law—bilateral conspiracy
   Conspiracy, a specific intent crime, has been committed IF there is an (all elements)
   a) Intent to enter into an agreement to commit a crime
      Traditionally, the object of the agreement needed only to be something ‘unlawful,’ but most jurisdictions today limit conspiracies to agreements to commit crimes, even if the parties to a conspiracy are not aware that their plan is illegal.
      i) A single agreement to commit multiple crimes = a single conspiracy
   b) Between two or more people
      Conspiracy involves the ‘meeting of the minds’ of at least two ‘guilty minds’
      People v Foster (under common law, could not be convicted of conspiracy because the other party was only feigning the agreement)
      i) EVEN if identity of other people unknown
         → Chain Relationship = 1 large conspiracy
         People who do not know each other can ‘agree’ to commit crime IF (all elements)
         1) They know of each other’s existence
            The parties know each other exist by the large nature of the conspiracy
         2) Have a community of interest
            The success of one member’s part is dependent upon the success of the whole enterprise
      ii) Hub and Spoke Relationship = multiple conspiracies
         The common member (hub) of each reasonably independent sub-agreement (spoke) is a member of each conspiracy, whereas the members of each sub-agreement are members of a single conspiracy.
         Kilgore v State (different conspiracies due to ‘wheel’ conspiracy because the parties did not know of each other and no community of interest)
   c) With an intent to achieve the objective of the agreement shown by an overt act toward furthering the crime
      Traditionally, the agreement itself was the actus reus of the offense, but most jurisdictions today require a minimal overt act
      People v Swain (There can be no conspiracy to commit implied malice murder, which requires no intent to kill, because conspiracy requires intent to commit an offense)
   d) Inference of intent from circumstances of crime
      Conspiracy may be inferentially established by showing
      1) Association with alleged conspirators
      2) Knowledge of the commission of the crime
2) Presence at the scene of the crime
3) Participation in the object of the conspiracy
   Commonwealth v Azim (driver of the getaway vehicle held to inferred conspiracy because drove perpetrators from the scene)

ii) LIMITED Inference of intent from knowledge of illegal activity
   Intent may be inferred from knowledge ONLY IF (any element)
   a) Direct evidence that he intends to participate
   b) Indirect evidence / inference that he intends to participate based on
      a) Special interest in the activity
      b) Aggravated nature of the crime itself
   People v Lauria (Intent to further prostitution not inferred from knowledge that phone service was used for such purpose because no elements met)

iii) Knowledge of attendant circumstances
    Some courts hold that conspiracy cannot be proven unless the parties have knowledge of the attendant circumstances. Other courts believe that if the underlying offense is strict liability as to the attendant circumstances, the same rule should apply to conspiracy to commit that offense.

d) Regardless of accomplice liability
   Proof of participation in a conspiracy is without regard to
   i) Association with a criminal
   ii) Knowledge of illegal activity
   iii) Participation in the offence
   Commonwealth v Cook (no conspiracy because attack was spontaneous, even though accomplice in rape of girl in the alley)

ej) Regardless of the completion of the crime – NO MERGER
   If the conspirators are successful, they can be convicted of both criminal conspiracy and the crime they committed pursuant to the conspiracy

3. MPC – unilateral conspiracy
   Under the MPC’s unilateral conspiracy, conspiracy has been committed IF (all elements)
   a) A single person
   b) ‘agrees’ with another to commit a crime
   c) REGARDLESS of whether the other person shared in that commitment
   People v Foster (under MPC, could be convicted of conspiracy even though the other party was only feigning the agreement)
   1) Punish because guilty mind
   2) BUT doesn’t meet goal of
      a) punishing dangers inherent in group criminal activity
      b) permitting preventive steps via attempt

4. Accomplice Liability for co-conspirators
   Each co-conspirator may be liable for the crimes of all other co-conspirators IF (all elements)
   a) Crimes committed in furtherance of the objectives of the conspiracy
   Commonwealth v Azim (getaway driver liable for assault / robbery of co-conspirators)
   b) Crimes were foreseeable
   4. EXCEPTION – crime frolic of co-conspirator alone
Offenses against the Person

XV. Battery

Battery is the unlawful application of force to the person of another resulting in either bodily injury or an offensive touching

1. Simple batter = misdemeanor
2. Aggravated battery = felony

Aggravated battery includes batteries in which
a) Deadly weapon is used
b) Serious bodily injury is caused
c) Victim is a child, woman, or police officer

XVI. Assault

Assault is the intentional creation (other than by mere words) of a reasonable apprehension in the mind of the victim of imminent bodily harm. Some jurisdictions also define assault as attempted battery.

XVII. Mayhem

1. Common law
   At common law, mayhem was either the disbursement/removal or disablement of a body part
2. Modern Statutes
   Most abolish mayhem and instead treat it as a form of aggravated battery

XVIII. False Imprisonment

False imprisonment is the unlawful confinement of another without his valid consent

XIX. Kidnapping

Kidnapping is the confinement of a person that involves some movement of the victim or concealment of the victim in a secret place.

