Criminal Law – Simons – Spring 2010

Justifications of Punishment

I. **Utilitarian justification**: punishment is justified in the useful purposes that it serves – the point of punishing D is to prevent bad future consequences (forward looking)
   a. Types:
      i. Specific deterrence (i.e. individual): by threatening this D with punishment, D is discouraged from committing future crimes
      ii. General deterrence: by threatening this D (and others) with punishment, others are discouraged from committing crimes
      iii. Incapacitation: by brute force, D is prevented from committing crime
      iv. Rehabilitation: by rehabilitating or reforming D, D is discouraged from committing future crimes
      v. Reinforce social norms (that this crime is wrong): improve the likelihood of D's compliance with the law, but not by direct threat of punishment
   b. Empirical Q's: how effective are these strategies?
      i. Ex: utilitarians might take into account D's celebrity to make an example of them – more deterrence
         1. Cf. retributivists would say that is unjust, even if more of a deterrent benefit – D should only get what he deserves (not more because he is famous)
      ii. Ex: utilitarians might support cooperation with the government as a factor in determining punishment if there is future social benefit by D helping put other/more criminals behind bars
      iii. Do criminals actually calculate cost/benefits; know of the rule? (if not, deterrence might not work)
   c. Normative Q's: which crimes are worth preventing?
      i. Ex: we use more social resources to deter and prevent more serious crimes than less serious crimes

II. **Retributive justification**: punishment is justified because people deserve it – the point of punishing D is to respond appropriately to D's prior wrongful act (looking back at the crime)
   a. Limiting vs. Affirmative Retribution
      i. Limiting: retribution is a proportionality constraint on utilitarian goals
         1. Want to deter behavior, but must limit punishments to deter based on what the actor deserves
      ii. Affirmative: retribution is a positive reason to impose or increase punishment, even if utilitarianism does not justify such punishment
         1. May not be any deterrence value in punishment, but should still impose because the actor deserves it
   b. Types:
      i. Vengeance: "eye for an eye" (Kant)
      ii. Just deserts: what D "justly deserves"
         1. Things to consider:
            a. D's conduct
            b. D's mental state
            c. Harm caused by D (physical harm, or emotional harm to victim/victim's family, e.g.)
               i. Victim Impact Statements?
            d. D's background (focus on the actor, as well as his acts)
               i. D's good deeds could mitigate
               ii. D's prior crimes (e.g.) could aggravate
      iii. A "pure" retributive theory need not rely on what actual beliefs are held by the population [see pseudo-retribution theory below]
   c. Empirical Q's: does D satisfy the relevant criteria/factors?

i. Ex: did D intend to harm victim?

d. Normative Q's: which crimes are most blameworthy?
   i. Ex: retributivists takes into account how wicked the offense is
   ii. Cf. true retributivists would not support plea bargaining because D is getting a break only to save social resources – D should get what he deserves regardless

III. **Pseudo-retribution**: justifications that give weight to the moral wrongfulness of D's conduct, but still might really be utilitarian because they focus on preventing bad future consequences
   a. Punish in order to avoid the risk that citizens will take the law into their own hands
   b. Punish in order to satisfy victims' desire for revenge
   c. Punish in order to reinforce social norms condemning D's conduct, in order to secure compliance with those norms

IV. Other Values to determine the proper level of punishment:
   a. Equality – avoid unjust discrimination & inconsistent treatment
      i. Ex: white vs. blue collar crime – should white collar criminals avoid prison sentences because they can pay higher fines? (might just see as an easy-out)
   b. Liberty
   c. Individualization
   d. Fair notice, predictability
   e. Democratic values – preference for legislative criteria over judicially created criteria, e.g.

Defining Criminal Conduct

Actus Reus (commission of a voluntary act that is prohibited by law) (note: also need to satisfy the objective elements of the particular crime and the required mens rea)

I. **Voluntary Act Requirement**: do not want to punish people for something that they cannot control doing
   a. Voluntariness is a requirement the State must prove (beyond a reasonable doubt)
   b. D is not guilty if his conduct fails to satisfy **either**:
      i. A requirement in a particular statute of a particular type of voluntary act
      ii. A general voluntariness requirement
         1. MPC §2.01(1) "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act …"
            a. Not all elements must be voluntary so long as at least one act is
               i. Meant to include *Decina* exception (see below)
            b. Involuntary acts: (a) a reflex or convulsion, (b) bodily movement during unconsciousness or sleep, (c) conduct during hypnosis, (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual
         2. Background CL presumption requires a voluntary act
            a. Not every act has to be voluntary
               i. Ex: *Martin v. State*: (i) getting drunk – voluntary, (ii) appearing in a public place – involuntary, (iii) engaging in boisterous activity – voluntary [note: this court did say all 3 need to be voluntary, but not so in general]
   c. *Decina* exception: if D engages in a voluntary act that he should foresee will result in a later involuntary act, then D should be liable (i.e. person's voluntary act can extend back in time)
      i. Don't want to extend too far back (overinclusive)
      ii. Ex: D made a voluntary decision to drive, despite knowing that the involuntary (seizures) could later occur, so D is still deserving of punishment

II. Involuntary Acts
   a. If the involuntary act is completely unforeseeable, D will not be convicted
   b. No punishment justification:
      i. Retributivist view: if D has no ability to control his actions, it is not just to punish D
      ii. Utilitarian view: if D did not make a choice (ex: unforeseeable heart attack), then punishment does not make sense because there is nothing to deter

c. Involuntary acts = not guilty
    i. MPC §2.01(2) + CL
        1. Reflex or convulsion
        2. Bodily movement during unconsciousness or sleep
        3. Conduct during hypnosis
        4. Bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual
d. Habit vs. Sleepwalking: significance of D's capacity to control his conduct
    i. Sleepwalking – unconscious the entire time; complete incapacity to control conduct
        1. Ex: *Cogdon*: D killed her daughter while sleepwalking = involuntary act (MPC & CL)
    ii. MPC treats habitual action done without thought as voluntary action – assumption is that there is a greater capacity for control
        1. Result of conscious effort or determination
e. Amnesia vs. Unconsciousness
    i. Amnesia itself is not a defense (i.e. once at trial you cannot remember what happened during the act), but is relevant at the time of the acts in question to determine whether D had a conscious mind and control over his actions at the time of the act
    ii. Ex: People v. Newton: D was shot in the abdomen which caused him to lose consciousness for 30 minutes – during which he shot and killed a police officer; court found that he was unconscious between the time he was shot and the time he was arrested at the hospital
        1. Involuntary unconsciousness is a complete defense
f. Burden of proof
    i. State bears the burden of proof in showing voluntariness (beyond a reasonable doubt: close to 100% certainty)
    ii. If D offers the involuntary act defense, State must prove act was in fact voluntary
g. Insanity vs. Involuntary Act
    i. If D pleads insanity, D is still subject to civil commitment – not a complete defense
    ii. If D pleads involuntary act – complete defense
h. Conduct vs. Status
    i. State cannot punish 'being' – cannot punish a person for who he is, independent of anything he has done
        1. Ex: *Jones v. City of Los Angeles*: L.A. Municipal Code made it an offense for any person to sit, lie or sleep in or on any street, sidewalk or other public way
            a. Homeless people successfully argues that they cannot be punished for their status as homeless people
                i. Only option is to not fall asleep at all – which is not really an option – so sleeping in a public place was involuntary
            b. Note: if the ordinance just said "in a public park", then sleeping in a public park would be voluntary because they could choose to sleep elsewhere, like the public street

III. **Omissions**: cans be criminally punished if there is a duty to act
a. Affirmative Duties to Act
    i. <u>Statute</u>
        1. Ex: legal, statutory duty to file your taxes, so filing to file taxes (omission) can be punished
        2. Ex: *Pope v. State*: D took mother into her home; mother was crazy and beat her child; D did not stop her or help or report; D charged with child abuse and misprision (failure to report a felony); court held D was not guilty because D did not have an affirmative duty to act under the child abuse statute
            a. Statute limited duty to parents, adoptive parents, temporary/permanent guardian, or individual responsible for the

supervision of the child – court found none of these satisfied because mother was present the whole time and had the right to care for the child (concerns about liberty and autonomy)
                i. Might be able to make an implicit reliance argument re: mother was secluded at D's house, if she was at church and started beating her child, there might have been more people there to step in (try to claim voluntary assumption of duty)
        3. The duty neglected must be a legal duty, and not a mere moral obligation – there is no general duty to act simply because you are capable of doing so
            a. Ex: *Jones v. United States*: D charged with involuntary manslaughter through failure to provide for a 10 y/o boy; no seclusion concern because boy was living with his mother; even though D had ample means to provide for boy, cannot be convicted unless D had a legal duty
                i. Note: might try to argue voluntary assumption of duty
    ii. <u>Status</u>
        1. Parents have an affirmative duty to rescue/act for their child
            a. Parents still have a duty to act even if they fear they are at risk; not as clear if there is a risk of death to the parent
        2. Spouses have a duty
            a. Cf. *People v. Beardsley*: D was having an affair with a woman who took a lethal dose of morphine; D did not have a duty because they were not married
            b. Few modern courts would find absence of legal marriage a complete defense
        3. Step-parents have a legal duty – pretty close to being a natural parent
        4. Live-in boyfriends/girlfriends do not have a duty
            a. Courts hesitant to extend parental liability beyond clearly established legal categories of parent or guardian
                i. Concerns re: line drawing, hindsight (need warning of duty ahead of time), and possible deterring people from caring for children (not their own)
        5. Generally, siblings do not have a duty, nor do parents for adult children
    iii. <u>Contract</u>
        1. Duty can be imposed if D has assumed a contractual relationship with another
            a. Ex: babysitter
    iv. <u>Voluntary assumption of care/responsibility</u>
        1. Just finding yourself alone with another does not impose an affirmative duty
            a. Different situation if you have agreed to watch, e.g.
        2. Seclusion aspect: other people may assume the child is being taken care of, or may not know the child is in danger
        3. Reliance
            a. Ex: *Commonwealth v. Pestinikas*: D permitted a 92 y/o man to starve after agreeing to feed him and knowing there was no other way for him to get food; D convicted of murder because had a legal duty to act (murder because acted with purpose or knowledge that death would result)
    v. <u>Creating a peril, by voluntary (culpable or faultless) act</u>
        1. Duty imposed if you commit a culpable voluntary act
            a. If your criminal act puts another in danger, could be liable for involuntary manslaughter, negligent homicide, criminal negligence
            b. Creates a more culpable state of mind and will increase degree of liability

c. Actor decided to forgo liberty by affirmatively acting

2. Duty imposed if you commit a faultless voluntary act
    a. Whenever D's act puts another at risk of harm and D becomes aware that he has put someone at risk of harm, D has a duty to prevent the harm
        i. Ex: B slowly walks along and bumps C into river, B is faultless in his act, but nonetheless has a duty to C
    b. Creating a peril, even faultlessly, triggers a duty to rescue / minimize the risk/harm
3. No duty imposed if no voluntary act
    a. Involuntary act ≠ no duty
    b. Ex: B bumps into C who involuntarily bumps into A – C likely not required to help because C did not make a choice to act
    c. Hypo: B, sleepwalking, knocks someone into the water, the splash snaps B out of it and B realizes someone is in the water – tricky because up until the splash B's actions were involuntary, but could try to argue for liability because B created the risk and had knowledge of it once B snapped out of it
        i. Note: there is likely a knowledge requirement that you've created a peril

vi. Note: legal duty category is surprisingly fuzzy
1. MPC §2.01(3)(a) & (b): categories of legal duties not defined

b. **Duty of Bystanders**: policy
i. No duty for bystanders to aid or rescue
1. Concerns about: infringement on personal liberty; liability if you do attempt to rescue; and line drawing problems – if duty to rescue imposed, could become over-extensive
ii. Stick vs. Carrot approach
1. Stick: criminal liability for not rescuing
2. Carrot: reward people who rescue
3. Partial immunity approach: not liable for injuries from rescue unless rescuer is grossly negligent
iii. Bystander liability theories:
1. Liability for a major crime that the bystander failed to rescue
2. Liability for a minor crime of non-rescue
    a. Pro:
        i. Utilitarian: impose a duty because it would maximize good
        ii. Communitarian: we should think about all people as part of the community that are owed respect and care
    b. Con:
        i. Retributivist: less blameworthy than the person who caused the harm
        ii. Posner: duty to rescue can discourage people from rescuing
            1. If no affirmative duty, those who do decide to rescue will be better at it (presumption)
3. No criminal liability
    a. Right for individual's liberty not to be infringed, e.g.

c. **Good Samaritan statutes**: duty of easy rescue (MN, RI, VT, FL, HI, WI)
i. Generally, this is a limited duty of easy rescue
1. No duty if would infringe upon duties to others or if would create danger or peril to would be rescuer
    a. Only minor penalties imposed; prosecutions are rare

d. **Misprision**: duty to report crimes

i. Abolished in most states
ii. Professionals (doctors, nurses, teachers, clergy, attorneys, e.g.) may have a duty to report child abuse, elder abuse, domestic violence, etc.
iii. Pros:
    1. Statute could distinguish between people who know information vs. people who should have known
    2. Could limit it to certain situations, like child abuse, e.g.
iv. Cons:
    1. Violations of privacy in rape cases
    2. Incentives for people to falsely report a felony
    3. Difficult proof requirement
    4. Infringement on personal autonomy/liberty

e. Bootstrapping: Violation A results in Violation B
    i. Use breach of a legal duty to convict of a more serious crime
        1. Ex: if doctor does not report child abuse (violation A) and child later dies from this child abuse (violation B); can doctor be charged with homicide for failing to report the abuse if he has a legal duty? If so, State will prosecute the most serious violation (i.e. B)

f. Threshold Q vs. Sufficiency of D's fault
    i. If there is no duty to act, does not matter why the individual did not provide aid
    ii. If there is a duty to act, individual is required to take steps that are reasonably calculated to achieve success
        1. Breach is determined on a case-by-case basis
            a. No breach if steps would require one to risk their own life
            b. Ex: *Commonwealth v. Cardwell*: D's daughter was sexually abused by D's husband; daughter told D of abuse; D moved clothes to her mother's house and wrote an angry letter; daughter ended up running away from home – court determined D did not take steps sufficiently calculated to protect the child; mother had duty to protect child despite being herself endangered/fearful
                i. Note: consider D's state of mind and fear of husband; does her fault match up with the particular level of fault for the offense?
    iii. Two level analysis:
        1. Is there a duty?
        2. Is there enough fault for criminal liability?

g. **Possession**: liability for omission or failure to remove drugs
    i. Possession crimes impose an affirmative duty
        1. Need awareness of the thing charged with possessing (even when the statute is silent on the subject)
            a. If you have possession, but no awareness, likely not guilty
    ii. MPC §2.01(4): possession can satisfy the actus reus (voluntary act) requirement only when the **accused was aware** of his control of the thing possessed for a sufficient period to have been able to terminate his possession
        1. Affirmative duty to rid yourself of the illegal goods
            a. With proof of **knowledge**, you have responsibility
        2. Sufficient period of time is ambiguous
    iii. CL: some courts take a negligence or strict liability approach; generally CL courts requires closer to knowledge
        1. Liability if individual should have suspected was wrong (negligence)
        2. Minority approach: liability even if you do not have reason to suspect something is wrong (strict liability)

a. Ex: *State v. Bradshaw*: D was a truck driver across the border with drugs someone hid onboard; no evidence D knew or should have known drugs were onboard; court held awareness of the presence of drugs was not require for possession conviction

Mens Rea

I. Broad vs. Narrow Sense of MR
   a. Broad: requirement of moral fault/blameworthiness
   b. Narrow: statutory requirement of a particular mental state (or a particular type of culpability) for an element of a crime
      i. The kind of awareness or intention that must accompany the prohibited act, under the terms of the statute defining the offense
         1. Traditional CL: willfully, intentionally, maliciously, recklessly, negligently, e.g.
         2. MPC: purpose, knowledge, recklessness, negligence, strict liability
      ii. Foresight that a harm could occur (reckless)
         1. Ex: *Regina v. Cunningham*: D was stealing a gas meter for money; caused neighbor to be poisoned by the gas; D convicted of "unlawfully and maliciously" endangering someone; actus reus is satisfied (poisoning & endangering), is mens rea?; court held that "malice" is not limited to ill will ("wickedness") or actual intention to cause the harm
            a. "Malice" requires either (a) actual intention to cause the harm, or (b) recklessness as to whether such harm should occur or not (i.e. D has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it) ("has foreseen" = actual awareness, not "should have foreseen")
      iii. Must prove some sort of mens rea/intent
         1. Ex: *Regina v. Faulkner*: D went to steal rum from a ship; D lit a match that caused the ship to set fire; court found D not guilty because D did not intend to set the ship on fire; just because D's act was unlawful (stealing rum) is not enough to convict him of the harm caused (setting the ship on fire) – act must be intentional and/or willful (also refer to recklessness)
            a. D had no intent to commit the crime (setting ship on fire), so court will not transfer D's intent to steal to this crime
      iv. Proving awareness and intent can be difficult
         1. Sometimes need to prove awareness through circumstantial evidence to determine what D subjectively intended or believed
         2. SCOTUS does not like mandatory presumptions, unless they are *always* true

II. Specific vs. General Intent
   a. Specific: action done with a further purpose in mind
      i. Ex: assault with intent to kill, burglary requires an intent to commit a felony inside
   b. General: D acted intentionally and knew the nature of the acts preformed
   c. Note: MPC eliminated the specific/general intent language
      i. In favor of element analysis

III. MPC Approach to MR
   a. Actus Reus: non-MR elements of a crime
      i. Material vs. Nonmaterial Elements
         1. Material: all non-MR elements that must actually occur
            a. Conduct: bodily movements or immediate actions; type of voluntary action of inaction specified
               i. Voluntariness is typically enough to satisfy a conduct element
               ii. Ex: "enter a building"
            b. Circumstance: background facts/residual category (i.e. everything else)

i. Ex: "building must be a dwelling"

c. Result: something you bring about/ "cause …"

d. Ex: NY Burglary Statute: "knowingly enter or remain (i.e. unlawfully)" – conduct; "a building" – circumstance; no result requirement (as opposed to homicide/arson/assault, where D must cause actual harm)

e. Ex: Destruction of Property: requirement that you have no legal right to do so (circumstance element) and that you cause $1,500+ in damage (result element)