XX. Homicide

1. Common Law Criminal Homicides

A common law criminal homicide exists if (any element)
   a) Murder

   Murder, at common law no degrees, is the (all elements)
   i) Unlawful killing
      Murder does not include lawful killings (e.g. war)
   ii) Of a human being
      Death of a human being will be determined according to (all elements)
      1) Irreversible cardio-respiratory repose
      2) EXCEPTION
         a. Functions maintained by mechanical means
            Death may be deemed to occur when, according to medical practice, entire brain’s function has irreversibly ceased
            People v Eulo (defendant unable to establish that doctors were the intervening cause of death when they took heart and lung machines off victim and died because irreversibly brain dead)
         b) With ‘malice aforethought’
            Malice aforethought exists if a defendant has the state of mind with (any element)
            1) Express malice
               a) Intent to kill
                  Intent to kill may be inferred from intentional use of a deadly
weapon, which is any instrument used in a manner calculated or likely to produce death or serious bodily injury.

2) **Implied malice**
   a. **Intent to inflict great bodily injury**
   b. **Extreme Negligence / Reckless indifference to an unjustifiably high risk to human life**
      Such is an 'abandoned and malignant heart' / depraved heart – a jury may infer as matter of fact malice
   c. **Intent to commit a felony**
      Felony murder

b) **Manslaughter**
   Manslaughter, under common law, is the unlawful killing of a human being without malice aforethought
   
   i) **Voluntary Manslaughter**
      Voluntary manslaughter contains *mitigating, not excuse or justification*, factors that make society want to punish less than other intentional killings
      Voluntary manslaughter exists IF an intentional killing (all elements)

1) **Caused by adequate provocation**
   The defendant must have objectively been adequately provoked
   The provocation must have been one that would arouse sudden and intense passion in the mind of an ordinary person, taking into account physical attributes such as sex and age, NOT mental attributes, causing him/her to lose self control and act for the moment from passion rather than reason (not provocation which would cause reasonable person to kill)
   Director of Public Prosecutions v Camplin (15 year old boy’s age taken into account in jury instructions when killed Pakistani with a kitchen pan)
   a. Sudden discovery of spouse’s adultery
   b. Mutual combat
   c. Assault and battery
   d. Injury or serious abuse to close relative
   e. Resistance of an illegal arrest
   f. NOT mere words
      Words alone must be accompanied by conduct indicating a present intention and ability to cause bodily harm
      Girouard v State (words of wife’s verbal insults insufficient to reasonably induce a husband to stab her 19 times)

2) **Which in fact induced a sudden heat of passion**
   The defendant must have subjectively acted in a heat of passion

3) **Before a reasonable opportunity for the passion to cool**
   The defendant must have objectively had insufficient time to cool

4) **And in fact did not cool down**
   The defendant must have subjectively had insufficient time to cool

ii) **Involuntary manslaughter**
   Involuntary manslaughter is killing by either *(any element)*
   
   i) **Criminal Negligence**
      Gross deviations from the standard of care used by an ordinary person, such that the conduct can reasonably be said to manifest a wanton or reckless disregard for human life
2) Misdemeanor Manslaughter Rule
   Unlawful acts not amounting to a felony

2. Modern Statutory Modifications
   Modern statutes often divide murder into degrees, such that all murders are 2nd degree unless the prosecution proves 1st degree murder.
   a) 1st Degree Murder
      i) Deliberate and premeditated killing
         A deliberate and premeditated killing is 1st degree murder IF (all elements)
         1) Intention to kill existed, even for an instant
            The majority of courts hold that the intention and reflection on the idea to kill need only exist for an instant
            State v Schrader (defendant held to have premeditated when argument over a sword escalated to stabbing 51 times with a hunting knife)
            Midgett v State (BUT found father didn’t intend to kill his son when hit him in the back because found only had an intention to further abuse)
            a. Factors in determining if premeditated and deliberated
               1. Brutal manner of killing
               2. Lethal blows after victim rendered helpless
               3. Nature and number of wounds
               4. Threats and declarations before and during killing
               5. Conduct and statements before and during
               6. Provocation of victim
               7. Relationship of the parties
                  State v Forrest (son premeditated mercy killing of terminally ill and suffering father by shooting him 4 times with a gun he brought into the hospital, saving didn’t want him to suffer)
            b. MINORITY RULE
               A minority holds that the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a second look
            c. PURPOSE / POLICY
               The purpose of willful-deliberation-premeditation formula is to
               1. distinguish between more culpable intentional killings
               2. deter those who think about killing and have a choice
      ii) Specific Statutory 1st degree murder
         Some statutes make killing performed in certain ways 1st degree (poison, torture)
      iii) Felony Murder
         1st degree as malice is implied as a matter of law from the intent to commit the underlying felony IF a death results, even accidentally, during (all elements)
         1) Attempt, flight, or commission of a felony
            People v Fuller (convicted of felony murder when killed the driver of another car while attempting to escape from a police officer)
         2) EXCEPTIONS / LIMITATIONS
            a. Guilt of underlying felony
               The defendant must be guilty of the underlying felony, as if he has a defense to the felony, he has a defense to felony murder
            b. Killing in the perpetration or furtherance of a felony
               The felony murder rule requires (any element)
1. Felon directly cause the death
   The ‘agency’ approach focuses more on who does the killing & requires the felon to be a direct cause of death. State v Sophophone (felon in custody not held responsible for killing of his co-felon by police officer).

2. Felon proximate cause of death
   If the felon set in motion the acts which resulted in the victim’s death, such that an act by one felon is the proximate cause of the homicidal conduct by non-felon.

3. Felon isn’t the one killed
   The ‘protected persons approach’ focuses more on who is killed and doesn’t provide protection to felons.

c. Felony must be inherently dangerous
   A felony must be inherently dangerous because otherwise it is highly unlikely to be deterred as a felon will not anticipate that injury or death may arise solely from commission of the felony. A felony’s inherent danger can be viewed in (any element).

   1. In the abstract
      A felony by its very nature is so inherently dangerous that it could not possibly be committed without creating a substantial risk of loss of life.
      i. Primary elements of the offense at issue
      ii. Factors elevating the offense to a felony
      People v Burroughs (violation of felony practicing medicine without a license not deemed inherently dangerous when deep abdominal massages caused fatal massive hemorrhage).

   2. Facts of the case
      A felony is inherently dangerous if in view of the manner in which the crime was committed on the present occasion, there was substantial risk of lost life.

d. Felony must be independent of killing (Merger Limitation)
   Felony murder rule is inapplicable to a felony if (all elements).
   1. Integral to and included in facts of homicide
   2. No independent felonious purpose
      People v Smith (2nd degree murder merge into child abuse).

3) ALTERNATIVES
   Even if can’t use felony murder, may still convict of 2nd IF (all elements)
   a. Commits a felon
   b. Behaves raising a serious risk that people killed
   c. BUT must inquire into mens rea for recklessness

4) POLICY
   a. Utilitarian
      The felony murder rule operates to (all elements)
      1. Deter
         Deter negligent and accidental killings during felonies, which themselves will be deterred.
         i. BUT can’t deter accidental killing – BUT what about deterrent effects of negligent crimes.
ii. BUT few felons know of rule or its punishment

2. Allocate resources by lessening burden on state to prove malice
   Intent to commit a felony is transferred to kill in order to find culpability and relieve state of burden, simplifying task of judges and jury - efficient
   i. BUT no transfer of intent – mental patterns are distinct and separate

b. Retributivism
   1. General culpability
      The felon has an ‘evil mind’ in doing bad acts and cannot complain about punishment for consequences
      i. BUT categorize homicide according to degree of culpability, not general culpability

2. Societal condemnation
   Avoid depreciation of the seriousness of the offense and encourage respect for the law and human life, and provide a means by which can repay debt to society

b) 2nd Degree Murder
   2nd Degree murder is the unlawful killing of a human being with implied malice, but without the additional elements of willfulness, premeditation, & deliberation (1st degree)
   i) Intentional Killings, but NOT premeditated or deliberated
   ii) Intent to inflict great bodily injury
      iii) Extreme Negligence / Reckless indifference to an unjustifiably high risk to human life (completely objective)
         An act is done with a high probability that it will result in death and it is done with a base antisocial motive and with a wanton disregard for human life
         People v Nieto Benitez / Berry v Superior Court (pit pull trained to fight mauls neighbor’s two year old)
      iv) Intent to commit a felony not specified under 1st degree
         1) E.g. larceny

c) Manslaughter
   Manslaughter is the unlawful killing of a human being without malice
   i) Voluntary
      See Common Law, BUT
      1) NOT limited to specific categories for provocation
         a. Mere words may be sufficient for adequate provocation
      2) Throw more to the jury
      3) Imperfect Self-defense
         Modern courts recognize voluntary manslaughter for a defendant’s imperfect self defense
         a. Defendant was aggressor
         b. Defendant honestly but unreasonably believed deadly force was necessary
   ii) Involuntary
      1) Criminal Negligence
         A person must (all elements)
a. Inadvertently create a substantial and unjustifiable risk
   The defendant must create a risk of which a person ought to be aware, as judged by a reasonable person (objective standard).

b. In failing to perceive the risk, grossly deviate from the care that would be exercised by a reasonable person
   Given the circumstances (more subjective standard).
   State v Hernandez (some drinking slogans admitted as evidence because they related to his knowledge of how alcohol consumption would affect him and thereby impede his ability to perceive such a risk).

2) EXCEPTION
   Ordinary negligence, the failure to exercise the ordinary caution a man of reasonable prudence would exercise under the same or similar circumstances, may suffice as a standard.
   State v Williams (parents convicted of manslaughter on ordinary negligence when child died because failed to provide medical care).