2. Nonmaterial: procedural; elements in the statute that do not impose any type of liability (do not go to the harm or evil legislature is concerned with)
    a. Do not need MR for nonmaterial/jurisdictional elements because it does not go to the underlying harm
        i. Ex: SOL, jurisdiction, venue, or any other matter similarly unconnected with the harm, e.g.
3. For each material element there could be a different MR
    a. MPC element analysis
4. Sometimes statutes also require proof of a "free-floating" or detached MR
    a. Proof of a MR but MR need not attach to a corresponding actus reus element
        i. State must prove the MR (e.g. with intent to commit a crime therein) but need not prove a corresponding actus reus (e.g. that D actually committed a crime therein)
        ii. Ex: NY Burglary Statute: "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when the building is a dwelling"
            1. MR re: "knowledge" you are entering or remaining unlawfully
            2. MR re: "dwelling" – might not need any MR
            3. MR re:"intent" – purpose to commit a crime inside; you are not off the hook if you do not, for whatever reason, commit the crime; you need the intent to commit a crime, even if you do not actually commit the crime … "intent to commit a crime" does not refer to the result, circumstance, or conduct element of the crime = free-floating MR

b. Types of MR (MPC §2.02(2))
    i. Purpose (intent):
        1. Result: D's conscious object is to cause the result
        2. Circumstance: D is aware the circumstance exists, or D believes/hopes that circumstance exists
        3. Purpose usually encompasses lower MR
            a. But can act with purpose without being knowing
                i. Ex: want to cause someone's death, but know you are not a good shot – acted with the purpose or object to cause death, but did not act with the knowledge or awareness of a high probability/practical certainty that death will occur (still have purpose even if you only have 50/50 knowledge the result will occur)
            b. Purpose is more culpable than knowledge, but generally treated the same because we want to deter both
                i. Purpose focuses on D's intent/objective

ii. Knowledge focuses on D's belief about how likely the result is to occur

4. Purpose (or intention) vs. motive
    a. Purpose: immediate purpose/intention
    b. Motive: further purpose/intention
        i. Criminal law does not look to motive as much as immediate purpose; less often legally relevant
5. Purpose (or intention) vs. wish
    a. Purpose: immediate purpose/intention
    b. Wish: liable for a wish if you had some reason to believe that the wish would come true, therefore you acted with the conscious object to cause the result
        i. Must be an underlying rationale basis for the harm to occur
            1. Ex: D hated aunt; D knew chances of the plane crashing were remote, but decided to purpose the ticket anyways; plane crashed – D not guilty because the actual crash is coincidental
6. MPC's "intent" means purpose, but might not always be the case in CL courts

ii. <u>Knowledge</u> (practical certainty)
1. Result: D is aware that it is practically certain that his conduct will cause result
2. Circumstance: D is aware that circumstance exists, or D is aware of a high probability that circumstance exists (unless clause, MPC §2.02(7); clause is unimportant in practice though)
    a. Do not need actual knowledge that a circumstance exists, rather, subjective awareness of a high probability that a circumstance exists
    b. High probability is likely more than 50% (more likely than not)

iii. <u>Recklessness</u> (substantial certainty, can be as low as 10% chance)
1. Result: D **is** aware of a substantial and unjustifiable risk that result will follow
2. Circumstance: D **is** aware of a substantial and unjustifiable risk that circumstance exists
3. Knowledge vs. Recklessness: difference in D's subjective awareness or perception of what the risk was

iv. <u>Negligence</u>
1. Result: D **should be** aware of a substantial and unjustifiable risk that result will follow
2. Circumstance: D **should be** aware of a substantial and unjustifiable risk that circumstance exists
3. MPC criminal negligence is different than civil/tort negligence in that it must be a **gross deviation** (more than slight) from the standard of care that **a reasonable person** would observe **in the actor's situation** [criminal negligence requires a more culpable mental state than simple, ordinary tort negligence]
    a. Gross deviation requires something more than not acting as a reasonable person should – risk is much greater (ex: 5 mph over speed limit – slight deviation; 45 mph over speed limit – gross deviation)
    b. Some CL courts might require only tort negligence (Ex: *State v. Hazelwood*); others criminal negligence (Ex: *Santillanes v. New Mexico*)

v. Recklessness vs. Negligence
1. Negligence is less culpable than recklessness because D acts only inadvertently; the person should have been aware of the danger, but was not; fault is inattentiveness
    a. Recklessness is more culpable because D was subjectively aware of the danger but acted anyways; fault is choosing to run the risk
    b. Crucial factor: awareness of a risk

i. Recklessness includes subjective elements: (1) risk – subjective), (2) risk is substantial – subjective, (3) risk is unjustifiable – objective
1. Negligence is focused on the objective (whether a reasonable person would see the risk as unjustifiable; **not** whether D considers it justifiable) – D does not have to be aware of a risk at all

vi. Strict Liability
1. No MR required; no fault necessary

c. MPC Interpretive Rules
i. First: Does the statute explicitly require a particular MR? (if yes, inquiry done; if no, step 2)
1. Ex: If murder is defined as purposefully or knowingly causing death, the purpose or knowledge is the required MR for the actus reus result element

ii. Second: Does the "travel rule" apply? (MPC §2.02(4))
1. Travel rule: when the statute specifies the MR sufficient for the commission of an offense, but does not distinguish among the material elements, such MR will apply to all material elements of the offense, unless otherwise noted/a contrary purpose plainly appears
a. Ex: a statute punishes "knowingly giving a false statement to a federal officer" – so D has to **know** both that he is giving a false statement and that it is to a federal officer
b. Cf.: a statute punishes "any person who, with a purpose to obstruct justice, gives a false statement to a federal officer" – so D has to purposely obstruct justice, but re: "giving a statement" – just need to ask if this was a voluntary act

iii. Third: Apply the MPC's Default MR Rule – under that rule, a minimum MR of recklessness is required (MPC §2.02(3))
1. Ex: NY Destruction of Property: " … with intent to damage property of another, … and he damages property of another in an amount $1,500+" – so D has to have purpose to damage, but "intent" does not travel because there is a comma/two independent clauses; since there is no MR re: amount of damage, default MR rule tells us it is a minimum of recklessness
2. Ex: "A person is guilty of robbery if, in the course of committing a theft he inflicts serious bodily injury upon another" – no MR stated, so default MR of recklessness is required (i.e. negligence is not enough to be convicted)
3. Ex: A statute punishes, "any person who, with a purpose to obstruct justice (conduct element), gives a false statement to a federal officer" – purpose does not travel, so recklessness is required re: giving a false statement to a federal officer
4. Default MR of recklessness requires at minimum that D is aware of a risk to be guilty of a crime

iv. Finally, MPC's Hierarchy Rule occasionally applies – if the State is able to prove a MR "higher up" than the MR that the statute requires, this higher MR can satisfy the lower statutory MR, even if, factually, D does not satisfy that lower statutory MR
1. If D has a worse (higher) MR than the legislature required, we can assume they also meant to convict Ds with at least that MR + higher MR
a. Ex: "knowingly cause the poisoning of another" – D is still guilty if he purposely tried to poison someone, but subjectively he believed he only had a 50% chance of succeeding; we read the statute as saying "purposefully or knowingly"

IV. Recklessness vs. Knowledge vs. Willful Blindness

a. MPC approach: knowledge requires D to be aware of a "high probability"; so not really a willful blindness doctrine because there is no additional requirement that D have deliberately or consciously avoided the truth
    i. MPC's "high probability" means at least 50% probable
b. CL approach: the State can prove knowledge either by showing: (1) D was pretty certain of the fact (we do not know how certain) **OR** (2) demonstrate willful blindness – a CL doctrine, which makes it easier for the State to prove knowledge
    i. Willful blindness:
        1. Awareness of a high probability (probably meant to encompass both MPC recklessness and knowledge, so awareness of a substantial risk that can be anywhere from 20-90% certain) AND
        2. D lacks actual knowledge because D deliberately or consciously avoided the truth – either because
            a. D took affirmative or unusual steps to avoid the truth, or
            b. D could very easily have determined the truth but decided not to do so
    ii. Requires awareness/some suspicion, otherwise knowledge could be confused with negligence (i.e. what D should have known)
        1. Ex: *United States v. Jewell*: D charged with knowingly transporting pot in his car; evidence showed D deliberately avoided positive knowledge; court convicted D: "a court can properly find willful blindness only where is can almost be said D actually knew"
        2. Ex: *United States v. Giovannetti*: D charged with aiding a gambling operation because D rented a house to gamblers; no evidence D had knowledge or strong suspicion that house was used for gambling; D did not inquire about what renters used house for; court found D not guilty because D's failure to display curiosity is not the same as preventing the truth from being communicated to him
    iii. CL Willful Blindness is bumping recklessness to knowledge

V. **Mistake of Fact**: D believes something it true, that is not true
a. General steps:
    i. First, figure out what MR the statute requires as to the element in question
        1. Examine language – or – apply interpretive rule (travel/default/hierarchy)
    ii. Second, determine what kind of mistake D made, if any
        1. Reasonable mistake: D's mistake is not negligent or reckless; ordinary reasonable person would make this type of mistake
            a. Ex: V has a mature physical appearance, looks 21 and has a perfectly forged ID = reasonable mistake
        2. Negligent mistake: D should be aware, and his failure to be aware is grossly unreasonable (measured by a reasonable person standard)
            a. Ex: V lies to D and tells D that she has purchased alcohol from him before, and she left her ID at home; most people, judging by her appearance, would guess V is 18 or 19; but D is gullible, is confident she is of age and sells V alcohol = grossly unreasonable mistake
                i. D does not have actual awareness of a probability that V is underage, but reasonable people would
        3. Reckless mistake: D is aware of a substantial risk that circumstance or result exists, but D actually believes that circumstance or result is not true; D's disregard of the risk is grossly unreasonable
            a. Ex: D is aware of a substantial risk that V is underage, but D actually believes that she is in fact above age, and D disregards of the risk is grossly unreasonable (measured by a "law-abiding" or reasonable person standard)

b. Ex: same facts as above, except D is not as gullible and says he is not sure if he believes her story, but he's not a good judge of age, D is willing to sell this time, but says to bring ID next time; could be true that (a) despite some doubts, D ultimately believes that she is probably 21, (b) D is nevertheless aware of a substantial risk (say, 20%) that she is under age, and (c) D's mistake is grossly unreasonable

iii. Third, determine whether that kind of mistake "negatives" the MR indicated in the first step – does the mistake reveal that D lacks the MR required for the relevant element of the crime?

1. MR Knowledge: any kind of mistake will negate knowledge, because knowledge requires that D is aware of a high probability that circumstance exists – D can't be aware of a high probability even if D makes a reckless mistake if D honestly believes that V is over 21
    a. So D is not guilty if he has an honest believe that V is over 21, whether the mistake is reasonable, negligent, or even reckless [any mistake exculpates MR knowledge]
2. MR Recklessness: a reasonable or negligent mistake will negative recklessness because in either case D will not have any actual awareness that D is under 21
    a. D is guilty if D makes a reckless mistake
3. MR Negligence: only a reasonable mistake will negative negligence – if D makes a reasonable mistake, D's actions are not a gross deviation from an ordinary standard of care
    a. D is guilty is D makes a negligent or reckless mistake
4. No MR/Strict Liability: no type of mistake will negative strict liability
    a. D is guilty no matter what kind of mistake he makes

b. **Ignorance**: D ignores circumstances and does not have any beliefs/knowledge one way or the other

i. MR Knowledge: ignorance would be a defense because D had no subjective awareness of a high probability that a circumstance existed

ii. MR Recklessness: ignorance would be a defense because D had no subjective awareness of a substantial risk/probability that circumstance existed

iii. MR Negligence: ignorance might not be a defense because D does not need to have a subjective awareness

1. If D can prove that an ordinary reasonable person would have made that mistake or that the mistake was not a gross deviation from the ordinary standard of care, then ignorance could be a defense to MR negligence

c. **Lesser Crime Approach**:

i. Many non-MPC jurisdictions endorse this idea

ii. Relates to the gravity of the offense-continuum

1. Specific MR does not matter

iii. D intended to commit a lesser crime (i.e. had the MR for the lesser crime), but it turns out D committed a greater crime (actus reus for the greater crime) – D can be convicted for the greater crime (suggests strict liability, no explicit requirement that he have the awareness)

1. Two crimes must be closely related; lesser crimes approach relates to the gravity of the offense (ex: grand vs. petty larceny)
    a. Tough luck principle: idea is that you were already committing a crime, so you take the risk that you might be guilty of a more serious crime
        i. Focus on the actual social harm caused
        ii. Just deserts: D deserves the punishment for the actual crime committed
2. Some courts might hold that D does not need MR for an extra element/aggravating factor

a. Ex: *State v. Benniefield*: D was convicted of possessing drugs within 300 ft of a school; court held State must prove D knew he was in possession of drugs, but that D could be convicted of the more serious school-zone offense without any proof he knew or should have known that he was near a school

d. Moral Wrong Approach

i. If the legislature is silent with respect to immoral conduct and MR, the court applies the greater crime approach to the moral wrong
   1. Lesser legal & moral wrongs = interpretive rules in the absence of MR for CL (because MPC has other interpretive rules to use when no explicit MR)
   2. Ex: *Regina v. Prince*: statute did not explicitly state a MR with respect to V's age; because what D believed he was doing (having sex with an above age V to whom he was not married) is still a moral wrong, though not a crime, D is punished in accordance with the actual AR (statutory rape of an underage V)
      a. Note: English courts have repudiated *Prince*, requiring some kind of MR (knowledge or recklessness) for conviction

ii. The basis of the moral-wrong doctrine is that there should be no exculpation for mistake where, if the facts had been as D believed them to be, his conduct would still be immoral
   1. D can make a reasonable mistake regarding an attendant circumstance and yet demonstrate moral culpability worthy of punishment
   2. Moral wrong doctrine not triggered unless D's conduct would be immoral had the situation been as D supposed

iii. Very few jurisdictions endorse this idea, though traces of the idea appear in non-MPC decisions upholding strict liability

iv. Counter argument: it is subjective as to what a moral wrong is – may not be a widespread intuition; who is to decide what is a moral wrong if it has not been criminalized?

e. MPC Approach

i. Almost always rejects lesser crime approach – requires MR recklessness at a minimum
   1. Retributive argument: D should only be liable for D's MR
      a. <u>MPC §2.04(2): Although ignorance or mistake would otherwise afford a defense, the defense is not available if:</u>
         i. D would be guilty of another offense had the situation been as he supposed …
         ii. However, the ignorance or mistake of D shall reduce the degree of the offense of which he may be convicted to that of the offense of which he would be guilty had the situation been as D supposed
      b. MPC tries to align punishment with D's actual mental state (more so than the traditional approach), so D liable only for what D actually believed he was doing
         i. Ex: D had MR for petty larceny, but actus reus for grand larceny – D guilty of petty larceny
   2. MPC does not reject lesser crime approach if D commits a crime with a child of tender years
      a. Because the actus reus is a very serious crime (i.e. rape: sex when V is under 10), MPC departs from its usual approach and endorses the traditional lesser crime approach, but only for this type of serious sexual assault crimes
         i. Serious crime exception: there is an injustice for holding someone liable for an act that they did not have the requisite

MR for, but we are so upset about the crime that we are more comfortable with the injustice

ii. When criminality turns on a critical age greater than 10, MPC treats mistake as an affirmative defense on which D must carry the burden of proving that the mistake was reasonable

ii. Always rejects moral wrong approach
1. Because D reasonably believed he was engaging in an act that is not criminal, MPC imposes no punishment

f. Statutory Rape: usual rule for statutory rape in most jurisdictions is strict liability
i. Not a big deal to over-deter these types of crimes
ii. Prefer strict, bright line rules – deterrence function to encourage people to be more careful about where the line is, but harshness is mitigated by giving court sentencing discretion
iii. Strong public policy to protect very young children
1. Many courts continue to impose strict liability because of the interest in protecting children from these risks outweighs the interest that the individual may have in engaging in sexual relations with children near the age of consent (more desire to protect less blameworthy, i.e. child)
2. State avoids the risk that statutory rape will focus on the child's appearance and level of maturity (avoids a proof problem)
iv. Legislature intended strict liability because probation is available for individuals that committed a reasonable mistake
1. So, a reasonable mistake does not get you off the hook, but court will sentence less harsh if there is a reasonable mistake (probation idea – sentencing discretion)
2. Ex: *People v. Olsen*: court decides that because of public policy to protect kids under 14, D cannot assert reasonable mistake of V's age as a defense – court essentially imposes strict liability
v. Trend: traditional insistence on imposing strict liability for mistakes about age is beginning to erode
1. More than 20 states permit the defense of mistake in some circumstances when relevant age of consent is greater than 14 or when the two parties are close in age
a. Mistake must be reasonable
2. Some states do not permit a mistake defense under any circumstances
vi. Developments that have prompted reconsideration of strict liability
1. Ability of sentencing courts to mitigate the harsh impact of statutory rape convictions when D is morally innocent is undercut by proliferation of laws requiring registration and community notification for sex offenders

g. Jurisdictional and other nonmaterial elements: no MR required – under CL and MPC (even though MPC disapproves of strict liability for material elements)
i. MR always required for material elements, but not for jurisdictional elements
1. Ex: D plans to kill V on a hike, D reasonably believes he is in NH but is actually in MA; D wants to be prosecuted in NH because of their less harsh penalty – this is a nonmaterial, jurisdictional mistake, so no MR is required/State does not have to prove a MR re: D knew what jurisdiction he was in – D prosecuted in MA under CL & MPC

VI. <u>Strict Liability</u> (no MR required)
a. Interpretive Q: when a legislature does not explicitly say what the MR is for a particular crime, what should the court do?
i. MPC: apply the default MR or travel rule; objects to strict liability
ii. CL: less clear what the courts will do
1. Consider intention of the legislature

2. Policy concerns: more willing to find strict liability whether it would be unjust or unwise and vice versa (informed by the court's sense of justice)

b. Criminalizing vs. Grading
    i. Strict liability in criminalization (most people more concerned with criminalization than grading):
        1. Distinction between no crime and crime
        2. Turns non-criminal conduct into criminal conduct
    ii. Strict liability in grading:
        1. Lesser legal wrong doctrine – D knew he was committing a crime, but thought it was a lesser one

c. Arguments favoring Strict Liability (tend to be utilitarian or pragmatic)
    i. Strict liability avoids requiring the State to prove MR – such proof if often difficult, even when we have reason to believe that most of those convicted under strict liability probably do possess the MR
    ii. Although strict liability will harm some "innocent" Ds, this is outweighed by the need to prevent harm to innocent Vs
        1. Ex: *United States v. Balint*: D sold derivatives of opium without the order form required by the statute; court held that the innocent purchasers exposed to the dangers of the drug outweighed D's right to sell the drug – if D sells drugs he does it at his peril and will not be given the defense of good faith or ignorance
        2. Ex: *United States v. Dotterweich*: D is pres. of a pharmaceutical co., which bought drugs from a manufacturer, repackaged them, and shipped them using its own labels which contained the manufacturer's description of the product; these labels turned out to be incorrect, which resulted in D putting the wrong description on the product; D was convicted of shipping misbranded products in interstate commerce; no MR in statute, so court held D strictly liable because the legislature would rather put the hardship on those who have the least opportunity of informing themselves of the existence of conditions imposed for the protection of consumers rather than put the hazard on the innocent public
            a. Court held that reasonable care, or lack of an opportunity to prove reasonable care, is legally irrelevant with strict liability
                i. Notion is not that D was negligent, but that he was in the best position to do something – balancing relevant hardships
                    1. In the interest of the larger good, strict liability puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger – i.e. D here was president of the company, but he is in a better position than consumer or a janitor of the company, e.g.
    iii. Strict liability rule could be a more effective deterrent than a rule requiring the State to prove (say) negligence
        1. Negligent Ds know that the State cannot always prove their negligence beyond a reasonable doubt
        2. The moral stigma of criminal conviction adds to the deterrent effect
            a. Counter (retributivist): even if a criminal sanction is more effective than other types of sanctions because it expresses moral stigma, this is an unjust use of the criminal law, if D does not deserve that stigma
    iv. Often strict liability crimes impose only minor penalties
        1. Counter: not always
    v. We can rely on the discretion of prosecutors and juries to apply strict liability fairly

1. Counter: how can juries do this if they are not supposed to consider the D's MR? If D tries to introduce evidence of due care, the court should exclude it as irrelevant, where the law imposes strict liability

vi. Sometimes, D voluntarily assumed a responsibility (e.g. to manufacture products or distribute chemicals) and thus properly assumed the risk of criminal sanctions
1. Counter: just because D entered a business does not mean that it is always fair to impose strict liability

vii. Sometimes Ds who are found strictly liable really are negligent if we expand the time frame

d. Arguments against strict liability (apart from doubts about the above arguments)
i. Why not at least require negligence, or allow defense of lack of negligence?
1. Harsh to impose criminal liability even if D is not negligent

ii. A fault requirement is fundamental in criminal law
1. With strict liability juries might not even hear the evidence of lack of fault, and that's a problem

iii. Dangerous conduct can be effectively deterred by noncriminal sanctions (e.g. tort, civil regulation)

e. *Morissette v. United States*: D took rusting bomb casings from property of Air Force; D indicted for "knowingly converting" government property; D believed casings had been abandoned by the Air Force and thus he was violating no one's rights; court held that it was not enough D "knowingly converted" – D must know that he is invading someone else's rights (knowledge of the facts that made the conversion wrongful, that is, that the property had not been abandoned by its owner)
i. Traditional serious crimes like larceny: presume legislature intended a "high" MR (here, required MR includes knowledge that one has no legal right to the property)
1. *Morissette*: court held that there is a different MR for criminal conversion because traditional serious crimes like larceny require high MR; therefore D must have had the intent to take property that he knew was not abandoned by its owner for conviction

ii. Public welfare offense: term of art for law in which legislature permits strict liability
1. **Five relevant factors mentioned in *Morissette* that favor strict liability**:
a. Not a traditional common law offense, such as murder or theft
i. Sometimes put as: crime is merely malum prohibitum (wrongful only because criminal law prohibits its), rather than malum in se (inherently wrongful; most people would know it was wrongful even if it was not prohibited)
1. Malum prohibitum: can hold strictly liable
2. Malum in se: serious crimes should not be held strictly liable; should require a high MR

b. A mere omission
i. Often deals with businesses failing to regulate something in a way they are told to do

c. No direct or immediate injury
i. Crime does not turn on harm to a V, but rather to the public welfare

d. Minor penalty
i. Legislatures did not intend a MR to be required because of the small, typically fine only, penalties

e. D was probably negligent (but we don't require proof)
i. "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities"

2. Other factors later suggested:
    a. D is on notice that D's conduct is **especially** dangerous
        i. Ex: *United States v. Freed*: D knew that D was in possession of a grenade; D did not register D's grenade; no MR in the statute; D was found guilty under strict liability for possession of an unregistered grenade; court held that D took on the responsibility to own an ultra hazardous item
        ii. Ex: X-Citment Video: strict liability not imposed because a party shipping videos is not on notice that their conduct is especially dangerous
    b. D's underlying conduct is not "apparently innocent"
        i. Ex: *Staples v. United States*: D was charged with violating the National Firearms Act, which makes possession of an unregistered automatic firearm punishable by up to 10 yrs in prison; D claimed he did not know the gun was capable of automatic firing (weapon had been modified by someone other than D); court refused to impose strict liability – (a) high possible penalty, so strict liability should not be required; (b) owning a firearm is apparently innocent conduct, so MR required; (c) no strict liability because otherwise it would apply to all guns and criminalize a broad range of innocent conduct; and (d) legislature likely did not intent strict liability; State needs to prove D knew (MR) it was an automatic weapon
        ii. Ex: *Freed*: strict liability imposed because it is not apparently innocent conduct to own a grenade – not many people do

f. *United States v. X-Citement Video*: D transported explicit materials involving a minor; statute prohibited any person to knowingly transport or ship in interstate commerce any visual depiction if (a) producing the visual depiction involves the use of a minor engaging in sexually explicit conduct – does "knowingly" travel to (a)?
    i. Court held that "knowing" applied to knowledge that the party had materials containing children engaging in sexually explicit conduct even though the most natural grammatical reading was to allow "knowing" to apply only to the surrounding verbs; "to give the statute its most grammatically correct reading would be ridiculous" – suggesting "knowingly" travels, against what grammatical reading would hold, because of legislative intent
        1. Presumption of MR requirement implied in criminal statutes if not expressed
    ii. Scalia dissented and found that allowing "knowing" to apply only to the surrounding verbs was the *only* grammatical reading and that the presumption of intent requirement had never been applied when the plain text of the statute says otherwise
    iii. Reading the statute as a strict liability crime could impose liability on someone that it totally innocent and believed that they were shipping Disney movies but were not due to a mistake on the manufacturer's end

g. Strict Liability and Voluntary Act
    i. Even if courts accept strict liability, they tend to require a voluntary act too
        1. Hypo: suppose vehicular homicide is a strict liability statute (no need to prove fault) – (a) D is driving very carefully, a drunk is lying in the road on a curb, D does not see him and hits him = D is liable because of strict liability; (b) D is driving during the day, sees the drunk, hits the brakes, but they fail and D hits drunk = D probably not liable because did not commit a voluntary act – lacked sufficient control over the vehicle
        2. Ex: *State v. Baker*: D convicted of speeding, a strict liability statute; D claims his cruise control failed and D could not slow down; court holds D strictly liability

because failure of cruise control is different than failure of brakes – D voluntarily gave up control when D activated cruise control & brakes are an essential part of the car, whereas cruise control is optional for convenience

a. Prof does not find this case convincing – thinks this looks more like an involuntary act
    i. Reason for trying to draw a line between voluntary and involuntary acts is in some sense to try and mitigate the harshness of strict liability

h. MPC view: strongly disapproves of strict liability
    i. If legislatures want to recognize strict liability, conviction should not have any criminal consequences – should not be allowed to result in incarceration – should only be allowed in traffic violations or those that impose civil penalties (fines, e.g.)
    ii. Exception: mistake of age of a V of a sex crime if V under age 10
    iii. If statute is silent on MR, then the MPC default MR of recklessness will be applied

i. **Vicarious Liability**:
    i. D is guilty even though D did not satisfy actus reus for crime, because D is legally responsible for another person who did satisfy the actus reus for the crime
        1. Some jurisdictions do not require MR
        2. Vicarious liability is a necessary deterrent element
        3. Ex: *State v. Beaudry*: D held vicariously liable when his employee was convicted for allowing his tavern to say open past closing despite D's instructions not to leave the tavern open; court found D vicariously liable on the ground that the penalty imposed was only a $200 fine, even though the statute authorized a 90-day jail sentence (employer vicariously liable for employee)
    ii. What MR, if any, should be required of the D who is vicariously liable?
        1. Some jurisdictions do not require any MR
        2. Some jurisdictions require D have some degree of awareness that the crime might be committed
            a. No actus reus, therefore there must be some MR
                i. Unconstitutional to eliminate actus reus and MR
        3. Ex: *State v. Guminga*: D's waitress serve alcohol to an underage person without requesting ID; court held that the owner (D) could not be held vicariously liable for the waitress's actions if owner (D) did not have knowledge or give express or implied consent to the waitress's actions – court held unconstitutional to impose strict liability because D did not have actus reus or MR
        4. Ex: *State v. Akers*: minors drove off-highway cars on public highways; no evidence of parental culpability necessary to hold them vicariously liable; court: any attempt to impose vicariously liability on parents simply because they occupy the status of parents, without more offends the due process clause of our State constitution
        5. Policy Considerations
            a. D could be given a longer prison sentence for a future felony if convicted of a gross misdemeanor (*Guminga*)
            b. Criminal penalties based on vicarious liability is a violation of substantive due process and only civil penalties would be constitutional (*Guminga* & *Akers*)
                i. American courts generally uphold vicarious liability if there is only a criminal fine
                    1. Courts are split when the penalty could include imprisonment though
            c. Balance between public interest protected and the intrusion on personal liberty is not achieved through vicarious liability (*Guminga*)

j. Defense of Non-Negligence (as opposed to traditional strict liability)

i. Ex: *Regina v. City of Sault Ste. Marie* (Canada): suggests an intermediate category – shifting the burden to D and letting D off the hook if he can prove he acted with reasonable care (a non-negligence defense)
    1. Less helpful for D than a requirement that the State prove negligence, but more helpful than strict liability [negligence → non-negligence defense → strict liability]

VII. Mistake of Law

a. Mistake of Fact (D misunderstands the non-legal facts, or does not know all of the facts involved, but understands the law) **vs.** Mistake of Law (D misunderstands the legal facts – the scope or meaning of the law)
b. <u>Ignorance or mistake of the criminal law is no excuse</u>
    i. Ex: *People v. Marrero* (CL): D was arrested for unlicensed possession of a gun; D was a federal corrections officer; statute exempted corrections officers of any state correction facility or of any penal correctional institution as a peace officer; D clearly violated actus reus, so D argues the MR issue; D argued he should be exempt because he is considered a "peace officer"; court found exemption only applied to state, not federal, correctional officers [D made a mistake of governing criminal law re: definitional provision]
        1. A person is not relieved of criminal liability for conduct because he engaged in such conduct under a mistaken belief that it does not, as a matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law (need **reasonable reliance**)… <u>official reliance</u> on:
            a. A statute
                i. D cannot assert a mistake of law defense simply by misconstruing the meaning of a statute, but must instead establish that the statute relied on actually permitted the conduct in question and was only later found to be erroneous
            b. A judicial opinion
                i. Note: not a broad defense – need *reasonable* reliance
                    1. Reasonable: relying on the jurisdiction's highest court's opinion (HO 6)
                    2. Unreasonable: relying on a lower court's opinion that might be overturned on appeal, or if there is a conflict among the circuits, it is reasonably foreseeable that SCOTUS will decide the issue
            c. Advice of a government official
        2. Court held that NY statute in this case was modeled after the MPC, and MPC approach requires there to be a statute, judicial opinion, or grant of permission that authorized the particular activity and was later struck down/invalidated … even the NY statute did not include the MPC language "afterward determined to be invalid or erroneous" – court read the language into the NY statute and assumed legislature intended to copy the MPC [was probably sloppy drafting but missing language makes a dramatic change to the statute, broad vs. narrow]
            a. Policy for majority: more focused on deterrence and want to avoid a broad mistake of law defense
            b. Policy for dissent: more focused on retribution (if a reasonable person cannot understand what the statute says then it is not fair to punish them) and happy to have a broad mistake of law defense
c. Generally, advice of legal counsel, even if taken in good faith, is not a defense for mistake of law
    i. Ex: *Hopkins v. State* (CL): D erected signs after State Attorney told D it would not violate the law; court affirmed D's conviction because advice of legal counsel is not a defense for mistake of law; advice given by a public official, even a State's Attorney, that a

contemplated act is not criminal will not excuse an offender if, as a matter of law, the act performed did violate the law
    1. If an accused could be exempted from punishment for crime by reason of the advice of counsel, such advice would become paramount to the law
    2. If MPC applied case would likely give D a defense here because D relied on advice from a "public official" [note: private attorney ≠ public official]

d. **Government Office Misconduct/ Entrapment**: violates due process to convict a D for relying on statements made by government officials [constitutional doctrine]
    i. Ex: *Raley v. Ohio*: D invoked privilege against self-incrimination before Ohio Commission, after the Commission told them they had the right to do so; apparently this was bad advice and D was convicted for contempt for refusing to answer the Commission's question; SCOTUS found D's conviction unconstitutional because it violated due process – D reasonably relied on the government's official statements

e. **Entrapment by Omission** [constitutional doctrine]
    i. Ex: *State v. Leavitt*: D convicted of DV; judge told D could not possess firearm for 1 yr (affirmative statement), but omitted to mention that D could not possession firearms indefinitely; D got rid of his guns for the 1 yr, then possessed again; turns out illegal for someone convicted of DV to have guns ever, so D convicted of unlawful possession
        1. Court reversed D's conviction because D relied on statement of the court; "it would be a denial of due process to require D to speculate about additional firearm possession restrictions beyond D's 1 yr probation where the court did not inform him otherwise"
    ii. Ex: *United States v. Wilson*: wife got protection order against D; court did not tell D he was not able to possess a firearm, even though state & federal law made possession illegal w/ PO; court affirmed conviction, holding that D merely needed to knowingly carry a gun – failure to have knowledge of the law was no excuse

f. MPC Approach
    i. Mistake as to governing criminal law: usually strict liability
        1. MPC §2.02(9): Ignorance or mistake of law is normally not a defense
            a. MR as to the existence or application of the law is not a defense unless the definition of the offense of the MPC so provides
        2. Narrow exceptions (i.e. no strict liability if …):
            a. MPC §2.04(3): Narrow exceptions for non-publication of the law or <u>reasonable official reliance, afterward determined to be invalid or erroneous, contained in</u>**: a statute, judicial opinion, administrative order, or advice of a government/public official is a defense**
                i. MPC official reliance is a more liberal approach to protect defendants than traditional CL official reliance
                    1. MPC includes "administrative order or grant of permission;" whereas CL does not
                ii. Mistake in publication: defense if the statute it not known to D and the statute has either (i) not been published or (ii) reasonably made available prior to the conduct alleged
                    1. Only applies to whether the State has officially published rules in a way that someone could look them up
                        a. Does not apply to any situation where someone did not know that the law existed – too broad of an interpretation
            b. MPC §2.04(1)(b), §2.02(9) (last clause): Narrow exception if statute explicitly requires MR as to governing criminal law
    ii. Mistake as to other law: usually treated the same as mistake or ignorance of fact
        1. If so treated, the mistake of ignorance of other law might exculpate

        a. Notion: it is especially burdensome to learn the criminal law, plus divorce/property/etc. law that is not a part of the criminal law
    2. MPC §2.04(1)(a): Ignorance or mistake as to a matter of **fact or law** is a defense if the ignorance or mistake negatives the MR required to establish a material element of the offense
    3. Also, the offense itself might clearly identify certain mistakes of law as exculpatory
        a. MPC §2.04(1)(b): … the law provides that the state of mind established by such ignorance or mistake constitutes a defense
    4. Look to MR required in the statute, apply interpretative rules
        a. Ex: *State v. Woods*: D made a mistake of other law outside of the criminal statute (divorce law); this mistake of other law is treated like an analogous mistake of fact; statute did not require a MR; under MPC default rule recklessness is required – if D aware of a substantial risk that she is violating the law, could be liable; if D honestly believed man is legally divorced, then she is not liable because she does not have awareness (negligent or reasonable mistake would negate the MR of recklessness)
        b. Ex: *Regina v. Smith*: D installed panels, flooring and stereo wiring in apt & thought they were his property; when D damaged some panels and flooring to retrieve the wiring he charged with intending to damage property of another or being reckless as to whether any such property would be damaged; court required that D must have acted with intent to destroy property that belonged to another; D's mistake of property law (i.e. he thought property belonged to him) was a defense because D could not have intentionally damaged property of another if he thought it was his

g. CL Approach (mistake of governing criminal law):
    i. Generally strict liability (even stricter than MPC); few or no exceptions
        1. But if statute requires "**willful**" or knowing violation of the law, sometimes knowledge of legal duties is required, especially if duties are very complex or it strict liability would punish a broad range of apparently innocent conduct
            a. Meaning of "willfully" is ambiguous, so courts consider whether applying the general idea that ignorance or mistake of law is no defense would punish innocent conduct – court is sensitive to not apply the general idea too literally when the statute uses a term like "willfully"
                i. Assume when Congress used the word "willfully" they are sensitive to punishing innocent conduct
                ii. Ex: food stamp case (pg. 278): a strict reading of the statute with no knowledge of illegality required would thus render criminal a food stamp recipient who, for example, used stamps to purchase food from a store that, unknown to him, charged higher than normal prices to food stamp program participants; State must prove D knew of the existence and meaning of the regulation his actions violated
            b. Ex: *People v. Weiss*: mistake of law, but the statute required "knowing" violation of the law; court reversed D's conviction because good faith belief in the legality of the conduct would negate an express and necessary element of the crime of kidnapping (i.e. intent, without authority of law, to confine or imprison another); jury could find D lacked intent to confine the victim without authority of law – D thoughts he had the legal right to confine

c. Ex: *Cheek v. United States*: D did not file taxes for years because he claimed tax laws were unconstitutional (not a defense) and that he did not know he had a legal duty; D convicted of "willfully" failing to file taxes; standard for statutory willfulness requirement is the "voluntary, intentional violation of a known legal duty"; if it is an honest, but unreasonable, belief (and knowledge is the MR) then D not liable; but court suggests that if D has an unreasonable belief, jury can cast doubt on the honesty/reasonableness of D's belief; note: belief that the law is unconstitutional is not a defense

h. **Constitutional limit**: unconstitutional (violation of due process) to punish when *Lambert* exception applies (mistake of governing criminal law)
   i. D is unable to comply with the law without knowledge and/or notice of the statute
      1. Unusual law, so very little reason to expect that conduct is punishable
      2. Malum prohibitum, not malum in se (inherently wrongful)
      3. D's conduct is not the type that puts D on notice the D is committing a crime
   ii. D is punished for mere passive status or mere omission
   iii. Is the law a public safety measure of a general law enforcement device?
      1. Ex: *Bryant*: public safety measure
      2. Ex: *Lambert*: general law enforcement device
   iv. Courts interpret this exception narrowly
      1. Separate principle from misconduct of government officials
   v. Ex: *Lambert v. California*: D was convicted of a felony and did not register with the city; D was arrested on suspicion of another offense and was charged with violating the registration law; court held D had no notice and was completely unaware that D was required to register; court held D was required to have at least knowledge or recklessness with respect to violating the registration law
   vi. Ex: *State v. Bryant*: D was convicted of a sex offense; judge did not tell D that he was required to register as a sex offender in any state he may move to; court affirmed conviction, holding that all states have some sort of sex offender registration so D should have been on notice that he was required to register; court emphasized this law was a public safety measure, not just a general law enforcement device

i. Policy
   i. Pro strict liability for mistakes of law
      1. Encourages knowledge of the law
      2. Avoid risks of fraudulent claims of mistake
   ii. Con strict liability for mistake of law
      1. Individual culpability should be required
         a. Retributivist: someone that innocently commits a crime should not be punished equally as someone that has knowledge and committed a crime
         b. Ineffective as deterrence because it is useless to punish people when we cannot expect them to know the law
      2. Especially when the criminal law is malum prohibitum, rather than a traditional moral norm of which we can fairly expect D to be aware
      3. Allowing a defense for mistake of law will encourage legislatures to clarify the law

j. General defense of reasonable mistakes of governing law = N.J. approach
   i. Thinks strict liability is too harsh, so provides broader defense that MPC exceptions do
   ii. Not adopted under the MPC or a majority of jurisdictions

k. So-Called "Cultural Defense" (does not really exist)
   i. Not accepted in American jurisdictions – considered a mistake of governing criminal law, therefore no defense
      1. No defense that you did not know what the law was in that State

a. Cultural defense might be taken into account at sentencing
b. Cultural defense can create an alternative discriminatory standard of criminality for immigrant Ds and denies Vs (usually minority women and children) from protection of the law

VIII. Intoxication

a. Voluntary intoxication caused D to commit crime defense?
    i. Generally may mitigate the crime from 1st degree murder to 2nd degree murder, but the jury must decide
        1. **NOT** full defense (unlike self-defense)
            a. If I wasn't drunk, I would not have done this = never a full defense
        2. Can be relevant as to whether D had MR
            a. Ex: assault with intent to kill – could try and introduce intox evidence to negate "intent" MR; maybe D was intending to shoot to the side or just to scare off V, but lacked MR to kill
        3. Even if intoxication evidence is admitted the fact finder might determine the evidence insufficiently persuasive to make any difference to D's criminal liability
            a. Fact finder might conclude that D's intoxication did not negate D's MR
        4. Many intoxicated Ds can and do form an intent to kill, rob, e.g.
    ii. Extremely narrow circumstances may lead to a not guilty ruling
        1. If voluntary intox renders person brain dead or permanently damages; or insanity cases

b. Voluntary Intoxication

i. General Intent (GI) vs. Specific Intent (SI)
    1. Specific intent: intent to commit a further act or achieve a future consequence
        a. Crimes require knowledge or purpose, generally
            i. Ex: murder (intent to kill); larceny; assault with intent to kill, rob, rape, e.g.
    2. General intent: intent to commit the basic act
        a. Do not need to prove knowledge or purpose of a fact or circumstance, merely needs to act
        b. Crimes require recklessness or negligence, generally
            i. Ex: murder (extreme indifference or depraved heart); reckless assault
    3. Simple Assault – GI or SI?
        a. Ex: *People v. Hood*: unclear if simple assault/intent to injure (not kill) GI or SI
            i. SI: intent to do a further act or achieve an additional consequence
            ii. GI: description of an act without reference to a further act or consequence – simple assault/intent to injure could be part of the initial act
        b. Ex: *People v. Rocha*: clarified GI
            i. Simple assault with a deadly weapon is a GI crime, as to which intoxication evidence is inadmissible
                1. GI: not admissible; SI: admissible
    4. Certain elements of some crimes are SI, while others in the same crime can be GI elements
        a. Ex: breaking and entering into a dwelling with intent to commit a felony
            i. Intox evidence would not be admissible to GI element (whether D knew it was a store or a dwelling), but would be admissible to SI element (intent to commit a felony)

ii. CL Moderate Approach (*Hood*, e.g.)
    1. SI crime: intoxication evidence is admissible to prove that intoxication factually negates specific intent
    2. GI crime: intoxication is inadmissible even though it may be logically relevant
        a. Contradictory to allow evidence of intoxication to relieve someone of crimes that usually happen while drunk anyways (since alcohol reduces inhibitions and Ds may act more violently)
    3. Policy concerns:
        a. D who gets drunk and commits a crime should not escape its consequences
        b. Utilitarian: want to deter people from getting drunk and not realizing what they are doing
        c. Just deserts: D caused the social harm improperly, so maybe D deserves to be punished since he is at fault for getting drunk and not recognizing the risks D poses to others
        d. Counter: Drunk D's moral culpability may be less than a sober D's
    4. Ex: *People v. Hood*: D had been drinking heavily and resisted an effort by police to subdue and arrest him; during the struggle D grabbed officer's gun and shot him in the leg; court found that intoxication evidence is relevant to assault with intent to kill charge; intoxication evidence irrelevant to simple assault or assault with a dangerous weapon because those are GI crimes
    5. **Slightly stricter version** (*Turrentine*):
        a. SI crime: intoxication evidence admissible only if D is so intoxicated that D is incapable of forming SI
            i. Similar to temporary insanity
            ii. Intoxication removes the MR to understand the consequences of one's actions (MR in the broader sense is entirely absent) [extremely rare]
                1. Ex*: State v. Booth*: voluntary intox evidence allowed as a defense only when prolonged extensive use of alcohol produces a permanent condition sufficient to meet the test for legal insanity – substantially incapacity either to appreciate the criminality of D's conduct or to conform to the law
            iii. Courts that use this approach employ a high threshold for admissibility of intoxication evidence
                1. Reluctant to allow intoxication to rebut evidence of MR because there is a close connection between alcohol consumption and commission of crimes