3. MPC
   The Model Penal Code has no degrees, but instead uses the mens rea of purposefully, knowingly, and recklessly in a series of aggravating and mitigating circumstances to assess punishment.
   a. Murder
      i) Purposefully or knowingly
      ii) Extreme reckless indifference to an unjustifiably high risk to human life
          The actor’s disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life.
          1) Includes intent to cause grievous bodily harm
             That the actor intended to cause injury of a particular gravity is relevant consideration in determining whether he acted with extreme indifference to the value of human life.
          2) Includes Felony Murder Automatically
             Recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit:
             a. Robbery, rape, arson, burglary, kidnapping, felonious escape

   b. Manslaughter Equivalent
      i) Extreme Mental or Emotional disturbance
         If a jurisdiction adopts the MPC instead of heat of passion, the jury deliberates both objective and subjective, so no need to worry about adequacy of provocation, instead send it to the jury to focus on his state of mind in determining whether he was operating under extreme emotional disturbance. But don’t have to mitigate unless find it was reasonable response.
         1) Must have acted under influence of an extreme emotional disturbance
            The jury deliberates this subjective element, and although no psychiatrist testimony is required, it is a good idea – words alone sufficient.
         2) Must have been a reasonable explanation/ excuse for such extreme emotional disturbance
            The jury deliberates this objective element to determine reasonableness from the viewpoint of a person in the defendant’s situation under the circumstances as the defendant believed them to be.
      3) EXCEPTION
a. No jury deliberation if acted with malice
   People v Casassa (stalker stabbed victim with steak knife after
   she told him she was not falling in love with him and unable to
   receive jury instruction because acted with malice, but
   otherwise would have gotten instruction even though no
   adequate provocation under traditional heat of passion)

ii) Ordinary Recklessness
   Ordinary recklessness suffices for a conviction of manslaughter

iii) NO misdemeanor-manslaughter rule

b) Negligent Homicide
   Ordinary negligence suffices when killing done negligently
Sex Offenses

XXI. Rape

1. Traditional Common Law

   Rape, a felony, is the unlawful carnal knowledge of a woman forcibly and against her will OR without effective consent

   a) Must have corroborating evidence
      Uncorroborated testimony of the victim couldn’t support a conviction
      Corroborating evidence includes:
      i) signs and marks of the struggle upon clothing and persons
      ii) complaint at the earliest opportunity

   b) Resistance required
      A woman used to have to vehemently exercise every physical means or faculty within her power to resist the penetration of her person until the offense is consummated
      Rusk v State (light choking and implied threats insufficient to prove force or threat of force of rape of bar-hopper by man who took her car keys because victim must have resisted and her resistance must have been overcome by force or was prevented from resisting by threats to her safety)
      i) Dissent – resistance should not be required when personal dignity at stake

   c) NO rape by husband
      A woman must not have been married to the man who raped her

   d) NO Rape Shield Laws
      Entire past sexual history of the woman admissible as evidence

   e) Death for interracial rape
      Capital punishment for interracial rape

2. Common Law

   Rape has been committed IF (all elements)

   a) Sexual penetration
      Sexual penetration is sufficient, regardless of emission

   b) By force or threat of force
      Force or threat of force must occur (all elements)
      i) At the time of the rape
         Physical force is satisfied by any amount of force applied against another person in the absence of what a reasonable person would believe to be affirmative and freely given permission to the act of sexual penetration
      ii) NOT mere ‘general fear’ of force
         State v Alston (ex-boyfriend not convicted of rape after having intercourse without the use of force on that day because ‘general fear’ of force insufficient)
         1) BUT had been abused by defendant in the past
      iii) NO resistance required
         Resistance is not a required element for rape
         State of NJ in the interest of MTS (17 year old convicted of rape of a 15 year old who was asleep at the time of penetration)

   c) Without effective consent
      Intercourse must be without the victim’s effective consent, such that permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act
i) NO consent if withdraw
   A female’s withdrawal of consent serves to nullify any earlier consent, such that
   subject to rape if persist after victim’s subsequent withdrawal by (all elements)
   1) Statements or actions that expressly and unequivocally indicate
      withdrawal of prior consent and lack of consent to the particular act
      State v Alston (consent presumed if prior consensual relationship
      requires affirmative showing of withdrawal of consent)
   2) Communicated to the defendant
   3) At any time prior to penetration
      People v John Z (after apparent consent to intercourse with boyfriend’s
      friend, withdrew but continued having intercourse and convicted of rape)