iii. CL Conservative Approach (most restrictive) (*Stasio*, e.g.)
    1. SI crime: inadmissible always or almost always
        a. Some states allow intox evidence admissible only on premeditation
            i. If crime requires premeditation, intox can be relevant to mitigate the crime
    2. GI crime: inadmissible
    3. Ex: *State v. Stasio*: D was convicted of assault with intent to rob; court held that intox was inadmissible, even though D charged with a SI crime
    4. Policy concerns:
        a. Irrational to allow intoxication evidence to excuse some crimes and not others (i.e. SI/GI distinction)
        b. Intoxication can free D or SI crime that caused greater harm than an offense that only requires GI (i.e. if not lower crime to mitigate to, might result in acquittal)

c. Public safety and the harm done are identical irrespective of D's reduced ability to restrain himself due to intox (i.e. public safety demands are equal in SI & GI)

iv. MPC Approach
1. Purpose or Knowledge: admissible
a. D may try to prove that intoxication factually negates purpose or knowledge (MPC §2.08(1))
2. Extreme Indifference Murder: perhaps admissible with respect to the "extreme indifference" component (but not admissible with respect to the "recklessness" component)
3. Recklessness: inadmissible (if a sober D would have been aware of the risk)
a. D is unaware of a risk that D would have been aware had D been sober
i. When you get drunk you are aware of a substantial risk of what you might do while drunk
1. Broadening the time frame to determine when D was aware of the substantial risk (similar to *Decina* exception)
ii. Actor knowingly created a larger risk by getting intoxicated
b. **Constructive Recklessness**: treat D as if he were actually reckless, if a sober D would have been aware of the risk
i. Actual MPC Recklessness requires subjective awareness of a specific and relatively immediate risk
1. But, a person who is unaware of a risk only because he voluntarily got drunk, then MPC treats them as being constructively reckless (constructive = State does not have to prove actual recklessness)
a. MPC focuses carefully on MR, but is willing to look at why D was unaware of the risk and apply constructive recklessness if appropriate
ii. MPC §2.08(2): When recklessness establishes an element of the offense, if the actor due to self-induced intoxication, is unaware of a risk which he **would** have been aware had he been sober, such unawareness is immaterial
4. Negligence: inadmissible (and irrelevant)
a. Negligence requires D to adhere to a reasonable standard of care
i. Failure to see a risk because of intoxication is irrelevant
ii. A reasonable person standard is not a reasonable drunk person, so intox evidence irrelevant
5. Note: MPC approach is similar to the CL moderate approach (excluding *Turrentine*, e.g.)
a. MPC looks at the elements & MR of the crime; does not distinguish between GI or SI

v. Logical Relevance Approach (more liberal than MPC)
1. Always admit intoxication evidence
a. Let the trier of fact determine whether the evidence helps show that D lacked whatever MR the State must prove (even a MR of recklessness)
i. Often won't negate, but sometimes will

vi. Burden of Proof: if intoxication evidence is admissible, the burden rests on State to prove D had the requisite MR

vii. Policy:
1. General intent

a. Is it fair to prohibit evidence that negates the intent to commit a crime?
b. Counter: even though you're intoxicated, you could still have intent to injure someone
c. Evidence of intoxication treats D less harshly when the crime is worse
i. Admissible to negate intent re: assault with intent to kill
ii. Inadmissible to negate assault re: fear of a battery or contact

2. Recklessness: why punish a reckless D more than a negligent D
a. Deterrence: reckless D actually contemplated the crime and may not do it again in the future
i. Negligent D may not have contemplated the crime at all
b. Retributive: had the negligent D been aware of the risk, he may not have taken the negligent route
i. Reckless D was aware of the risk and chose to take it anyways
ii. Counter: criminalizing something that everyone does

3. Constructive Recklessness: why treat a drunk D unaware of the risk like a reckless D, rather than a negligent D
a. Getting drunk is not culpable alone; it is legal
b. Should be treated more harshly than someone whose reason for being unaware of the risk is less culpable than drinking before encountering the risk (reason for the lack of awareness is a bad one)
c. Many crimes involve alcohol – do not want to allow intoxication to negate recklessness

4. Social control concern: alcohol is a huge social problem; do not want to give drunks defenses unnecessarily

c. Involuntary Intoxication

i. Involuntary intoxication evidence leads to acquittal if:
1. It causes either permanent or temporary insanity (MPC §2.08(4)), <u>OR</u>
a. Ex: someone puts hallucinogenic drug in D's drink; D has delusions and thinks he is a superhero and the only way to save the world is to knock out everyone else; charged with assault; D might have a temporary insanity defense if involuntary intox causes D to have a very severe inability to conform to the law (very narrow defense; not merely a case of reduced inhibitions)
b. Note: more complete defense than insanity
i. If D insane – D civilly committed
ii. If D involuntarily intoxicated – D acquitted/not committed
2. It negates MR (even a MR of recklessness)
a. Admissible to negate purpose or knowledge
b. Admissible to negate recklessness (contrary to voluntary intox.)
c. CL and MPC rules are about the same for involuntary intoxication

ii. D is less likely to be acquitted if he is voluntarily intoxicated
1. Voluntary intoxication leads to acquittal only if:
a. It causes permanent (not merely temporary) insanity, or
b. <u>Sometimes</u> if it negates MR

iii. Two theories re: formation of intent – does not matter so long as the intent is there at the time the person committed the offense
1. Intent is already there and the alcohol makes the person act on the intent
a. Ex: *Regina v. Kingston*: Penn lured 15 y/o boy to Penn's apt. and invited D over; Penn drugged D; while D was drugged he sexually assaulted the boy
i. Absence of moral fault is not sufficient to negate mental element of the offense

ii. Must review the totality of the circumstances
iii. If D had the intent at the time of the crime, involuntary intox should not negate that intent because it enabled the intent to be released

2. Intent is formed after the person ingests the alcohol
    a. Hypo: Brown is proper and has never consumed alcohol; Sky makes a bet that he can bring Brown to Cuba; Sky spikes her milk with rum; fight breaks out and Brown throws chairs and is charged with assault; intent is not formed until after Brown consumes the alcohol; so she has the MR and actus reus, but she was involuntarily intoxicated
        i. Prevalent view is no defense; never know how much alcohol is responsible for actions – proving would not have done act if not intoxicated is too complicated

iv. Voluntarily ingesting Rx drugs ≠ always involuntary intoxication
1. Ex: *People v. Garcia*: D entitled to present a defense of involuntary intox, based on insulin shock from his own injection of a large dose of insulin for his diabetic condition, after D assaulted wife when she asked for a divorce
2. Ex: *Cobb v. State*: D who shot her former lover was not entitled to present evidence of involuntary intox based on the effects of antidepressants, because D had knowingly taken higher than prescribed doses

Homicide

Common Law

I. Murder
- a. **First Degree** (typically: poison, lying in wait, or any other kind of willful, deliberate and premeditated killing)
    - i. Certain felony murders
    - ii. Premeditated/Deliberate murders
        1. Cold blooded murder
        2. Specific intent to kill
        3. *Carroll* vs. *Guthrie* re: premeditation
            - a. *Carroll* approach largely erases/blurs the distinction between first-degree and second-degree murder
                - i. Ex: *Commonwealth v. Carroll*: D & wife were fighting in bed; D shot wife; court finds evidence of premeditation & that D had an intent to kill; evidence shows that there were 5 minutes between wife's last remark and the shooting; court says "no time is too short" to evidence premeditation, but do suggest some period of reflection is required
                - ii. Ex: *Young v. State*: agrees with *Carroll*; premeditation and deliberation may be formed while the killer is pressing the trigger that fired the fatal shot
            - b. *Guthrie* approach gives meaning to the distinction
                - i. Ex: *State v. Guthrie*: D suffered panic attacks and had obsession with his nose; workers at the restaurant started teasing D; someone flicked a dishtowel and it hit D's nose; D became angry and stabbed V in the next; court held D was guilty of **premeditated murder** = D has time to consider/weigh/reflect between the formation of the intent to kill and the actual killing (D took off his gloves, V had time to plead for life); instantaneous premeditation and momentary deliberation is not satisfactory for proof of first-degree murder – any other intentional killing, by its

spontaneous and non-reflective nature is second-degree murder; best to leave it to the jury to decide how much time is enough to satisfy premeditation

1. *Guthrie* Factors
    a. Statements made by D
    b. Motive to kill (money, revenge, e.g.)
    c. Planning activity
    d. Relationship to V (and state of relationship at time of killing)
    e. Manner of killing (type of weapon used, where killing occurred)
2. Note: this court finds premeditation pretty easily; the mere fact that D had a few seconds to think about it might not always be sufficient to push murder from second to first degree

iii. Policy re: premeditation
1. Retributive: premeditating D more blameworthy
2. Deterrence: D is more deliberate, so more easily deterrable
    a. Heat of passion murders are less deterrable
    b. If someone is better at covering their tracks and is more effective at carrying out the crime, need a higher penalty to deter them because they are harder to catch
    c. Counter: heat of passion murders should receive just as high of a penalty as premeditated murders because they need to be hit hard so they won't commit these crimes again
    d. Not clear if deterrence argument will always work (i.e. actually deter)
3. Incapacitation: may be likely to repeat

iv. Alternative approaches to 1st degree murder
1. Reliability of premeditation
    a. Misses the moral importance of why we have homicide
    b. Aggravating circumstances that can make an unpremeditated murder that is not deliberate more culpable
        i. Ex: *Anderson*: butchering a child because of sexual frustration and rage … not premeditated, but aggravating circumstances
2. Premeditation can be unreliable
    a. Ex: *Anderson*: D murdered 10 y/o V; blood all over the house; V's body under blankets with 60 wounds; court held there was insufficient evidence to support a premeditated, first degree murder conviction
        i. No evidence that D planned the killing
        ii. Nothing in prior relationship between D and V revealed motive
        iii. Manner of killing suggested explosion of violence, rather than preconceived design to kill
    b. Hot blooded, but so deprave that it should be first degree, rather than lesser degree murder (most people want this in the most serious category)
3. Conscious purpose to bring about death (*O'Searo*)
    a. Premeditation and deliberation requirement is met when there is a conscious purpose to bring about death
        i. *O'Searo* suggests do not even need premeditation/deliberation if there is a conscious purpose to bring about death

1. No reason to differentiate between the degree of culpability based on the elaborateness of the design to kill

4. Reflection: first degree murder if D has enough time to reflect before killing
    a. Proof of actual reflection is not required
    b. No first degree murder if the act is done instantly during a fight or heat of passion
5. Mercy Killings
    a. Ex: *Forest*: D killed his terminally ill father while sobbing with emotion; D convicted of first degree murder
        i. D less morally culpable even though case meets *Guthrie*/*Carroll* tests for premeditation, first degree murder
6. Tweaked Rule: MA first degree murder statute responds to *Anderson* by stating: "1st degree murder if you have deliberate, premeditated malice or the person acts with extreme atrocity or cruelty"
    a. Do we want to make an exception for euthanasia or benevolent motives (make an exception for mercy killings, even though premeditated)?
        i. Ex: NY Statute, manslaughter in the second degree: "… or if you aid another person to commit suicide"

v. Degrees of murder and the death penalty
1. The availability of the death penalty is a strong reason to draw the distinction between first and second degree murders
2. SCOTUS has said that courts need an appropriate system for determining who is the most deserving of the death penalty
    a. Any mandatory rules that subject a D to death penalty are forbidden
        i. Have to focus on the individual and specify both aggravating factors that make someone more deserving of the death penalty and mitigating factors

b. Intentional Murder

i. D purposely or knowingly causes death
1. Warm blooded
    a. May have killed instantaneously (i.e. no premeditation or deliberation)
    b. May have killed due to the heat of passion that did not involve provocation
    c. May have killed due to provocation that did not fit into one of the categories under *Girouard* or the *Maher* flexible standard approach
2. Ex: *Girouard v. State*: D & wife were arguing, it got pretty heated as wife taunted D; D grabbed a knife from behind a pillow and stabbed wife 19 times; court denied D a provocation defense because **words alone are not enough for adequate provocation**; D convicted of second degree murder (not manslaughter since provocation defense denied)
    a. Policy: domestic arguments easily escalate into fights, no reason to find in favor of these crimes

c. **Depraved Heart** (unintended)

i. Definition is unclear
1. Purpose or knowledge not required
2. D does not intend to kill, but malice is implied because there is a wanton and willful disregard of the likelihood that the natural tendency of D's behavior is to cause death or great bodily harm

ii. Ex: firing a bullet into a crowded room; shooting into a passing car; Russian roulette; driving a car at very high speeds in a main street; throwing a heavy object down onto a

busy street; beating someone severely, though not intending to kill or knowing to a practical certainty that they will die; crazy drunk driving

iii. Grossly reckless act that has a disregard for human life
    1. D reasonably anticipates his action is likely to result in death
        a. Ex: *Commonwealth v. Malone*: D and friend (V) played Russian roulette; D placed a single bullet in one of five chambers; V agreed to play; D shot at V 3 times; V died; court found D had acted grossly reckless and it was 60% certain from his 3 attempts to shoot that he would kill V
    2. Formulas tend to include: malice, implied malice, wickedness
    3. <u>Relevant factors</u>
        a. D subjectively believes he has created a high risk of death (greater risk than reckless, but less than knowing)
            i. Ex: *Malone*: D testified that he thought there was only a 1 in 5 chance of death and that the bullet was in the last chamber (i.e. 5th shot); court does not clarify how substantial D's awareness must be
            ii. Ex: *Dellinger*: intentional act, the natural consequences of which were deliberately performed by a person who knew that his conduct endangered the life of another and acted with conscious disregard for life
        b. D created an objectively high risk of death (whether D realizes this or not)
            i. Note: might seem unduly harsh to convict someone of murder on an objective standard of a risk D did not subjectively recognize
            ii. Ex: *Roe*: D was a 15 y/o boy tried as an adult for murder for killing his friend during Russian roulette; after D shot friend, D was instantly distraught; court held that so long as D was aware of the risk, evidence of D's subjective mental state is not pertinent to prove depraved heart murder
        c. D's actions display a culpably indifferent or callous attitude
            i. Clearly unjustifiable conduct for no legitimate purpose
                1. Risk can be pretty low if the case seems outrageous enough to be depraved heart murder
            ii. Desire to expose others to high risks of harm (no intent to kill, but D's intent by acting is to scare/endanger others)
                1. Evidence that D is not callous may come too late
                    a. If D was really worried he would have realized the risk before engaging in the activity
                    b. Ex: *Roe*: court held D was liable even though he displayed remorse (note: courts are likely to ignore that D felt remorse afterwards)
            iii. Premeditated or long continued dangerous conduct
                1. Premeditated dangerous conduct (not premeditated intent to kill, rather, planned/known course of activity)
                2. Ex: *Fleming*: D drove at extremely high speeds on highway; weaving; D lost control and struck a car; D was driving 70-80mph, speed limit was 30; D's BAC was .315; D convicted of second degree murder

iv. Cruelty, heartlessness
1. Cf. *Roe*
2. Ex: *Burden*: D consciously failed to feed his starving baby because he "didn't feel like it;" court upheld second degree murder conviction [this could be "knowing," so might not have to resort to depraved heart murder]

v. No effort to minimize the risk

4. Problems
   a. Difficult to distinguish between manslaughter and depraved heart murder
      i. Turns on how wicked and depraved the killing seems
      ii. Highly subjective: depends on jury's moral abhorrence/normative judgment
      iii. Some courts have not required D to be subjectively "wicked"
5. Intoxication evidence inadmissible because CL classifies depraved heart murder as a GI crime
   a. Courts do not want intoxication to negate MR
   b. Policy: why not let the case go to the jury to decide
      i. Drunk driver might not be acting as culpable in that he did not act with purpose or knowledge, but he did voluntarily handicap himself
      ii. Deterrence: can deter drunk drivers so that they will not act so callously
6. Intent to inflict great bodily harm
   a. Sometimes recognized as a separate category of murder
   b. Deliberately wounding someone; aiming at a vital body part – shooting someone in the chest
   c. Can be used to show depraved heart murder

d. **Felony Murder** (unintended)
   i. Often recognized, but with many variations with respect to covered felonies and limits
      1. Some states NY (p. 379) & CA (p. 375) list the specific felonies eligible for felony-murder
   ii. State does not need to prove D had the MR for murder (as to causing death) – only the MR for the felony and the causal connection
   iii. Qualified Approach (*Serne*)
      1. D must have MR or intent to commit the felony
         a. Does not need the MR to commit murder
      2. Felony is known to be dangerous and likely in itself to cause death
         a. <u>Foresight</u> is the test
         b. Cf. stealing V's watch and V dies of a heart attack ≠ felony-murder for this court because stealing is not known to be dangerous to life
      3. Felony causes V's death (actus reus)
   iv. Strict Approach (*Stamp*)
      1. D commits a felony
      2. Felony causes V's death (actus reus)
      3. D is liable for murder regardless of whether or not it was known that the felony would cause death
         a. Foresight is not the test
            i. <u>Directness</u> is the test: as long as the homicide is the direct causal result of the felony (whether or not the death was a natural or probable consequence of the felony)
         b. Essentially strict liability

4. Ex: *People v. Stamp*: D robbed V's business at gunpoint; D made V lay on the floor; V died of a heart attack from fright; court: so long as life is shortened as a result of the felony it does not matter that the victim might have died soon anyways

v. Causation Requirement (required by some courts; not *Stamp*)
   1. But for test
   2. Result (homicide) must have been the natural and probable consequence of D's action (i.e. foreseeable)
      a. The result must be fairly attributable to D's action, rather than to the intervening action of another or to mere coincidence
      b. Ex: *King v. Commonwealth*: D transported 500lbs of pot; plane crashes during transport; no felony-murder conviction; court says that foresight it the test – D's conduct needs to increase the harm that occurred; the fact that the plane was carrying drugs did not increase the probability of the death occurring (now, if they were flying low to avoid detection, that's another story)

vi. <u>Inherently dangerous felony limitation</u>: different approaches
   1. The felony is dangerous in the abstract (California)
      a. Limitation on the felony-murder rule
      b. Are there situations where the commission of the felony does not endanger human life?
         i. Ex: *People v. Phillips*: D (chiropractor) convinced V's parents to forgo surgery for eye cancer, as suggested by doctor, but rather D would do treatment for $700; V died in 6 months; D charged with grand theft; court refused felony-murder instructions because grand theft is not inherently dangerous to life (even though in this case it was)
         ii. Ex: *People v. Henderson*: unlawful restraint of another does not necessarily involve the requisite danger to human life for a felony-murder conviction
      c. Policy: courts do not want to extend felony murder beyond its required application
         i. Efficient; functions better as a rule; deterrence: Ds can figure out what types of penalties an act could carry; takes legislative's intent into account
   2. On the actual facts, the way in which D committed the felony is dangerous
      a. A number of felonies would not appear to be inherently dangerous but could be committed in such a way to be inherently dangerous
         i. Based on the facts the felony was committed in a way that risk to life was foreseeable (broad)
            1. Objectively foreseeable that death would occur
               a. D need not be subjectively aware that death would occur
            2. Ex: *Hines v. State*: friends hunting; D shot thought he heard a turkey, shot through foliage, killed V; D convicted of felony possession of a firearm by a convicted felon & felony-murder; court held D's possession of a firearm created a risk to life that was foreseeable – D had been drinking, knew other people were around, took an unsafe shot through foliage (dangerous based on the facts)
            3. Policy: deter the dangerous manner that the felony is committed

ii. Based on the facts the felony was committed in a way that death is highly probable (limitation)
1. Narrower rule, but still seems to be an objective standard
2. Ex: *Hines* dissent

vii. Policy Arguments for and against Felony-Murder
1. Deterrence
a. Pro:
i. Can deter the felony from occurring
ii. Can deter the dangerous manner of engaging in the felony
1. Rule is aimed at discouraging certain conduct during the felony
2. Encourage Ds to carry out felonies in a safe manner
3. Felons who might kill intentionally while completing their felonies might be discouraged
b. Anti:
i. Could create an incentive for people to commit murders while doing felonies
1. If D knows he will be charged with FM for an accidental killing, D might just kill everyone else as well
ii. Might not deter at all because only a small number of cases result in death – D might not think about the FM penalties, but focus on the penalties for the felony itself
1. Actual results of deterrence are relatively small
iii. Could create more efficient ways to deter (e.g. higher penalties for armed robbery)
2. Retribution
a. Pro:
i. Harm based retribution – focus on the harm that occurred
1. Punishment is proportional because the culpability of committing the felony without death vs. with death makes D more culpable
2. "By committing a felony, D runs the risk" – assumption of risk (similar to lesser legal wrong principle)
ii. Holistic – culpability of negligently causing death, in the course of a felony, is greater than the sum of the culpability of negligently causing death and the culpability of the felony
1. Death is caused in the context of a highly unjustifiable act, which makes culpability higher than that of an individual that innocently causes the death of another by pure negligence
b. Anti:
i. Culpability based retribution – punishment should be (at least roughly) proportional to D's MR and acts
ii. Avoid unequal punishment based on fortuity
1. The gun rarely goes off during the commission of the crime, therefore the person that accidentally caused the harm should not be punished more harshly than the person that caused the same felony but fortuitously did not accidentally cause the gun to go off, e.g.

3. Cost of long-term incarceration (anti-felony murder) – very high administrative costs to incarcerate people who commit accidental murders

viii. Overlap of felony-murder with other murder categories
1. Negligent Homicide
a. Fact based foreseeable injury does not require that D is subjective aware that death will occur – similar to negligent homicide because it would be a gross deviation from a reasonable standard of care (underlying conduct – felony: gross deviation from reasonable care) & D is negligent as to the death occurring under both
2. Reckless/Voluntary Manslaughter
a. Need subjective awareness (might need subjective awareness of a high risk of death) so may be no overlap; or constructive recklessness because of intox
3. Depraved Heart/Extreme Indifference Murder
a. Felony-murder is easier to apply because DH/EI is fuzzy, lacking bright line rules, hard to know how jury will interpret

ix. Other restrictions on felony-murder doctrine
1. Enumerate felonies only (e.g. NY)
2. D's act causing death must be "in furtherance" of the felony

x. D Not Guilty of felony-murder if:
1. Death occurs after the felony was terminated
2. Co-felon causes the death by an act unconnected to the felony
3. Act immediately responsible for causing the death is committed by someone opposing the felony

xi. Misdemeanor-Manslaughter = analogous to felony-murder (CL: sometimes recognized; MPC: not recognized

II. <u>Voluntary Manslaughter</u> ("Mitigated Murder")
a. D has the MR for murder, but the killing is due to adequate provocation or heat of passion, so murder is reduced to manslaughter
i. Hot blooded – normally dealing with an intense emotional reaction
ii. Why distinction/ reduction:
1. Stigma of being a murder
2. Difference in penalty is significant
iii. Adequacy of provocation
1. Heat of passion
2. Must be such that a reasonable person would lose control
iv. Immediate of provocation (cooling time)
1. If too much time has elapsed between the provocation to the crime, D will not be entitled to provocation instruction
a. Ex: *Bordeaux*: D was told during an all day drinking party that V raped his mother 20 yrs ago; mother confirmed the next day; following night D beat up V, left him injured, then returned later and slashed his throat; court refused to instruct jury on voluntary manslaughter because there was too much time between the prior argument and the killing
2. Rekindling
a. Some courts allow evidence of rekindling if there is an event immediately preceding the homicide that rekindles the earlier provocation
b. Some courts refuse rekindling
i. Ex: *Gounagis*: V committed sodomy of D and bragged to others; 2 was ridiculed for 2 weeks; D became enraged and killed V; court refused rekindling evidence

ii. Ex: *LeClair*: D suspected wife was cheating and strangled her in a rage; court refused provocation because there was adequate cooling time between the prior suspicion and the provocation

c. Some courts allow the jury to decide whether sufficient cooling time has elapsed (likely *Maher* courts)

i. Ex: *Berry*: provoked D waited for V in her apt 20 hrs before killing her; court held that D was entitled to manslaughter instruction because jury could find that D's heat of passion resulted from a long-smoldering prior course of provocative conduct by V & passage of time aggravated rather than cooled D's agitation

3. Cooling time will be dealt with differently in categorical approach vs. flexible reasonable person approach

a. Categorical approach also tends to be categorical about how little time there is to take advantage of this partial defense

b. Flexible reasonable person approach is going to more flexible and likely leave it up to the jury to decide

b. Categorical Approach (*Girouard*)

i. Positive rule: the provocation must fit within one of a few specified categories

1. Ex: extreme assault or battery upon the D; mutual combat; D's illegal arrest; injury or serious abuse of a close relative; or the sudden discovery (witnessing) of a spouse's adultery
2. Note: have to actually prove the person was provoked/acted in the heat of passion; D cannot calmly respond with violence

ii. Negative rule: words alone are never enough, even if the words describe a provocation that, if directly witnessed, would be legally adequate

1. Worry about misinformation/mistake
2. Editors note that some jurisdictions courts allow an exception when the words provoke, not because they are abusive, but because they disclose provocative happenings (i.e. if D witnessed these facts directly, would be adequate provocation)

c. Flexible Reasonable Person Approach (*Maher*, minority view)

i. Would a reasonable man's reason be disturbed by passion to an extent which might render ordinary men liable to act rashly or without due deliberation/reflection?

1. NOT: "would a reasonably or adequately provoked D <u>kill</u>"

a. If we think a reasonable person would kill, then why aren't we giving a full defense?

i. Rather, the Q is: would a reasonable person want to act/be emotional/tempted to kill

2. Strong presumption that almost all cases will go to the jury for them to decide whether the provocation is adequate/reasonable

a. Notion: might be better for juries to understand D's emotions on a case-by-case basis, rather than a strict list

3. Words alone **can** be considered re: provocation

ii. Ex: *Maher*: D's wife and V were having an affair; D found out that they slept together in the woods an hour before D shot V; court held sufficient evidence to show that a reasonable man would be impassioned and is sufficient evidence to go to the jury

iii. Variation in flexible standard approach – *Maher*: ordinary man

1. Does not take into account peculiar mental illnesses
2. Man of average mind and disposition
3. Provocation required
4. Would not allow mercy killings or quasi-insanity defense

d. Provocation is not a complete defense
    i. Provocation mitigates the penalties because there was an excuse
    ii. Unless, the provocation was related to self-defense and a reasonable person would have been provoked to lose their self control
e. Provocation as partial justification vs. partial excuse
    i. Justification ("I didn't do anything wrong") [Retributive]
        1. Good reason to act as you did (i.e. D entitled)
        2. Traditional categories for provocation generally fit under partial justification (serious assault, e.g.)
        3. Did not act in the heat of passion
        4. Not wrong because D responded appropriately to the wrongdoing
            a. Responding to the one that wronged D
            b. V committed a wrong that provoked D and caused D to respond accordingly (so V committed wrong and D is to some extent morally justified in making a punitive return)
                i. Counter: V's immoral conduct should not make his life less deserving of protection
        5. Tends to be narrower
        6. Classic example: self-defense
    ii. Excuse ("OK, maybe I did something wrong, but I can't fairly be blamed for it")
        1. Heat of passion
            a. Emotions dethrone reason
        2. Reasonable person would have lost control and acted as D did
            a. Concession to the frailty of human nature
        3. Should not have lost control but there is a reason why D is less culpable
        4. Classic examples: insanity and duress
f. Situations where V is not the provoker (D mistakenly or even knowingly kills non-provoking V)
    i. V was not associated with the provoker but was accidental victim of rage directed against the provoker
        1. Several courts will allow D to be convicted of manslaughter, not murder, if there is a statute
            a. Ex: *State v. Mauricio*: Bouncer ejected D from bar, kicked and pushed D down the stairs; D waited for the bouncer to come outside; D mistook a patron for the bouncer and shot patron; court allowed voluntary manslaughter instructions
                i. D relying on partial excuse, not partial justification since V did nothing wrong
            b. Note: TX's statute requires provocation be given by the individual killer or another acting with the person killed (i.e. no voluntary manslaughter instructions for mistaken ID cases)
    ii. V was not associated with the provoker and was not accidental V of rage against provoker
        1. Some courts will **not** allow the provocation instruction
            a. Ex: *Rex v. Scriva*: D saw a driver run over his daughter; D went after the driver and a bystander attempted to restrain D; D fatally stabbed bystander
            b. Ex: *People v. Spurlin*: D killed his wife after an intense argument over their respective sexual escapade, and still in a rage, killer his sleeping 9 y/o son
    iii. D elicits provocation
        1. Ex: *Regina v. Johnson*: D made threatening/insulting remarks to V and V's female friend; both attacked D; D fatally stabbed V; court: "find it impossible to accept that the mere fact that a D caused a reaction in others, which in turn led

him to lose his self-control, should result in the issue of provocation being kept outside a jury's consideration" – let the jury decide whether D reasonable
2. Some American statutes explicitly disallow the provocation defense where D induced the provocative action

iv. Argument: once D loses self-control it is irrational to think that his rage will only be directed at his provoker

g. Sexual Infidelity
   i. Provocation defense does not adequately protect a woman's life
   ii. Many heat of passion crimes are related to sexual infidelity
      1. Some courts limit defense to sexual intercourse (sexual intimacy, less than intercourse, is not enough)
      2. Some courts limit the defense to married couples
   iii. Reasonableness is determined from a value system that is biased in favor of men
      1. Less women commit these crimes
   iv. This is an emotional defense
   v. Women are no longer viewed as a man's property
   vi. Counter: this is not a complete defense, just a mitigation
   vii. Might argue sexual infidelity is an odd thing to group with other forms of adequate provocation because infidelity is not illegal, like serious assault is, e.g. (suggesting it does not fit with the others as a partial justification)

h. Homosexual Advances
   i. Under the traditional categorical approach, no voluntary manslaughter instruction
   ii. Under the flexible reasonable person approach, it is at least possible case would get a voluntary manslaughter instruction since a lot more cases go the jury under this approach
      1. Ordinary human beings might become so upset that they lose control
      2. Some might argue this is a completely inappropriate basis for mitigation – not a reason to kill (i.e. murder is an inappropriate response to a homosexual advance, so no defense)
      3. Dressler's theory that any unwanted advance (i.e. hetero or homo) can cause a reasonable response is weak

i. Abolition of Voluntary Manslaughter
   i. Feminists worry that if you abolish this doctrine, you leave the jury with the choice of murder of no punishment
   ii. Apparent gender bias
   iii. Line drawing problems
   iv. Some juries may acquit if they think that this person should not spend their life in jail (if the options are only murder or acquittal)
      1. So abolishing voluntary manslaughter might be counterproductive
   v. Retributive: people should exercise self-control, so we should not let there be this exception
      1. Counter: D is not as blameworthy because of the provocation

III. <u>Involuntary Manslaughter</u> (unintended) (D is reckless or (perhaps) merely grossly negligent as to death)

a. <u>CL Reckless Manslaughter</u>: **a reasonable person would be aware of a high likelihood of substantial harm or death** (meaning of "reckless" is unclear; seems like negligence, but CL calls it reckless – different "reckless" than the MPC because CL does not require subjective awareness for recklessness)
   i. Requires either:
      1. Subjective awareness of a grave risk (high likelihood of substantial harm or death) (if D subjectively aware, that is enough, even if reasonable person would not have been aware), or
      2. If a reasonable person would be aware of a grave risk

ii. Ex: *Commonwealth v. Welansky*: D was the owner of a nightclub; fire caused many people to die because the fire escapes were not visible and some doors did not open; court found D guilty of involuntary manslaughter; State did not need to prove D caused fire by reckless conduct, enough to prove death resulted from D's reckless disregard of the safety of patrons in the event of fire from any cause
    1. Reckless conduct requires a high degree of likelihood of injury to another
    2. "The essence of reckless conduct is intentional conduct, by way of either commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another" – seems like a gross negligence standard for manslaughter, per this court
    3. Court does not require a gross deviation, so seems to cover ordinary negligence (prof. suggested this might not be the best/most appropriate test)
iii. Ex: *Commonwealth v. Pierce*: D convicted of manslaughter; court did not require subjective intent that D's action presented a substantial and unjustifiable risk; court held him to the objective standard of what would be morally reckless under the circumstances to a man of reasonable prudence

b. <u>CL Negligent Manslaughter</u>
    i. Ordinary vs. Criminal Negligence
        1. Ex: *State v. Williams*: test of State at this time for manslaughter was simple, ordinary negligence; parents charged with negligent manslaughter for failing to supply baby with necessary medical attention; parents not educated; loved baby, but feared if they took baby to the doctor child services would take the baby away; court held parents were aware that baby needed medical attention during the critical period of time that would have made a difference in life or death
            a. State now in accord with majority and requires criminal negligence for manslaughter
c. Consciously disregard a substantial and unjustifiable risk that death could result
    i. Ex: *People v. Hall* (followed MPC): D was a ski instructor who was skiing way too fast and flying in the air in such a way that if he were to run into another skier, there was nothing he could do to avoid harm; court found evidence of a substantial risk of death; risk was unjustifiable because D skiing like that only for his own pleasure, not to rescue, e.g.; court finds a gross deviation (usually this requirement is superfluous if prior two are satisfied); court finds sufficient evidence to suggest D was aware of the risk that death could occur (doesn't need to be aware that the contact will kill someone)
        1. Court held that substantial risk of death does not mean "more likely than not"
d. CL courts generally do not take mental characteristics into account
e. Policy re: negligence should not qualify for manslaughter
    i. Retributive: how blameworthy is the actor?
        1. Unawareness of the risk means that D is less culpable than the person who has awareness of the risk
            a. We need a higher threshold for criminal liability
    ii. Deterrence: difficult to deter if the person does not know they are doing something wrong
        1. Could be other methods that do not require criminal liability to deter (traffic laws, e.g.)
        2. Criminal penalty is not going to make people deter from ordinary mistakes
    iii. Reckless vs. Negligent
        1. Reckless punished for seriously; D more culpable because D has chosen to take a risk
        2. Negligent might be somewhat blameworthy, but D did not make a choice in taking a risk

MPC

I. Murder
   a. Note: MPC rejects distinction between first and second degree murder
   b. Intentional murder
      i. D purposely or knowingly causes death
   c. **Depraved Heart/Extreme Indifference Murder** (same as CL, but requires recklessness, so see CL DH for relevant factors)
      i. Conscious disregard of a risk that manifests extreme indifference to the value of human life
      ii. D is reckless as to death, plus extreme indifference
         1. MPC imposes a requirement of recklessness (subjective awareness of a substantial risk of death to another) and "extreme indifference to human life"
            a. Must be subjective awareness
               i. Ex: *Malone*: if jury believed that D did not think he would kill V until the 5th trigger pull, then D likely not guilty of depraved heart murder under the MPC
         2. MPC §2.10(2)(b): recklessness and extreme indifference are presumed if D is engaged or is an accomplice in the commission/attempt of robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape
         3. Intent to inflict great bodily harm can be used to show recklessness + extreme indifference
      iii. MPC bumps recklessness up to culpability for purpose/knowledge if there is an extreme indifference to human life
         1. This is murder (which typically requires P/K)
      iv. Relevant Factors (same as CL)
         1. D subjectively believes he has created a high risk of death
            a. A risk greater than is required for recklessness, but less than is required for knowledge
         2. D created an objectively high risk of death
            a. Whether D realizes this or not
         3. D's actions display a culpably indifferent or callous attitude, or have especially blameworthy motives
            a. Clearly unjustifiable conduct, for no legitimate purpose, or
            b. D desires or intends to expose others to high risks of harm, or
            c. Premeditated or long-continued dangerous conduct, or
            d. Cruelty or heartlessness, or
            e. No effort by D to minimize risk
      v. Relevance of Intoxication
         1. Recklessness element: inadmissible if a sober defendant would have been aware of the risk (but because D was intoxicated he was not subjectively aware of the risk) [constructive recklessness]
         2. Extreme indifference: may be relevant
            a. Could mitigate awareness of callousness
            b. Irrelevant re: objectively creating a high risk of death
            c. Courts are split
               i. Maybe it should be admissible since under the MPC intoxication can be admissible if it negatives an element of the offense
                  1. Just because it is admitted does not mean intox automatically negates MR, but in some cases intox could show D was less in control of his conduct and

thus lacks the callousness and depravity required for depraved heart murders

d. Felony Murder

i. MPC recognizes only in a very limited way

1. Indefensible to use murder sanctions unless there is a finding that D's conduct manifested an extreme indifference to human life
2. Only as a factor relevant to proving extreme indifference murder
    a. Rebuttal presumption of extreme indifference murder
    b. MPC wanted to completely get rid of the felony-murder rule; compromised to say it is evidence of extreme indifference if you engage in certain felonies
        i. If D commits murder recklessly while committing a robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape, that creates a rebuttable presumption that the required extreme indifference and recklessness existed
3. Can get to the jury – for them to decide if this is extreme indifference murder

II. <u>Voluntary Manslaughter</u> (MPC §210.3)

a. D has MR for murder, but conviction reduced to voluntary manslaughter if murder is committed due to reasonable "extreme emotional disturbance" [EED]
    i. "Manslaughter: (a) it is committed recklessly [involuntary manslaughter], or (b) <u>a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse</u> [voluntary manslaughter]
        1. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be"

b. MPC includes extreme emotional disturbance because of (i) provocation, (ii) other forms of stress, and (iii) mental disorder
    i. Would cover mercy killings?

c. MPC Approach is meant to:
    i. In cases of provocation or heat of passion, provide a broad *Maher*-type approach
    ii. Even in cases not involving provocation:
        1. Provide a partial excuse to mentally normal D's with extreme emotional disturbance (other forms of stress)
            a. Ex: *Boyle v. State*: D shot and killed partner while she slept because she suffered from physical ailments and lived in extreme pain
                i. Review: traditional approach = no voluntary manslaughter instructions; *Maher* approach = no instructions because no provocation; MPC = no provocation requirement, just extreme emotional disturbance – but still a reasonable objective standard
        2. Provide a partial excuse based on a mental illness or disorder that is not severe enough to give a full insanity defense (mental disorder)
            a. **Insanity**: D completely out of touch with reality, does not have MR at all
            b. **Extreme emotional disturbance**: D has MR, excuse for actions, if D suffers from this kind of paranoia it is somewhat excusable to mitigate punishment
            c. Ex: *State v. Elliott*: D has paranoid fear of his brother and suddenly decides to kill him; court held extreme emotional disturbance, so long as a reasonable person that suffers from that mental disorder would react in a similar way

i. Review: traditional = no; *Maher* = no provocation; MPC: would allow case to go to the jury on extreme emotional disturbance
1. MPC meant to deal with certain types of mental disorders that do not count as provocation or as reasonable, but still want case to go to jury

d. Cf: *People v. Casassa*: D met V and dated casually; V broke up with D; D devastated, became obsessed with V; D developed extreme emotional disturbance; D killed V when V rejected D; D tried to take advantage of MPC's super-liberal extreme emotional disturbance, but court held that D's emotional reaction was too subjective to him and was unreasonable (might more be D's malevolence than a mental disorder)
i. Same result under *Maher*: ordinary reasonable man would not react this way

e. Note: *Elliott* is a more plausible construction for what the MPC intended for mental disorders (as opposed to *Casassa*)
i. MPC likely did not intend to have a reasonable person test for mental disorders (intuitively does not make much sense)
ii. MPC intended for mitigation

f. "Reasonable" in the mental disorder context
i. Reasonable person test = a somewhat idealized test
1. In the <u>provocation</u> context: would a person with a reasonable amount of self-control get angry and be tempted to use violence (defines the *Maher* test)
a. Simons thinks OK to use "reasonable" here
2. An explanation that makes D's actions somewhat excusable – that calls for sympathy or mercy
a. This could apply to a mental disorder case: the person has a mental disorder such that it is hard for them to conform to the criminal laws and norms, but not impossible
b. Reasonableness here means something like there is a plausible basis for the argument – to suggest it was due to the mental illness
c. Simons thinks not OK to use "reasonable" re: <u>mental disorder</u> cases
i. Would have been better off using something like "diminished capacity"
3. A "fudge" term the legislature might use when they are too lazy or when they want to delegate to the courts to decide what counts as reasonable

iii. MPC Approach is trying to do too many things:
1. *Maher*-type test for provocation
2. Partial defense even with no provocation, and
3. Quasi-insanity defense (mental disorders)

d. <u>Elements of MPC Approach</u>:
i. Subjective: actually acted under extreme emotional disturbance
ii. Objective: is there a reasonable explanation or excuse for the emotional disturbance
iii. Quasi-subjective: the reasonable person viewpoint is individualized by considering
1. "The actor's situation" and