ii) NO consent if from forcible compulsion
   Determination of whether intercourse was obtained through compulsion includes
   1) Respective ages
   2) Respective mental and physical conditions
   3) Atmosphere and physical setting
   4) Position of authority
   5) Domination or custodial control
   6) Duress
   Commonwealth v Berkowitz (acquaintance rape in college dorm room consensual
   sex because mere verbal protest in saying ‘no’ insufficient to establish forcible
   compulsion, despite persistent and aggressive, but no use of force)
   State v Rusk (enough evidence with light choking to go to jury because evidence
   of forced submission is sufficient to get to the jury)
   1) Dissent – woman must resist unless the defendant objectively manifested
      his intent to use physical force to accomplish his purpose

iii) NO consent if woman is incapable of consent
   Inability to consent may be caused by unconsciousness or by the victim’s mental
   condition

iv) NO consent if obtained by fraud
   Only in limited circumstances will intercourse with consent obtained by fraud
   constitute rape
   1) Fraud in the factum
      If the victim is fraudulently caused to believe that the act is not sexual
      intercourse = no consent because that act not consented to
   2) Fraud in impersonating a spouse
      Courts differ
      a. No consent because fraud in factum, only consented to
         innocent act of marital intercourse, not adultery
      b. Consent because consented to act of intercourse itself
   3) NOT Fraud as to inducement
      Misrepresentation or concealment which leads another to enter into a
      intercourse with false or mistaken belief = consent because deception
      relates only to some collateral matter and not the act itself
      Boro v Superior Court (man not guilty of rape when fraudulently induced
      a woman to have sex with him in order to cure her illness)

d) With general intent (mens rea)
   i) History
      Before rape law reform, the actus reus proved the mens rea
1. If force or threat of force \( \rightarrow \) purposefully or knowingly
2. If no force \( \rightarrow \) female must resist \( \rightarrow \) reasonable warning of lack of consent
   a. At minimum, recklessly or negligently
3. With the abandonment of the resistance requirement and increased willingness to prosecute nonforcible forms of nonconsensual intercourse, risk of conviction in the absence of mens rea is enhanced

ii) Mistake as to consent
Mistake of fact (female’s voluntary consent to intercourse) must be \( (all \ elements) \)
1. Reasonable
2. Good Faith
Commonwealth v Sherry (3 doctors convicted of rape after taking a nurse to a house and separately having intercourse with her, despite the doctors’ mistake as to the nurse’s consent)

e) Rape Shield Laws
Statutes prohibit or restrict evidence or cross-examination concerning a victim’s prior sexual conduct or reputation
i) Prevention of harassment and humiliation
ii) Irrelevant evidence as to consent
iii) Focus fact finder on relevant evidence
iv) Promotion of effective law enforcement
A victim will more readily report and testify in cases if she does not fear that her prior sexual conduct will be brought before the public
v) BUT possible denial of DF’s 6th Amendment right to cross-examination
1. Defendant’s needs vs enforcement of rape shield law
vi) EXCEPTIONS
1. If shows a unique pattern of conduct similar to the pattern of case
2. If shows complainant biased
3. If shows complainant has motive to fabricate
Lewis v Wilkinson (victim’s diary allowed into evidence because showed motive for fabrication and evidence of consent)

XXII. Statutory Rape
A rape is a strict liability offense \( (all \ elements) \)
1. Victim is below age of consent
   A young person is incapable of giving consent to undertake sexual acts, and therefore, even if the female willingly participated, the offense is still committed because consent is ineffective
2. EVEN if mistake as to age
   As the offense is a strict liability offense, even a good faith reasonable mistake will not prevent liability for statutory rape
3. Even if gender specific
   A statute might justifiably protect young females, but not young males, from underage sexuality in order to deter teenage pregnancy. Michael M v Superior Court of Sonoma

XXIII. POLICY
A. Sexual Autonomy
Rape laws protect sexual autonomy, the right to refuse to have sex with any person at any time, for any reason and for no reason, and correct the existing imbalance of sexual power
Defenses to Crime

XX-XXIV. General Principles

A defense is a set of identifiable conditions or circumstances which may prevent a conviction for an offense.

A. Types of defenses

Defenses may consist of (any element)

1. Failure of proof
   The negation of an element required by the definition of the offense

2. Offense Modification
   An actor has satisfied all of the elements of the offense, but hasn’t in fact caused the harm or evil sought to be prevented by the statute defining the offense

3. Public Policy
   Public policy in time limitations, diplomatic immunity, or incompetency

4. Justification
   The social harm of the offense is negated by the need to avoid an even greater harm or to further a greater societal interest
   a) Public Benefit Theory
      A person is justified in performing in the public’s interest as her underlying motivation
   b) Moral Forfeiture Theory
      A person is justified in performing in response to an aggressor’s voluntary decision to violate the rights of another, and thereby forfeiting her right to life, such that no socially recognized harm has occurred (socially irrelevant)
   c) Moral Rights Theory
      A person is justified in performing an affirmative right to protect a particularly threatened moral interest (affirmatively proper)
   d) Superior Interest / Lesser Harm Theory
      A person is justified in performing when her interests and values outweigh those of the person she harms (reducing overall harm and weighing moral rights)

5. Excuse
   The moral blameworthiness of the actor is negated by the conditions of the crime which suggest that the actor is not responsible for the wrong deed.
   a) Causation Theory
      A person should not be blamed for conduct caused by factors outside of her control
   b) Character Theory
      A person should not be punished disproportionately to her moral desert, measured by an actor’s character.
      i) BUT may have to look at entire life to determine character
      ii) BUT doesn’t explain punish good people who commit out-of-character offenses
   c) Free Choice Theory
      A person should not be blamed for conduct in which she did not have a choice, lacking the substantial capacity and fair opportunity to (all elements)
      i) Understand the facts relating to her conduct
      ii) Appreciate that her conduct violates society’s mores
      iii) Conform her conduct to the law

B. Principles of any defense

1. Necessity
   The action taken must have been necessary to protect or further an interest at stake

2. Proportionality
   The action taken must be proportional to the perceived harm threatened
3. **Lack of Fault**
   The defendant must not have been at fault in causing the danger

4. **EXCEPTIONS**
   a) Some offenses only require a reasonable belief of necessity, even if there was no actual necessity
   b) Some offenses only require a reasonable belief of proportionality, even if the response was disproportionate

C. **Burden of proof for a defense**
   Depending on the state, a defense must be proved by *(any element)*
   1. **The state**
      A state that considers a defense to negate the required elements of the offense must prove the absence of such a defense beyond a reasonable doubt
   2. **The defendant**
      Other states consider the offense completed and put the burden on the defendant to prove the defense of the committed crime.

---

**XVI.XXV. Justification**

A. **Self Defense**
   A person may be privileged to self-defense IF *(all elements)*

1. **Without fault**
   An aggressor who has initiated a conflict, as in felony murder charge, cannot invoke self defense
   a) **EXCEPTIONS**
      - Defense against a disproportionate return of force by a victim
      - Aggressor withdrawal
         An aggressor may withdraw by *(all elements)*
         1) Communication to the adversary his intent to withdraw
         2) Good faith attempt to withdraw

2. **Reasonably Proportional**

3. **Reasonably Necessary**
   If without fault, force is reasonably necessary IF *(all elements)*
   a) **Immediate**
      Danger must be imminent and immediate, such as cannot be guarded against by calling for the assistance of others or the protection of the law
      State v Norman (battered woman doesn’t get self defense for killing of sleeping husband because imminence requirement ensures deadly force only when necessary)
      1) Could argue shouldn’t have to wait until deadly attack occurs
   b) **Unlawful**
      The force threatened must constitute a crime or a tort
   c) **Objectively Reasonable**
      In light of all surrounding circumstances, even those substantially before the conflict, if a defendant makes an objectively reasonable mistake may still raise perfect self defense, taking into account *(all elements)*
i) Any relevant knowledge of parties, including substantially before conflict

ii) Physical attributes of the parties, including gender

State v Wanrow (conviction reversed when woman shot neighbor who was thought to have violated her daughter because jury not instructed on objective knowledge of prior circumstances or gender of the woman)

iii) Prior experiences of the parties

iv) NOT psychological peculiarities

v) EXCEPTIONS

1) MPC
   The MPC is purely subjective and the only issue is the defendant’s mens rea (graded offenses)

2) Imperfect self defense for subjectively reasonable
   Some states allow an imperfect self defense for force used while harboring a genuine, but unreasonable, belief

People v Goetz (man who shot 4 youths in subway unable to raise common law self defense because not objectively reasonable, only subjectively reasonable)

d) Actual or Apparent Threat of Force or Forcible Felony

   The force that is reasonably necessary in response may be (any element)

i) Nondeadly force

ii) Deadly force
   Deadly force only if force threatened would result in death or great bodily injury

1) Imperfect self defense for deadly in response to nondeadly
   Some states allow an imperfect self defense for deadly force used in response to nondeadly force

e) EVEN without attempt to retreat

There is no duty to retreat, IF NOT an aggressor, before using (any element)

i) Nondeadly force
   All jurisdictions – no duty

ii) Deadly force
   Most jurisdictions - no duty
   Some jurisdictions / tradition common law – duty unless (all elements)
   1) Retreat made in complete safety (strict necessity)
   2) If in a special situation in which the attack occurs while (any element)
      a. in victim’s home or cartilage outside home (castle doctrine)
      b. victim is making a lawful arrest
      c. robbing the victim

US v Peterson (defendant considered aggressor because conflict was not deadly until left the conflict, went to a safe place to get a gun, and returned to the conflict an aggressor cannot raise the defense that he had no duty to retreat)

B. Defense of Others

A person may be privileged to a defense of others IF he (all elements)