2. "The circumstances as D **believes** them to be" (i.e. inaccuracy of D's perception does not matter)

e. Reasonable Person Test (MPC & under *Maher* flexible approach)
   i. Purposefully ambiguous re: "reasonable explanation or excuse" – wanted to leave room for judgment calls
      1. Not clear about what is supposed to go into "the situation"
         a. Yes: personal handicaps, shock from traumatic injury, extreme grief
         b. No: idiosyncratic moral values
         c. Everything else MPC gives to the jury to determine
            i. MPC leaves the reasonableness test open so the extreme emotional disturbance is not strictly held to an objective standard

f. Reasonableness is a Q of fact for the jury under both MPC and CL
   i. If reasonable jurors could not disagree that the evidence would not prove beyond a reasonable doubt that the provocation would have produced the requisite passion in an ordinary man, the judge can exclude provocation
   ii. **Emotional temperament** (D is hot tempered, e.g.) is not included in a reasonable person test
   iii. **Age** might be taken into account re: <u>extent of the provocation</u> (i.e. V is taunting D because of his age, D takes offense, V is preying on specific characteristics D has) or re: <u>capacity for self control</u> (i.e. maturity level might not be there, so less ability to exercise self control)
   iv. **Gender** differences: no defense under MPC or CL
      1. The reasonable woman is less likely to respond to violence to most provocation, but because men respond to violence much more often, women might be held to a higher standard
   v. **Cultural** differences: many courts are willing to take this into account for mitigation at sentencing (but not a complete defense)
   vi. **Physical** differences: MPC will take into account; unclear if CL would
   vii. **Taunts and Insults**: allowable under *Maher* and MPC
      1. Taunts could provoke a reasonable person to loss his cool
      2. Taunts could be serious enough to cause extreme emotional disturbance

g. Critique of MPC extreme emotional disturbance: concern that people will use it for fraudulent claim

III. <u>Involuntary Manslaughter</u> (Reckless Manslaughter)
   a. D reckless as to death (aware of a substantial and unjustifiable risk)
      i. Does not mean more likely than not
      ii. Could use Hand formula
         1. B<PL – must avoid the situation
         2. B>PL – not required that you avoid the situation
      iii. Unjustifiable: personal benefit is not worth the risk to others
   b. D consciously disregarded the risk – substantial risk of death
   c. Risk was a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation
      i. Ex: *Hall*: D was an experienced skier, so he knew there was a high risk
   d. What kind of awareness must D have?
      i. D must be aware of a risk (specifically, of death, for reckless manslaughter),
         1. D must be aware of a **specific** risk and of a relatively **immediate** risk
            a. Ex: "I might hit that pedestrian, but I'll take the chance"
            b. Cf. "I know that if I talk on my cell phone while I drive this could be dangerous"
               i. Not enough that D is aware in a diffuse or general sense of a certain kind of risk

ii. D must be aware that the risk was substantial, and
    1. Substantial is a legal Q (objective)
        a. Ex: *Hall*: substantial does not mean more likely than not
iii. D must be aware <u>of the facts</u> that make it unjustifiable to take the risk
    1. D does **not** need to subjectively believe that the risk is unjustifiable
        a. Question of justifiability is not left to the judgment of D
            i. Even if D personally believes that the risk is justifiable, the trier of fact might disagree and find that risk unjustifiable – and the trier of fact's judgment on this issue that matters
    2. Key difference between MPC reckless and negligent homicide is D's awareness

e. Problems with MPC reckless, including unreasonably self-confident actor
    i. Subjective theory of recklessness based on D's POV
        1. If D is unreasonably confident then D believes his expertise has completely eliminated the risk
            a. D cannot be liable for recklessness because he does not think that his expertise will fail him
            b. Objectively it may be a risk, so D might be liable negligent homicide
    ii. Constructive recklessness
        1. If D thinks that his expertise is good but has any doubt that his expertise will succeed, then he can be liable for reckless manslaughter
            a. Bumps D up from negligent to reckless if there is a culpable reason for lacking awareness – still chose to encounter the risk
                i. Argue that we should not merely rely on the fact that you are not aware of a risk, but the reason *why* you are not aware of the substantial risk

f. MPC Individualization
    i. MPC's definition rejects a fully individualized standard
        1. MPC leaves to the courts the problem of determining the appropriate degree of individualization
    ii. "In the actor's situation"
        1. Physical characteristics: usually considered
            a. Ex: blindness, just suffered a heart attack
        2. Mental characteristics: usually ignored
            a. Ex: heredity, temperament, intelligence/education
            b. Cf. *State v. Everhart*: court takes D's low IQ into account – unusual in taking mental characteristics into account though
        3. Religious beliefs
            a. D has an honest belief that prayer will be more effective in saving the life of a child
                i. If not aware of a substantial and unjustifiable risk, D cannot be liable for reckless manslaughter
                    1. Remember: unjustifiable is not left for D to determine; it a social, objective judgment
                ii. Could be liable for negligent homicide if an ordinary person in the actor's situation (not "with these same religious beliefs") would know that there was a substantial risk of death
            b. Some courts give more discretion to the religious parents if the condition is **not** life threatening (e.g. vaccinations)
                i. Ds entitled to their religious beliefs, but minor does not have a choice, and parents are imposing their beliefs on the minor and ability to save minor's life
            c. Might be considered re: whether D was aware of a substantial risk of death

i. Probably will not be considered re: whether D was justified in taking that risk

IV. Negligent Homicide (≠ murder because no subjective awareness)
- a. MPC only; not recognized in the CL
- b. D is grossly negligent as to death
  - i. Failure to perceive the risk was a gross deviation of a standard of care that a reasonable person in the actor's situation would have observed
    1. Actor should have been aware of the risk (no subjective awareness required)
- c. Ordinary Negligence (*Williams*)
  - i. Failure to demonstrate a reasonable standard of care
    1. Does not require gross deviation
    2. Does not include subjective element "in the actor's situation"
- d. Contributory Negligence
  - i. Relevant in tort law
  - ii. Not relevant (not a defense) in criminal law
    1. Contributory negligence does not mitigate the punishment of D if the V was also at fault
    2. Criminal law seeks to protect everyone
       - a. Looks much more at the culpability and wrongfulness of D's act
       - b. Largely ignores the fault of the V
    3. State must prove only that V was alive prior to the incident
       - a. Ex: *Dickerson*: D drove his car into another and killed a drunk driver that was stopped in the middle of the street with his lights off; court held that State merely needed to prove that the V was alive prior to the incident

Rape

Actus Reus

I. Introduction
- a. Distinctions in grading for rape generally turn on actus reus; whereas degrees for murder generally turn on MR
- b. Nature of the harm in rape:
  - i. Traditional view was to emphasize the violence/physical force used against the V
  - ii. More recently, there is an emphasis on the way rape is a violation of sexual autonomy

II. Traditional Approach: "carnal knowledge of a woman forcibly and against her will"
- a. Sexual intercourse (i.e. vaginal)
  - i. Modern law covers oral and anal and penetration with an object – broadening of the scope of the statute
- b. Without a woman's consent
  - i. Modern law typically is gender neutral – with respect to V and D
- c. By force or threat of force (separate from the force needed for penetration)
- d. Resistance requirement
  - i. Resistance is usually required, either as an explicit statutory element or in order to prove force or non-consent
- e. The woman is not D's wife
  - i. Marital rape exception has been rejected now in virtually all jurisdictions
- f. MR (not usually much of an issue whether D intended to have sex with V)
  - i. Issue as to the V's consent or non-consent
- g. Summary: actus reus = non-consent and force or threat of force
  - i. Resistance usually required

III. Modern Statutes:
- a. Distinguish between degrees of rape
- b. Often do not require force or threat of force

i. If they do, it will be defined much broader than the traditional approach

c. Reject marital rape exception

d. Most gender neutral

e. Summary: actus reus = non-consent and force or threat of force [predominant modern approach]

i. Resistance is often **not** required

1. Ex: *State v. Rusk*: P met a friend at a bar; P met D, chatted, and D asked P for a ride home; P said only a ride home as a friend; D lived in a neighborhood that P was unfamiliar; D asked P to come up, she refused several times, D grabbed P's keys and asked her to come up; P said D looked at her threateningly, P was scared, P didn't know what to do, and P was worried D would rape her; D left for a few minutes, P did not leave; D asked P to get into bed and remove some of his clothes; P kept asking D to leave and said if I do what you want will you let me go without killing me and D said yes; P started to cry and D lightly choked P [actual use of force, not just threat of force]; P had oral sex and vaginal intercourse with D and then left

a. Statute: "force or threat of force against the will and without the consent of the other person" (two independent requirements)

b. Court holds resistance is not required; P had a reasonable fear of serious bodily injury, so in a sense this fear substitutes the traditional requirement of proof of resistance in order to prove force or threat of force and non-consent

i. Court imposes a **reasonable fear requirement**

1. Lack of consent can be shown if V has a reasonable fear of death/serious bodily injury or a reasonable fear that could preclude resistance

c. "Threat of force" is ambiguous as to what qualifies

i. The threat is gauged from the POV of a reasonable person (i.e. if unloaded gun pointed at V = reasonable threat of force since V does not know it is unloaded)

IV. Reasonable Fear Requirement

a. Fear that prevents resistance can also demonstrate threat of force and non-consent

i. Ex: *Rusk:* court imposed in the case where V did not physically resist

1. V's fears must be reasonably grounded

a. *Rusk* holds threat needs to be death or great bodily harm (pretty high standard)

i. But new CA statute: "fear of immediate and unlawful bodily injury)

b. Risk of violence from third parties would not be enough

i. Ex: if in *Rusk* D grabbed P's keys; P claims implicit force because P thought she would be harmed in the neighborhood; not enough because threat of force must be from D

ii. Ex: *Warren*: V was biking along an isolate river; V was 100lbs, 5'2", D 185 lbs, 6'3"; V tried to leave; D carried V into the woods and raped her; court held V did not have reasonable fear to warrant non-resistance because resistance would not have been futile or life threatening; V's failure to resist when it was within her power to do so coveys impression of consent; V never told D to put her down or leave her alone … could argue this is the wrong outcome

1. Court reasoned that while V subjectively did not consent, objectively she did legally consent

b. Is it enough that D is aware of, and ignores, V's subjective fear (even if that fear is "unreasonable" in some sense)?

i. Some will consider D being aware of V's fear and ignoring V's fear (even if "unreasonable") are using force or threat of force
    1. Ex: man goes to kiss on first date; girl gets terrified out of nowhere and expresses her fear of being threatened (sees D's actions as a threat) …
        a. Worries that D will take advantage of V's fears (i.e. if V says if I sleep with you, will you not hurt me; D may be legitimizing her fear if he answers yes and thus creates a threat or threat of force – even if he never intended to threaten V initially)
ii. However, some courts may require *reasonable* fear of force or threat of force

c. Some situations fear is clearly reasonable and resistance is unnecessary
    i. Ex: V is jumped by a stranger with a gun/knife

V. Resistance Requirement
a. Courts have traditionally required physical resistance because it makes it obvious
    i. To D that V is not consenting (MR), and
    ii. That V does not consent – proof of active resistance shows that V is not desiring this
b. Courts have gotten away from or watered down this requirement because:
    i. It is subjective to the V in the situation as to whether she can physically resist
        1. Might freeze up because of shock/fright
        2. Might think active resistance will make it worse/more dangerous
            a. Counter: resisting can avoid the D actually raping; resistance has psychological benefits for the V, even when unsuccessful in deterring D
    ii. Seems like a blame the V kind of argument to say D has not committed a crime because V did not resist
        1. Real issue is whether D has committed rape, not whether the V acted optimally

VI. Continuum of possible conduct by V:
a. Physical resistance → Passivity → Active participation (ex: performs oral sex, gives a condom, undresses man)

VII. Non-Consent
a. No exercise of choice (direct imposition)
    i. Ex: stranger assaults V in dark alley and overpowers V or V is unconscious or physically incapacitated – V has not exercised any choice at all
    ii. Incapacity: failure to give consent
        1. Liability when D has administered the intoxicant without V's knowledge and for the purpose of preventing resistance
        2. CL: If V is incapacitated because V voluntarily chose to consume alcohol, it is tougher to impose liability
            a. Counter: some states have begun to impose liability even when V knowing consumed drugs/alcohol because V's willingness to drink does not mean V forfeits her right to protection against non-consensual sex
        3. Defective Consent
            a. Maturity: statutes always draw a bright line, setting a specific age of consent (statutory rape)
                i. Social goal of deterring teen pregnancy
                ii. Risk of implicit coercion when one party is older than the other
            b. Drugs & Alcohol
                i. Liability when D has sex with a V who was completely unconscious
                ii. Liability when D has sex with a V who, though not completely unconscious, was severely incapacitated by drugs/alcohol D gave V without her knowledge

iii. Many rape statutes do not impose liability if the V was incapacitated, short of unconscious, and if someone other than D had secretly drugged the V
iv. **MPC** (especially restrictive) liability only when:
1. D gave V drugs/alcohol,
2. without V's knowledge,
3. for the purpose of preventing resistance

b. Coerced Choice
i. V makes a decision of sorts, but under extremely pressured/wrongful circumstances
ii. Turns on physical vs. nonphysical threat
1. Implicit threat
a. Ex: *State v. Alston*: V broke up with D after several episodes where D hit V; D saw V a month later and said he would fix her face and that he had a right to have sex with her one more time; V said she did not want to; D took her to a friend's house, opened her legs, penetrated; court said there was non-consent, but there was no force
i. Narrow definition of "force or threat of force" – there is an implied threat of force from history and from D's comment earlier in the day, but court finds D's comment too disconnected to satisfy force or threat of force
2. Non-physical threats
a. Ordinarily do not constitute forcible rape
b. Ex: *State v. Thompson*: principal threatened to prevent V from graduating unless she had sex with him; statute defined non-consent as, "V is compelled to submit by force or by threat of imminent death, bodily injury or kidnapping; court said that although D's action took advantage of V and intimidated her, <u>unable to extend statute's definition beyond threat of physical force</u>
c. Ex: *Commonwealth v. Mlinarich*: V was 14 and taken into D's home after being sent to a juvenile detention home; D threatened to send V back to the detention home if she did not have sex with him; <u>court held no forcible compulsion because there was no threat of physical force</u>
d. Policy argument for criminalizing non-physical threats?
i. Could treat it as a physical threat (i.e. treat it as rape)
ii. Could treat it as a lesser sexual assault crime
iii. Could say no crime, but may be other alternatives for victim (i.e. bring another lawsuit, go to the newspapers)
3. Threats v. Offer
a. Threat: D will fire V from job if V refuses to have sex with D
i. Consider that V already has a legal entitlement to job though
b. Offer: D offers V a job if V has sex with D
i. The threat is withdrawing an offer (failing to give a benefit)
ii. Note: no liability if V initiates or attempts to strike the bargain
c. Philosopher argued that threats restrict your range of options, whereas offers expand your range of options; so maybe there is a reason to treat the distinctions differently in the law
d. Ex: *State v. Lovely*: D hired a drifter to work at his store; D began paying rent for V; D and V had sexual relationship; V tried to break it off; D threatened to stop paying V's rent and get him fired from the store; might be impermissible pressure to threaten job loss, but the

rent issue might be more on the bargain/permissible pressure side – D was voluntarily paying V's rent

4. PA statute, post-*Mlinarich*: forcible compulsion for rape includes physical, emotional, intellectual, moral or psychological force, either express or implied
    a. Note: minor psychological pressure is likely not meant to be criminalized, but statute does not clearly define, so maybe legislature went too far, too broad?
5. Enumerating specific situations that are unduly coercive could alleviate the concern about overbreadth
    a. Ex: consent is not given if V is younger than 16; D is a parent, foster parent, guardian, or other person in a disciplinary or authoritative position
    b. Ex: in NY a person is incapable of consent when the V is a patient and the D is a health care provider and the act of consent occurs during medical treatment

VIII. **MPC "gross sexual imposition"** (MPC §213.1(2))

a. GSI: where submission is compelled by threat of force or by *any threat that would prevent resistance by a woman of ordinary resolution* (must have a threat!)
    i. Elements:
        1. Non-consent, and
        2. Force or threat of force
            a. Broader definition of force
            b. Leaves certain provisions open to interpretation
    ii. Duress, coercion, extortion, or using a position of authority could satisfy the MPC GSI approach
        1. Ambiguous, broad standard could be problematic
        2. Does narrow by drawing a distinction between threats and offers
            a. Submission must result from coercion/threat rather than bargain
                i. Coercion turns on the legitimacy of the proposal
                    1. What is the offeree's legitimate right to the proposal (e.g. keep job, student entitled to graduate)
    iii. Incapacity/Defective Consent
        1. MPC imposes liability only when: (1) D has given drugs/alcohol, (2) without V's knowledge, and (3) for the purpose of preventing resistance
        2. Mental retardation
            a. D knows that the person consenting to sex "suffers from a mental disease/defect that renders her incapable of appraising the nature of her conduct" (MPC liability standard)
                i. Concern that it might become illegal for the mentally retarded to have sex

IX. <u>Approaches Eliminating Force Requirement</u>

a. Actus Reus Elements:
    i. Sexual penetration
        1. Sexual contact such as kissing or petting alone would not be treated as rape
    ii. Non-consent
        1. **"NO means NO"**: no legal consent if V affirmatively expresses <u>unwillingness</u>, either in words or conduct
            a. Policy concern: "no" might not always mean "no"; might convict too many innocent defendants; but, might want to send a symbolic message that "no" must be taken seriously absent some further clarification
        2. **"Only YES means YES"** (*MTS*): no legal consent <u>unless</u> V affirmatively expresses <u>willingness</u>, either in words or conduct

a. Must be some sort of affirmative signal that V consents to sex (to the specific act of penetration (i.e. need more than just consent to kissing or petting))
    i. What a reasonable person would believe to be affirmative freely given permission
    ii. If V is merely passive ≠ enough
b. Fairly broad approach
    i. Court will likely come out differently if there is a history of sexual intercourse and woman has not given affirmative permission to sexual penetration
c. Policy concern: favor this approach because gives clarity – if there is ambiguity, then initiator should assume "no" unless affirmative expression of consent; but concerns re: privacy, not diminishing the spontaneity of sex, autonomy (ppl might not want to be required to say "yes"); but this approach might also best protect V's that become frozen with fear and cannot say "no"
d. Note: V might say "yes" but also need to consider coercive pressures, threats, defective consent, e.g.