1. Reasonably believes the other person would be justified in self defense

   a) EVEN if the other person in fact would not be justified
      Most jurisdictions allow the defense if there was a reasonable appearance of the right to use force, even if that belief is mistaken.
      Some jurisdictions / common law assumes the defendant ‘steps into the shoes of the person she defends’ and has no defense if that person has no legal defense – at own risk
b) **Extends to strangers**  
Most jurisdictions allow the defense of any other person  
Some jurisdictions / common law only allow the defense if in a special relationship

c) **Extends to protection of a fetus, viable or nonviable, in unlawful attacks on a mother**  
NOT to embryos outside a woman’s body  
NOT to lawful abortions  
**People v Kurr** (woman entitled to defense of others in protection of her fetus which was being attacked by punches to the stomach, even if denied self defense)

C. **Defense of Property**  
A person may be privileged to a defense of property IF *(all elements)*

1. **Uses Nondeadly force**  
   A person is justified in using nondeadly force in defense of property IF *(all elements)*
   a) **Reasonably necessary**  
      A request to desist or refrain must appear insufficient  
      Immediate pursuit of property taken must be present to regain possession
   b) **To prevent unlawful interference with**
   c) **Property in possession**

2. **NOT Deadly Force**  
   Defense of property alone can NEVER justify the use of deadly force, *even with set up mechanical device*. The common law exception to this rule (allowed if privileged to do it directly) no longer applies because the court no longer allows the property owner to gamble with the exception.  
   **People v Ceballos** (defense of property doesn’t apply to property owner who set up a spring gun to injure an intruder attempting to enter)
   a) **Where an actor is present, may realize use of deadly force is unnecessary, whereas mechanical device retains no discretion**
   b) **The law places a higher value upon human life than rights in property**
   c) **EXCEPTIONS**
      i) **Tumultuous entry of dwelling + Personal Danger**  
         A person is justified in using deadly force where the entry was violent and the person reasonably believes the force is necessary to prevent a personal attack upon herself or another inside the dwelling.
      ii) **Intent to commit Felony in dwelling**  
         A person is justified in using deadly force where the person believes that it is necessary to prevent entry into a dwelling with intent to commit a felony

D. **Crime Prevention**  
A person may be privileged to a defense of crime prevention IF *(all elements)*

1. **Uses Nondeadly force**  
   A person is privileged to use nondeadly force to the extent that it appears reasonably necessary to prevent a serious crime *(some states allow any crime)*

2. **Uses Deadly force to prevent a ‘dangerous felony’ involving risk to human life**  
   The traditional view allowed prevention of any felony

E. **Necessity**  
A person is privileged to the defense of necessity IF he performs an otherwise criminal act *(all elements)*

1. **Without fault in creating the necessity**
2. **He reasonably believes such act is necessary**  
   An act may be reasonably necessary IF *(any element)*
a) **Objectively determined**
Good faith belief in the necessity of one’s conduct is insufficient

b) **Without any adequate, legal alternatives**
Legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action. *US v Schoon* (indirect civil disobedience below) *Nelson v State* (the act of reckless destruction of personal property of dump truck and loader was not necessary because his truck was stuck in the mud for 12 hours and people stopped to help him, in addition to the disproportionate harm caused)

i) **Limited in prison escapes because resort to authorities & courts**
People v Unger (*prisoner escapes* in response to threat of death and sexual attack)

   1) Specific/immediate threat of death, sexual attack, or bodily injury
   2) No time for complaint to authorities or history of futile complaints
   3) No time or opportunity to resort to courts
   4) No evidence of force used toward prison personnel or innocent persons
   5) Prisoner immediately reports to the proper authorities when safe

3. To prevent an **immediate and significant evil**
An immediate and significant evil may be (any element)

   a) **NOT existence of valid law**
The mere existence of a policy or law validly enacted by Congress cannot constitute a cognizable harm

   b) **Indirect civil disobedience can never support necessity**
Indirect civil disobedience involves violating a law that is not, itself, the object of protest, and as such can never be grounds for necessity because (all elements)

   i) Likely no immediacy
   ii) Disobedience is unlikely to abate the harm
   iii) Legal alternatives in congressional action

   *US v Schoon* (protestors sat in on the IRS, and while proportional, no immediacy, legal alternatives in congressional action)

   1) Don’t want to get involved in political realm

4. From forces of nature

5. **Causing a greater harm to society than a harm reasonably & foreseeably caused by the act**
The harm reasonably foreseeable at the time must not be disproportionate to the harm avoided

   a) **All human life is equally valuable**
A person may not use a defense of necessity to kill an innocent person in order to save himself because the life of every individual is of equal value

   *Queen v Dudley & Stephens* (Defense of necessity unavailable to stranded men who killed one of them in order to save their lives)

   i) **BUT necessary, proportional, and not at fault – killed one to save many**
   ii) **YET message of morality, nobility, and self-sacrifice instead of utilitarian killing**

---

**XVII.XXVI.** **Excuse**

A. **Duress**
A person is not guilty of an offense due to duress IF he performs an otherwise criminal act (all elements)

1. **Under threat of immediate death or serious bodily injury to himself or another**
A threat must be present or impending, as opposed to a veiled threat of future, unspecified harm