3. **Lack of verbally expressed willingness**: no legal consent unless V affirmatively expresses <u>willingness</u> and does so <u>in words</u>
    a. Not followed in any jurisdictions

iii. State need **<u>not</u>** prove extrinsic force
    1. Penetration without affirmative permission from V is "extrinsic force"

b. Policy Arguments
    i. Requiring a woman to say "no" is not consistent with other areas of the law (e.g. battery: do not need to tell someone not to touch you in a battery)
    ii. Personal Autonomy
        1. Ex: physician cannot perform a surgery without getting patient's consent because there is an element of personal autonomy involved
        2. Counter: not realistic to require formality of signed consent before having sex; sex has an element of spontaneity and intimacy
    iii. Bright line rules favor clarity
        1. Deterrence: want people to treat "no" as "no" and silence as "no" – deter unless there is further clarification that "no" does not actually mean "no"
            a. Counter: sometimes "no" does not mean "no"
        2. Retribution: D may not deserve a certain level of punishment if you view "just deserts" as measured by existing social norms
        3. Consenting to some other level of intimacy, but not getting affirmative permission to penetration is not the same as forcible rape against a woman's will

c. Ex: *MTS*: D and V had conflicting stories; court found that there was sexual penetration, but that V did not give affirmative permission to the specific act of penetration; court concluded that penetration counted as "extrinsic" physical force so long as the penetration was without permission from V by V's words or conduct
    i. This is **not** the majority approach
        1. Cf.: *Rusk* requires force (light choking, e.g.)

d. Summary:
    i. Most jurisdictions who have recognized "no means no" or "only yes means yes" recognize these offenses as <u>lesser crimes of sexual assault</u>; while reserving the predominant modern approach (non-consent **and** force or threat of force) as the <u>more serious rape</u>

<u>Mens Rea</u>

I. Note: MR issues usually do not arise as a serious problem re: intent to have sex
    a. In a lot of cases it will not make much difference what the MR is
    b. MR is typically only an issue when D claims a mistake of fact as to V's consent
II. Dressler:
    a. Rape is a general intent crime – so D does not need intent that the sex be nonconsensual – it is enough that he possessed a morally blameworthy state of mind regarding V's lack of consent
        i. To disperse with the reasonable mistake of fact doctrine would effectively convert rape, a felony with very severe penalties, into a strict liability offense
III. Negligence is probably the most popular MR
    a. Most of the recent American cases permit a mistake defense, but only when D's error as to consent is honest and reasonable
        i. Only a **reasonable** mistake will negate
            1. A reasonable mistake as to affirmative signals (i.e. consent)
    b. Few states appear to have joined MA and PA in opting for strict liability on the consent issue (minority approach)
    c. Alaska is one of the few American jurisdictions to require proof of recklessness
IV. *Commonwealth v. Sherry*: Ds wanted jury instruction re: unless the jury found beyond a reasonable doubt that Ds had knowledge of V's lack of consent then they must be found not guilty; Ds did not try to raise a mistake of fact defense; court upheld convictions, stating that knowledge of victim's non-consent is not required; court does not decide whether a reasonable mistake could possibly be a defense
    a. Court suggested that <u>only a reasonable mistake of fact</u> as to V's non-consent would relieve Ds of liability
V. *Commonwealth v. Fischer*: D and V has intimate contact previously; V stated they only kissed/fondled; D stated they had rough sex; D and V had another sexual encounter a few hrs later; D held V's wrist and forced himself in V's mouth; V said no, D say no means yes, and V said no; D removed himself; D argued that he made a reasonable mistake as to V's consent based on previous sexual contact and D's inexperience
    a. Court held that a <u>reasonable mistake is only applicable in a situation that involves miscommunication without any extrinsic force</u>
        i. This case involves extrinsic force, so D is held strictly liable – reasonable mistake is no defense
            1. Court's hands were tied because of strict liability statute, but expressed their sympathy for D because of the prior sexual activity, e.g.
VI. MR: extrinsic v. no extrinsic force
    a. In the debate about whether we should require K, R, N, SL – the significance of the question relies entirely on the actus reus required
        i. Some jurisdictions require higher MR if the jurisdiction does not require extrinsic force or possibly resistance
        ii. Jurisdictions that require force and/or resistance would not need to prove D's MR because D presumably would have some awareness that V was not consenting (strict liability)
VII. *Morgan* and the "logic" of rape law
    a. In England, the House of Lords said that D either had the intent or did not to have sex without caring that V consented
        i. Court required knowledge/recklessness as to the circumstance element of non-consent and the result element of intent to engage in intercourse
    b. Could be bad policy because V would need to prove that D was subjectively aware that V was not consenting
    c. Solution: 2 MR requirements
        i. Circumstance element of non-consent: recklessness, negligence, or strict liability
        ii. Result element of intercourse: knowledge or recklessness
VIII. MR as to non-consent in other crimes

a. Consent can deprive conduct of its criminal character which does not apply to other crimes such as homicide (i.e. consent is not a defense for homicide)
    i. Larceny requires property be taken with knowledge of non-consent of the owner
        1. But property can be returned
        2. Rape is a much more serious, personal crime

IX. *MTS*: negligence standard for "only yes means yes" approach
    a. "Reasonable" mistake: that V affirmatively consented to penetration based on V's words and conduct will negate MR
        i. Consider: surrounding circumstances; petting alone is not enough; pulling D towards them may suffice
    b. Unreasonable mistake as to V's consent = conviction
    c. Mistake of law = conviction (in almost every case)
        i. D thinks they are in a "no means no" jurisdiction, but actually in an "only yes means yes" jurisdiction
    d. Applying a reasonableness standard
        i. Reasonable male vs. Reasonable female interpretation
            1. Men see aggressive behavior as seduction
            2. Women might believe she has communicated her unwillingness but men view it as willing
        ii. When there is a split the law tends to conclude that a rape did not occur

X. Interaction of AR and MR
    a. Easier to differentiate in actus reus than MR
    b. Reasonable mistake defense should only be given in cases where the version of one party supports the defense
        i. Mistake of fact is not applicable if D thought that the intercourse was completely consensual and there was no doubt in his mind
            1. There is no reason to give mistake because D is not saying that he was mistaken (two diametrically opposed arguments)

XI. Other MR issues
    a. Women sometimes say "no" when they mean "yes" because they do not want to seem promiscuous

<u>Attempt</u>

I. Causation
    a. In a crime that requires a harm be caused for liability, need to figure out what counts as "causing" a harm
        i. But for
        ii. Proximate cause (foreseeability, directness)

II. Grading Differential Between Attempt and Completed Crime
    a. Majority view: grading
    b. Minority view (and Simons'): equivalence
    c. Why not <u>equivalent</u> treatment, at least when the attempt is "complete"
        i. Complete attempt: D has done the last act he believes necessary to bring about the prohibited result
            1. D has "unleashed" the risk of harm and whether the harm occurs is now outside his control
        ii. Incomplete attempt: all other attempts (or risky acts)
    d. **Arguments for equivalent treatment** (against grading)
        i. Culpability-based retribution: 2 parties attempt the same crime, but one happens to cause the crime while the other does not
            1. Luck should not play such a large role in determining criminal liability
            2. Both parties had the same MR to commit the crime, one just got lucky and the other did not

3. Just deserts are the same when measured by intent
4. Should not reward criminals for actions that are not in their control

ii. Deterrence: little or no deterrent or utilitarian benefit from treating them differently

e. **Arguments against equivalent treatment** (luck or harm should matter)

i. Harm-based retribution: should not just consider D's MR, but also the harm done
1. Popular sentiment opposes equal treatment
a. Retributive emotional component: community's vengeance is not aroused when harm has not occurred

ii. "Economizing" (MPC argument): save societal resources by not punishing some attempters as harshly, if this policy produces little loss in deterrence
1. D ignores or is not aware of the threat of punishment in attempts, therefore we should economize and not use the heaviest sanctions for attempted crimes and crowd jails

iii. Deterrence: do not want to create incentives for D to complete the crime if there is a chance they will not complete the crime
1. Give the attempted an incentive to desist from completing the crime

iv. Linguistically makes sense to require purpose
1. To attempt something is to try to accomplish it
2. One cannot try if one does not intend to succeed in bringing about the result
a. Cannot attempt to cause the death but be merely reckless

v. Criminal law should not extend so widely, to commonplace behavior
1. Thousands of drivers drive negligently – do not want to punish an action that is so widespread
2. Ex: HO 15 "Gary" hypo

vi. Within unintentional conduct, it is especially difficult to determine whether D has done the "last act" necessary to unleash the risk of harm
1. Ex: HO 15"Glina" what if no car approaching; "Gary" what if no child behind

vii. Proof problems
1. There may be greater uncertainty about D's MR (dangerousness or culpability) when he merely attempts (i.e. did D really intend the harm?)
2. Completed attempt and death occurs, more assurance about intent

f. Policy arguments for the majority approach are stronger for incomplete attempts, rather than complete attempts

III. MR of Attempt

a. <u>Result Element</u>:

i. <u>Traditional CL Approach</u>: heightened MR → State must prove D's **purpose** ("specific intent") to bring about the result
1. Ex: *Jones v. State*: D shot at a house of people, wounded several and killed one; D convicted of murder of the person he killed, but acquitted of attempted murder of those he wounded because no heightened MR; court found D did not have the purpose to bring about woman's death
2. Ex: *Thacker v. Commonwealth*: drunk angry D shoots at a light in a tent knowing that the woman was inside; if bullet killed her, he would have been guilty of murder [reckless manslaughter or extreme indifference murder]; however, it missed; court held that D lacked intent to kill or purpose and could not be convicted of attempted murder
3. Note: where an attempt requires specific intent, there clearly can be no crime of attempted involuntary manslaughter
a. Attempt requires proof of intent to kill, and the essence of involuntary manslaughter is unintentional killing
b. Illogical to say that a person can intentionally commit an unintentional crime

ii. Minority CL Approach: no heightened MR required → attempt requires the same MR required for the completed crime
    1. If the completed crime required recklessness or extreme indifference, then that MR also suffices for attempt (based on the language "**culpability otherwise required**")
        a. No heightened MR is required if the completed crime requires a MR of recklessness or greater
            i. Not clear whether *Thomas* would extend its "no HMR" approach to an attempt to commit a crime if the completed crime requires only negligence or even strict liability as to a result
    2. Ex: *People v. Thomas*: CO statute: "person commits criminal attempt if 'acting with the culpability otherwise required for commission of an offense' and engages in conduct constituting a substantial step toward commission of the crime; D convicted of attempted reckless manslaughter; no HMR required
iii. MPC §5.01(1)(b): heightened MR → State must prove either D's **purpose** to bring about the result or D's **belief** (knowledge to a practical certainty) that he will cause the result
    1. When causing a result, D does or omits to do anything with the **purpose** of causing or with the **belief** that it will cause such a result
        a. So, no liability if D is merely reckless
    2. "Belief" = "knowledge" for attempts
iv. Hypo: experimental aircraft example: D wants to destroy the plane, does not care whether the people on board live or die, but D knows it is almost impossible for the people to escape; bomb fails to go off and destroy plane, attempted murder? (p. 552)
    1. *Thacker*: D not guilty because no intent to kill – only intent to destroy the plane
    2. *Thomas*: D guilty because D had the relevant MR – believing it is practically certain the people would die
    3. MPC: D guilty because D has knowledge that it is practically certain these people will die
v. Heightened MR = HMR is required relative to the MR required for the completed offense – State must prove a higher MR than it would be required to prove for conviction if the actor had committed the completed crime, and had not merely committed an attempt

b. D that does not intend to kill
    i. Could be convicted of reckless endangerment (MPC §211.2 & some CL)
        1. Misdemeanor if D recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury
            a. Creating a risk of harm, but not actually harming
            b. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded
        2. Attempted murder punished more harshly than reckless endangerment
    ii. Could be convicted of assault if D acted with the purpose to cause harm

c. Attempted Felony Murder
    i. Felony murder: strict liability, no MR required
    ii. Most states reject this idea – too tenuous/fortuitous
        1. Any robber could be guilty of attempted felony murder even if shots were never fired

d. Real Objective Risk (heightened MR jurisdictions)
    i. *Thacker*: must act with the purpose or specific intent to cause the result
    ii. MPC: must act with the conscious object (purpose) or belief to bring about the prohibited result

iii. Ex: *Smallwood v. State*: D raped V without using a condom despite D's awareness that he was HIV positive; court held that D intended to rape and commit armed robbery, but D was not guilty of attempted murder
1. D may not have had the intent or purpose to kill when he had sex without a condom (may have just not wanted to bother putting one on, e.g.)
a. Mere knowledge that there is a risk that HIV will spread is not the same as acting with the intent to kill
2. If V did contract AIDS and die, D might be liable to extreme indifferent/depraved heart murder, which requires recklessness

e. Circumstance Element
i. Traditional CL: no heightened MR (probably) → same MR for the attempt as is required for the completed crime
ii. MPC: no heightened MR → same MR for the attempt as is required for the completed crime (MPC §5.01(1))
1. MPC §5.01(a) & (c): D can be guilty even if it is factually impossible to complete the crime, so long as, if the facts were as D (mistakenly) believed them to be, D would be committing or taking a substantial step toward committing the crime
a. (a) is for "complete" attempts
i. The reason a crime is not completed is because a different circumstance element exists
1. Ex: D buys talcum powder and thinks it is cocaine – only guilty of attempt because the completed crime is factually impossible
b. (c) is for "incomplete" attempts, where D has not yet done the last act he believes necessary to commit the crime
c. Note: (b) applies to the result element and does have a heightened MR [see above]
iii. Ex: *Regina v. Khan*: D attempted to rape V; judge instructed jury that consent is a circumstance element; D guilty of rape if he acted with knowledge or recklessness that V did not consent
iv. Ex: *Commonwealth v. Dunne*: D guilty of assault with intent to commit statutory rape; MR as to age of consent (circumstance element) in completed statutory rape crime is no MR (i.e. strict liability); D unable to invoke a reasonable mistake defense as to age in attempted statutory rape

f. Conduct Element:
i. Traditional CL: **purpose** to engage in the prohibited conduct
1. Ex: in attempted bank robbery, D must have as his ultimate purpose to take the bank's property
ii. MPC: **purpose** to engage in the prohibited conduct

IV. Actus Reus of Attempt
a. Policies:
i. Deterrence: want to give actors incentives to change their mind
1. Farther that an actor goes, the more it seems like the actor is committed to the crime
ii. Role of police: want to empower police to stop people and ask the Qs based on their suspicious behavior (facilitate intervention)
1. Important to strike the right balance between too much and too little police involvement
iii. Evidentiary role: actions show what intent actually is
iv. Danger to public: want to apprehend people before they have actually shot or harmed hostages, e.g.
v. Autonomy: want to give people freedom to have bad thoughts; do not want to punish unless we are relatively confident that D did something wrong

vi. Continuum:
    1. No criminal liability:
        a. Mere desires (thoughts alone, no conduct)
        b. Preparation (some conduct, but not enough for attempt)
    2. Criminal liability:
        a. Incomplete attempt
        b. Complete attempt
        c. Completed crime

b. Actus Reus Tests
    i. Last Act Test (most AR)
        1. Actor must take the very last act to bring about the harm
            a. D must have gone far enough that his conduct is a "complete" attempt (only test that requires a "complete" attempt)
                i. If the actor has stopped short of taking the last step, he still has the opportunity to repent/change his mind
        2. Most stringent test; requires the most actus reus
        3. No court today accepts this view
    ii. Proximity Test (more AR)
        1. Closeness in time and space to committing the crime
            a. Reasonably probable that the crime would be committed but for timely interference
        2. Fairly confident that the crime would be committed
            a. Opportunity to commit the crime must be present
        3. Some courts will take into account the seriousness of the crime and will allow police to get involved earlier in more serious crimes
        4. Focus is on what remains to be done
            a. Ex: *People v. Rizzo*: D and 3 others went to rob a man carrying payrolls; Ds (armed) were driving around looking for the man, but did not find them; police were watching Ds and when D jumped out of the car, police arrested him; no one carrying the payroll was in the building; court held that Ds did not satisfy the proximity test because the opportunity to rob never arose – since they had not yet found the man
            b. Ex: State v. Duke: D surfed the net looking for young kids to have sex with; undercover cop posed as a 12 y/o girl and arranged with D to meet and have sex; D said he would flash his lights and then take the girl home to have sex; D flashed his lights and was arrested; court held that D's act did not go far enough to constitute attempt under a proximity test – do not know that D would have actually gone through with the crime, D may have changed his mind
    iii. Unequivocal Act or Res Ipsa Test (lesser AR)
        1. RIL: the thing speaks for itself
        2. Actions on its face show that D intended to commit the crime
            a. The **acts themselves** must be sufficient evidence of intent
                i. Ex: D's conduct, physical movements, physical steps taken
                ii. Cf: no words (i.e. confessions, testimony); no innocent acts
            b. Not how far D has gone, but how clearly D's act show his intent
                i. Ex: *People v. Miller*: D threatened to kill V; D entered a field where V worked and carried a gun with him; D stopped and loaded his rifle but did not lift the gun to take aim; V fled and police disarmed D; D was not convicted of attempt because his actions did not clearly show his intention – no one could say with certainty whether D had come into the field to shoot V or demand his arrest by the police

1. Outlier: D would be convicted under proximity test because the nearness in time and space and the opportunity to commit the crime had arisen, but not RIL
    a. Usually the proximity standard is tougher to meet than RIL
3. If watching a silent movie, at what point in time would it be clear that the actor was going to commit the crime?
4. Note: *Rizzo*: D would likely be guilty of attempt under the RIL test

iv. <u>MPC Substantial Act Test</u> (MPC §5.01(2)) (least AR)

1. Strong corroboration requirement – acts must add significant evidential force to proof of intent
    a. Conduct shall not be held to constitute a substantial step unless it is strongly corroborative of actor's criminal purpose
2. **Acts strongly corroborative of actor's criminal purpose**:
    a. Lying in wait
    b. Enticing or seeking to entice the contemplated V of the crime to go to the place contemplated for its commission (*Duke*)
    c. Reconnoitering the place contemplated for the commission of the crime
    d. Unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed
    e. Possession of materials to be employed in the commission of the crime, which are designed for unlawful use or which serve no lawful purpose
    f. Possession, collection or fabrication of materials to be employed in the commission of the crime
    g. Soliciting an innocent agent to engage in conduct constituting a crime
3. Comparison with RIL
    a. Acts must add significant evidential force to proof of intent
        i. Both tests focus on what has already been done by the D to show D's intent
    b. MPC test broadens the scope of attempt liability
    c. Substantial step is less of a hurdle for prosecution than RIL
        i. RIL requires conduct to manifest criminal purpose
    d. MPC allows words (confessions, testimony)
        i. RIL does not – only acts
4. Comparison with proximity test
    a. Emphasis on what has actually been done
    b. Fact that further steps must be taken does not preclude a finding that the steps taken are substantial
5. Benefit: allows police to apprehend a dangerous person at an earlier stage
6. Criticism: MPC relies too much on outside evidence (confessions, informants, e.g.) while RIL does not
    a. Ex: *McQuirter v. State*: D was a black man convicted of attempted rape of a white woman in the segregated south; D allegedly followed v down the street, waited while V was at a friend's house; police testified that D said he did not know what was wrong with him but he was going to get the first woman that came by; police also said D said he was going to carry V into a cotton patch and kill her if she screamed; however, D testified that he was waiting for a friend to go home; D denied making any statements to the police; court found D guilty of attempted rape

i. MPC: D might be guilty if jury found D was lying in wait
1. "Evidence" must be strongly corroborative of D's intent
a. Jury chose to believe police; could be racial bigotry
ii. RIL: likely no conviction because following someone may not be enough to show attempt to rape
1. Would not be able to take into account police testimony (considers acts, not words)

v. Ex: *United States v. Harper*: Ds were found in a car parked next to an ATM; police found 2 guns in a bush 6 ft from their car, stun guns and surgical gloves; Ds had set a bill trap causing the ATM to shut down; repair guy to arrive within 45-90 mins to fix ATM; Ds likely going to rob ATM when repair guy arrived
1. Proximity test: no liability because the opportunity to commit the crime had not yet arise and there was still 45-90 mins before the crime could be committed
2. RIL: liability because conduct on its face shows intent to commit the crime
3. MPC: liability because Ds were lying in wait, enticed the V and had possession of materials that would not normally be used for legal purposes; the fact that further steps must be taken does not preclude finding of attempt

c. Substantive Crimes of Preparation
i. Independent substantive crimes to deal with future risks
1. Ex: Burglary: does not require that D harmed or stole; requires only that D broke and entered with an intent to commit a felony therein
ii. Stalking: conduct that cannot always be addressed under attempt law because it can be ambiguous as to the risk or likelihood that harm will occur
1. Legislatures struggling with this crime – do not want to punish an intent that may not be there, concern statute/crime will be too broad
a. Ex: CA's attempt = has to be a threat that puts the target in reasonable fear for his or her safety and requires a credible threat of physical harm

d. <u>Abandonment</u>
i. No liability if D has not yet crossed the AR line from preparation to attempt
1. Apply the tests to determine
2. Does not matter why D did not cross the line (good or bad reasons OK)
ii. If D has crossed the AR line from preparation to attempt …
1. Some CL courts recognize an abandonment defense (some do not)
2. MPC §5.01(4): abandonment is an affirmative defense
a. D must abandon "under circumstances manifesting a **complete and voluntary** renunciation of his criminal purpose"
i. Renunciation is <u>not voluntary</u> "if it is motivated by circumstances, not present or apparent at the inception of the actor's course of conduct, which increase the probability of detection or apprehension or which make more difficult the accomplishment of the criminal purpose"
1. Ex: not voluntary if stop D stops because he hears sirens
ii. Renunciation is <u>not complete</u> "if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar object or victim"
3. Ex: *United States v. Jackson*: Ds intended to rob a bank; when they arrived there were a lot of customers and tellers were separating the weekend

deposits, so decided to wait; in the meantime a would be robber was arrested for an unrelated crime and told police about the planned robbery; cops arrived at the bank the day the robbery was suppose to occur; Ds kept driving near/around the bank, started driving up to the bank, but notice cops and fled

a. Maybe attempt under a proximity test, but Ds had not actually entered the bank yet
b. Attempt under RIL: Ds' actions clearly show intent to rob
c. Attempt under MPC: Ds had taken substantial steps that strongly corroborate intent
    i. No abandonment (for 1st attempt) because Ds did not completely and voluntarily abandon their criminal attempt – merely rescheduled for better circumstances