   *US v Contento-Pachon* (taxi driver allowed defense of duress due to threats to kill his family immediately the moment he did not transport swallowed balloons of cocaine across the border)

   a) **BUT could argue had opportunity to escape and tell the police**

2. **From another person**
Another person must overcome free will, as opposed to forces of nature with necessity
3. With a well-grounded fear that the threat will be carried out
   a) MPC § 2.09 requires that a person of reasonable firmness would be unable to resist

4. Without any reasonable opportunity to escape

5. Without fault in exposing himself to such a threat
   Defense of duress is NOT available to an actor who recklessly or negligently places himself in a situation in which it was probable that he would be subjected to duress

6. EXCEPTIONS
   a) Prison Escapes
      Duress is NOT a defense to a prison escape
      People v Unger (prisoner allowed necessity defense, but not duress, when escaped from prison when threatened with death and sexual assault by another prisoner)

   b) Murder (only common law, not MPC)
      Duress is NOT a defense to murder in common law, nor can it reduce it to manslaughter
      People v Anderson (no duress defense available to defendant who killed a victim under threat of assault because ought to die himself than escape by the murder of innocent—violates proportionality principle by valuing one life over another)

      i) EXCEPT – Felony Murder
         Duress is a defense to felony murder because not guilty of underlying felony

B. Intoxication
   Intoxication, caused by any substance, may be raised as a defense to a crime IF (any element)

1. Voluntary Intoxication
   Intoxication is voluntary IF intentional taking (all elements)
   a) Without duress
   b) Of a substance known to be intoxicating

   Voluntary intoxication is a defense to (all elements)
   c) Specific intent crimes
      Voluntary intoxication may serve as a defense to a crime that requires purpose or knowledge because it may establish that the defendant lacked the capacity to form the requisite intent
      i) No malice mental state
      ii) Not as bad a human being
      iii) BUT could argue put self in position to voluntarily assume may do things different
   Commonwealth v Graves (evidence of voluntary intoxication allowed where defendant had taken LSD and alcohol before murder, robbery)

   d) NOT if already attached to crime
      Voluntary intoxication is not available to a person who agrees to the offense before becoming intoxicated because he has already attached himself to the crime
   e) NOT General intent crimes

2. Involuntary Intoxication
   Intoxication is involuntary IF intentional taking (any element)
   a) Under direct duress
      Forced ingestion of something a person doesn’t want to ingest
   b) Without knowledge of its nature
      Intoxication may be taken without knowledge of its nature by (any element)
      i) Actor does not know of grossly susceptible degree of intoxication
      ii) Actor does not expect intoxication due to medically proscribed drug
iii) Actor makes an innocent mistake about the character of the substance taken

Involuntary intoxication is a defense to any crime insanity is a defense to.

C. Insanity
Legal insanity, caused by any means, may be raised as a defense to a crime IF (all elements)

1. A defendant presents evidence of insanity to shift the burden of proving sanity to the state
Sufficient evidence as to require a judge to conclude that no reasonable juror could entertain a reasonable doubt of insanity shifts the burden to the state to prove sanity.

2. The state fails to meet its burden of proof of sanity
The state may meet its burden of proof through the introduction of (any element)
   a) Expert testimony
   b) Lay testimony IF proper foundation shown
   c) Acts or statements of the defendant at or very near the time of the crime which are consistent with sanity and inconsistent with insanity
      State v Green (state failed to meet its burden of proof of sanity because acts not inconsistent with insanity when defendant killed a police officer because he thought he was reading his mind)

3. The defendant meets the jurisdiction’s test of legal insanity
A jurisdiction may determine a defendant’s legal insanity via (any element)
   a) M’naghten Test (traditional / NC)
      A defendant is legally insane IF (all elements)
      i) A disease of the mind
      ii) Caused a defect of reason
         Loss of physical control over oneself is no defense
      iii) At the time of committing the act
      iv) Such that the DF lacked the ability to (any element)
         1) Know the wrongfulness of his actions
         No defense just because believes actions are morally right → must not know actions are regarded by society as wrong
        2) Know the nature and quality of his actions
   b) MPC Test (lower standard than knowledge)
      A defendant is legally insane IF (all elements)
      i) A disease of the mind
      ii) Resulted in DF lacked substantial capacity to either (any element)
         1) Appreciate the wrongfulness of his actions
         2) Conform his conduct to the requirements of law
         Permits impairment of both cognitive and volitional (physical) capacity

4. NOT incompetency to stand trial
Legal insanity is distinguished from competency to stand trial as competency to stand trial is the defendant’s ability to
   a) communicate and assist the lawyer in his trial
   b) Rationally understand the proceedings
   c) At the time of the trial

5. POLICY
   a) Society decides not to punish because
      i) No deterrence of the insane – can’t deter because not choosing what they do
ii) No retribution of the insane – no moral wrongdoing
b) BUT trying to provide a legal framework for answering a medical question

D. Diminished Capacity
E. Infancy