4. Ex: *People v. Johnston*: armed D demanded money from a gas station clerk; clerk only had $50 in register; D said he was kidding, forget it ever happened
    a. No abandonment (likely) because could say the lack of money made it more difficult to accomplish the criminal purpose
        i. Might argue D did not completely abandon because he is likely to do again
        ii. If D had pangs of conscience (and jury believed him) might have an abandonment defense under the MPC
    b. If D took the money, drives off, decides that was stupid and gives the money back → no abandonment defense because D has complete the crime
        i. <u>Cannot abandon a completed crime</u>

iii. Voluntary renunciation of criminal purpose
1. Ex: *People v. McNeal*: D held a girl at knife point and was going to rape her; girl pleaded with D not to rape her and he lets her go
    a. Argue not voluntary? Maybe
    b. Argue not complete? No complete defense if D abandons in this case, but intends to do again in the future (i.e. might try again under more advantageous circumstances – a V that does not fight back)

iv. Good vs. Bad Reasons for Abandonment
1. Abandon intent for good reasons – likely abandonment defense
    a. Ex: pangs of conscience
    b. Policy: want to encourage people to abandon criminal attempts (deterrence)
2. Abandon intent for bad reasons – likely no abandonment defense
    a. Ex: avoiding detection, waiting for more advantageous circumstances, hearing sirens

v. Last Act
1. Under MPC, D would get a defense if renunciation was complete and voluntary
2. Policy: D should not get an abandonment defense if D has taken the last act
    a. No: D has gone too far in inflicting the social harm
3. Hypo: D stabbed someone, then gets pangs of conscience and takes V to the hospital and save's V's life; D charged with attempted murder; seems to fall within abandonment defense since D abandoned for a good reason
4. MPC permits the abandonment defense because it has a broad AR rule
    a. If a jurisdiction is using the proximity test, it is much harder to prove attempt, therefore they do not need the abandonment test

V. Impossible Attempts
a. Ex: *People v. Dlugash*: D had been drinking with V and B; V and B got into an altercation and B shot V; a few minutes later D shot V too; case turned on whether or not V was already dead

when D shot V; if V was already dead, court did not think D could be convicted; court holds D can be convicted of attempted murder because jury found D believed V was still alive

i. MR:
    1. Result Element: D acted with the purpose or belief that death would result by shooting V
    2. Circumstance Element: D acted with the MR necessary to commit murder if circumstances were as D believed them to be (i.e. V was alive)
ii. Actus Reus: D crossed the line from preparation to attempt under any test
iii. **Impossibility**: "no defense that under the attendant circumstances, the crime was factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be"
    1. Court held that factual and legal impossibility is not a defense

b. <u>True Legal Impossibility</u>
    i. Law does not criminalize the crime
        1. Ex: smoking pot when this is no longer a crime; smuggling French lace when this is not a crime
        2. Cannot just have a guilty mind, the act must also be guilty
        3. Policy: do not want to waste money on people that the law does not want to deter
    ii. Traditional CL Approach: defense – D cannot be guilty of attempt, even if he believes he is committing a crime
        1. Principle of Legality: nothing is a crime unless it is clearly forbidden by the law
    iii. MPC and Modern Approach: defense
        1. NY Statute: "It is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime <u>could have been committed</u> had the attendant circumstances been as such person believed them to be"
        2. Principle of Legality: nothing is a crime unless it is clearly forbidden by the law

c. <u>So-Called "Legal" Impossibility</u>
    i. The object's status completely precludes D from committing the crime
        1. Ex: shooting a corpse rather than a live person; shooting a stuffed deer rather than a live deer; receiving stolen property that is no longer stolen; smuggling English rather than French lace
        2. D is mistaken about the facts
    ii. Traditional CL Approach: defense – D cannot be guilty of attempt
        1. Lack of an illegal "intent"
        2. Concern that acts do not strongly corroborate intent
    iii. MPC and Modern Approach: no defense
        1. NY Statute: "It is no defense to a prosecution for such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime <u>could have been committed</u> had the attendant circumstances been as such person believed them to be"
        2. This category (so-called legal impossibility) is really just a type of factual impossibility
        3. Note: MPC & Simons do not think there is a basis for the CL's distinction between factual impossibility cases (no defense) and so-called legal impossibility cases (defense)
            a. If D has done enough for attempt and has the required MR, then we have culpability and dangerousness, so both are amenable to punishment and should be treated the same

d. <u>Factual Impossibility</u>

i. D cannot complete the crime because of a "fortuitous" change in the object's status
    1. D is mistaken about the facts
    2. Could be a crime if not for the "timing"
    3. Ex: picking an empty pocket; shooting at an empty bed that the target is usually sleeping in
ii. Traditional CL Approach: no defense – D is still guilty of attempt if he has the required MR for attempt
iii. MPC and Modern Approach: no defense – D is still guilty of attempt if he has the required MR for attempt
iv. "Inherently Impossible" Attempts: a subcategory of factually impossible attempts
    1. Some jurisdictions **would** recognize a defense, or at least permit the judge to dismiss the case, if a reasonable person would realize that the means cannot possibly succeed or if the means chosen are inherently very unlikely to succeed
    2. Situation is more pathetic than dangerous
        a. Ex: D trying to kill someone with voodoo
        b. Ex: D aims a toy pistol but thinks he has powers to make it actually kill people
    3. Robbins proposal: a person be guilty of attempt only when he purposely does or omits to do anything that, *under the circumstances a reasonable person would believe them to be*, is a substantial step to committing a crime
    4. Policy Considerations:
        a. Culpability-based Retribution: D is no less culpable because they have the intent to cause the crime
        b. Harm-based Retribution: D is less culpable because d does not pose an objective risk to society
        c. D is so out of touch with reality that we do not think he is dangerous
        d. Deterrence: may want to prevent D from trying to commit the crime again (possibly with better means)
    5. MPC §5.05(2): if the particular conduct charged to constitute a criminal attempt is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct not the actor present a public danger warranting the grading of such offense under this section, the court shall exercise its power to enter judgment and impose sentence for a crime of lower grade or degree, or may dismiss
        a. No bright line rule
        b. Gives the judge discretion
    6. Ex: *State v. Smith*: D was an HIV-positive prison inmate; D spit at an officer and said "now die you pig from what I have"; D offered evidence that it was medically impossible to transmit HIV by sitting or biting; court held that the **evidence was irrelevant so long as D believed it was possible to infect the officer and intended to kill him**
        a. A reasonable person could view this as a substantial step
        b. Policy: want to deterrence D and prevent him from using a used syringe or other more effective method to transmit HIV
v. Objections to liability for factually impossible attempts
    1. Problem with broad view of attempt liability in factual impossibility cases is sometimes evidence of MR is relatively weak
        a. MPC requires strong corroboration when the act has not been completed
            i. No explicit requirement that the intent be strongly corroborated with the act
        b. Maybe we should have a requirement for more evidence to corroborate the required culpability

i. Editors' suggested amendment to the MPC re: requiring strong corroboration (pg. 587) – a worry that if the objective facts do not really demonstrate that D committed the crime and we're not sure about D's MR, then we might wrongly convict
1. Concern about MR being too easily proven and attempt convictions being imposed when we are not as sure as we should be re: D's intent, etc.
2. Overlooks whether the acts done by D are consistent with an innocent state of mind

e. Distinction between factual/so-called legal impossibility & true legal impossibility
i. Legal circumstance makes the crime impossible
1. Mistakes about the scope of the law
a. D thinks that the scope of the law is larger than it is

f. Why eliminate factual or legal impossibility?
i. Attempt: D is culpable if D intended or desired the act to constitute a crime
ii. Shift from external circumstances to actor's mental frame of reference

Complicity or Accomplice Liability

Introduction

I. Terminology
a. Principal: person who personally commits the actus reus of the crime
b. Accomplice: anyone who intentionally aids/assists the principal to commit the act/offense
i. Liability is derivative in nature
1. Accomplice is not guilty of an independent offense of "aiding and abetting"
a. Rather, accomplice derives liability from the primary party/principal
i. Primary party's act become accomplice's acts

II. Traditional vs. Modern Approach
a. Traditional: an accessory or accomplice was not liable unless the principal was convicted of the crime (conviction of principal was prerequisite for accomplice liability)
i. Grading between the principal, accomplice, accomplice before the fact, and accomplice after the fact
b. Modern: principal does not need to be convicted for accomplice to be convicted; principal's activity merely needs to amount to a crime
i. No grading between the principal and the accomplice (before the fact) – same punishment
1. Exception: accomplice after the fact – person knowing a felony to have been committed, receives, relieves, comforts or assist the felon/principal
a. Receives a lesser penalty
i. Why? you have not facilitated the actual commission of the crime; rather, you are helping principal escape detection, which is less of a concern

III. MPC Approach (MPC §2.06(3))
a. A person is an accomplice if, with the purpose of promoting or facilitating the commission of the offense, he:
i. solicits such other person to commit it, or
ii. aids or agrees or attempts to aid such other person in planning or committing it, or
iii. having a legal duty to prevent the commission of the offense, fails to make proper effort to do so
1. Omission: failure to prevent the crime – must have requisite MR and legal duty to act
b. 2.06(1): imputed conduct is essential
c. 2.06 (2): you can be legally accountable for the conduct of another person when (a), (b), (c)

d. 2.06(3): (a) MR requirement = purpose of promoting or facilitating; (i)-(iii): actus reus, see above*
e. 2.06(4) MR requirement as to results

Mens Rea

I. Types of MR issues:
   a. Required MR of the principal
   b. Required MR of the accomplice
      i. Accomplice's MR as to:
         1. Furthering the **actions** of the principal
         2. A **result** element of the offense, and
         3. A **circumstance** element of the offense

II. MR as to furthering the actions of the principal
   a. Encouragement vs. Actual Aid
      i. Encouragement:
         1. Must intend to actually encourage or aid
            a. Words or acts cannot have the mere effect of doing so
            b. Expressed assurance that accomplice will not interfere with principal's plans
            c. Presence with hidden (unknown) intent to aid/encourage is not enough
         2. Principal must be aware of accomplice's intent to encourage
            a. Principal cannot be emboldened unless he knows of accomplice's encouragement
            b. Presence, coupled with a prior agreement to assist
         3. Ex: *Hicks v. United States*: D did not have the purpose of furthering/aiding/encouraging the principal's actions; court: even if you have the mens rea (purpose to assist), you need the actus reus too (i.e. actually emboldened the principal; need to have communicated to the principal that you are willing to help)
      ii. Actual Aid:
         1. Principal need not be aware of accomplice's intent to aid if actual aid is given
         2. Ex: *Attorney General v. Tally*
   b. Purpose vs. Knowledge
      i. MPC and most CL jurisdictions require purpose: accomplice must act with the purpose or conscious object to aid the crime
         1. MPC §2.06(3): actor must have the purpose of promoting or facilitating the commission of the offense
         2. Ex: *State v. Gladstone*: police informant went to buy pot from D; D did not have any, but sent him to Kent; D gave informant Kent's address and drew him a map; court held that D could not be guilty of accomplice liability because D did not act with purpose – D did not act with the conscious object to aid in the sale; D merely acted with knowledge (awareness of a high probability that the sale would occur), which was not enough; D had substantial actus reus/assistance; but D did not have the requisite MR
            a. But, if D was getting a commission from referring business to Kent, if D communicates with the seller and is present during the transaction, if D shares a residence and makes encouraging comments – all could suggest purpose
      ii. Some CL jurisdictions have a 2-tiered approach
         1. Purpose required for less serious crimes
         2. Knowledge required for more serious crimes
         3. Policy:

a. Anti-2-tiered approach: should require purpose for most serious crimes because court is incarcerating D for life; do not want to burden merchants to regulate crime when they are legally selling their products (ex: store owner hears kid talking about spray painting a wall; legal gun seller overhears potential buyer talking about plans to kill); difficult to distinguish between a merchant selling a good and actually aiding the crime
b. Pro-2-tiered approach: deterrence of future crimes; culpability-based retribution: if you act purposefully, you are especially dangerous/culpable

4. Ex: *United States v. Fountain*: D convicted of accomplice to murder; inmate was led down the hall, reached into D's cell, D gave principal a knife; principal stabbed and killed guard; court held that **D's mere knowledge that death could occur was sufficient**, even though it was not clear that D acted with the purpose or conscious object to aid in the killing of the guard

iii. NY Penal Code adopts <u>criminal facilitation</u> (a lesser crime), in addition to accomplice liability
1. NY is willing to impose liability in cases where you give actual aid and do so merely knowingly, or believing it "**probable**"
a. Very broad
2. Does not punish as severely as accomplice liability

c. Substantive Crimes of Facilitation: some people suggest we should focus on particular kinds of help or particular kinds of crimes – define a narrow category of activities
i. Problem: makes sense in theory, but in practice some are written rather broadly (ambiguous what qualifies)

d. Natural or Foreseeable Consequences CL Doctrine
i. Basic idea: (1) D must purposely facilitate crime X by the principal; (2) if a more serious crime Y is a foreseeable consequence of crime X, then D is also guilty of Y
1. Accomplice is liable for result principal committed if it was the natural and foreseeable consequence of the crime accomplice aided
a. Objective test
2. An accomplice may be convicted of a crime of intent although his culpability regarding its commission may be no greater than that of negligence
a. Effect: conviction is permitted of an accomplice whose culpability as to Y is less than is required to prove the guilt of the principal

ii. Broader Accomplice Liability: any degree of "reasonable foreseeability"
1. Ex: *People v. Luparello*: D wanted to locate former lover and told friends to get the info at any cost; friends kill possible informant trying to get the info; court held that accomplice did not have the same MR as the principles – D likely intended assault or battery – but principals' MR re: murder was imposed upon D; court held it was reasonably foreseeable that principals could kill as a result of an assault

iii. Narrower Accomplice Liability: significant probability that Y would occur
1. Ex: *Roy v. United States*: V wanted to purchase a gun from D; D told V to return with money; D referred V to principal; when V came back, principal robbed V; court held D intended to sell a gun, not armed robbery; "an accessory is liable for any criminal act which in the ordinary course of things was the natural and probable consequence of the crime that he advised, although such consequence may not have been intended by him"
a. Ordinary course of things = what may reasonably ensue, not what might conceivably happen
i. Presupposes an outcome within a reasonably predictable range

iv. Note: MPC is even narrower than *Roy*; D must have the purpose to facilitate **THE** crime he is charged with
1. But MPC is not meant to endorse any version of the natural and probable consequence doctrine, as it is a CL doctrine only
2. MPC: the liability of an accomplice does not extend beyond the purposes that he shares

III. MR as to a result element of the offense (MPC §2.06(4) & CL)
a. Purpose re: furthering the actions of the principal
b. Result: need the MR required for commission of the crime
i. Accomplice could be liable for a less culpable crime than the principal if the accomplice acts with negligence or recklessness as to the result, but the principal acted with purpose
ii. Dressler:
1. **Was D an accomplice in the conduct that caused the result**?
a. Rather than asking the ordinary question of whether D was an accomplice in the commission of the charged offense
c. MPC §2.06(4): "When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result is sufficient for the commission of the offense"
i. Accomplice only needs whatever MR is imposed for the completed offense (i.e. not purpose, like for results)
1. Accomplice only needs to facilitate the risky underlying conduct (ex: speeding), that leads to the result (ex: death) – and then can be liable for the crime with a MR of less than purpose
d. Ex: *State v. McVay*: D hired captain and engineer of steamboat; D gave captain and engineer instructions re: how to operate the boiler; boiler burst and people died; captain and engineer charged with negligent homicide; D charged as accomplice; D acted with purpose as to underlying conduct (i.e. conscious object was to aid captain and engineer in how they operated the boiler); D acted negligently as to the result; D's conviction affirmed (D did not need purpose as to the death occurring)
e. Ex: *People v. Russell*: 3 Ds engaged in a gun battle; V was fatally wounded by one of the bullets; court could not determine which D's bullet killed V; court found all 3 Ds were guilty as accomplices to depraved heart murder; court seemed to stretch the purpose element as to the underlying conduct, but all 3 acted with MR as to result of depraved heart murder
i. Court: even if accomplice is not purposefully assisting in the reckless conduct, but what accomplice is doing is so dangerous and unjustified, we are willing to impose accomplice liability in light of the social consequence
f. Ex: *People v. Abbott*: D and another were in drag race; other lost control and killed someone and was charged with negligent homicide; court held D as an accomplice to the crime because D acted with purpose as to the commission of the underlying conduct (i.e. drag race) – in order for the race to be enjoyable, both would have to speed; D acted with the MR of negligence (gross deviation from a reasonable standard of care) as to the resulting death

IV. MR as to a circumstance element of the offense
a. MPC is silent as to the MR for attendant circumstances
i. MPC meant to leave this up to the court to decide
b. In attempt liability there is not a heightened MR
i. Arguments in favor of no HMR: accomplice encouraged a crime and created a social danger by assisting another
ii. Arguments in favor of a HMR: do not want to extend strict liability any more than necessary
1. If worried that accomplice liability is too broad, this is one way of cutting it back
c. Very few cases on this

Actus Reus

I. CL Actus Reus
    a. Satisfying any of these categories is sufficient actus reus
        i. Preconcert
            1. This is enough actus reus even if accomplice's help is not ultimately needed, but because principal knows of accomplice willingness it emboldens principal/makes him feel more confident
        ii. Known efforts of encouragement
            1. Ex: where principal is aware that accomplice is acting as a lookout
        iii. Actual aid, with some chance of affecting principal
            1. This is enough actus reus even if principal is unaware of the aid
            2. Accomplice's actions merely needs to facilitate the result, even though principal may have achieved the end regardless of the help
            3. Ex: *Attorney General v. Tally*: V seduced judge's sister in law; brothers followed V to a nearby town to kill him; V's relative sent V a telegram warning; judge stopped the telegram from being sent; judge's act might have made it easier for principals to commit the murder
            4. Ex: *Wilcox v. Jeffrey*: D was a journalist; American musician was coming to play jazz illegally in England; D attended the concert – paid for a ticket, clapped, and wrote a good review; court held that D had the MR of purpose (conscious believe or hope that the resulting performance would occur); court also held that D satisfied actus reus because D encouraged the principal
                a. Policy
                    i. If mere encouragement is enough than anyone could be guilty as an accomplice
                        1. Concern about proportionality if you are just a member of a crowd – should you really be treated the same as the principle since not a lot is required to satisfy actus reus as an accomplice
                    ii. Counter: audience paid for tickets and attended the concert, therefore they are aiding the concert because musician would not have been able to play if not for the audience's attendance
        iv. Omission
            1. Only if the accomplice has a duty to act
            2. Accomplice fails to act with the purpose of promoting or facilitating the crime
                a. If no purpose to facilitate, no accomplice liability, even if there is a duty to act
            3. Ex: *People v. Stanciel*: mom did not prevent abusive BF from beating up and killing her child; mom violated court order to keep BF away from her child; mom allowed BF to discipline child, so mom acted with purpose as to the underlying conduct by authorizing the BF to use some disciplinary force against the child; MR as to the result could be negligent homicide or reckless manslaughter
                a. Principal could be guilty of murder, but accomplice could be liable for reckless manslaughter
                b. Would mom be able to be convicted of murder under natural and foreseeable consequences doctrine?
            4. Need a duty to act
                a. Still a question of MR
                    i. An omission that is the result of fright or ignorance, rather than neglect of duty, would not result in accomplice liability

v. The mere fact that you are there/present does not make you liable if you are not encouraging or taking any positive actions

II. MPC Actus Reus [includes the four above CL categories above, plus adds two more:]
   a. Attempt to Aid
      i. This is broader than the CL "actual aid, with some chance of affecting principal"
      ii. Accomplice is guilty even if, looking back on the criminal activity, we later know for certain that his aid could not possibly have made a difference to whether the principal committed the crime
         1. Ex: *Tally* variation (a) (pg. 620): judge sent the telegram but the operator disregarded the judge's instruction and had tried, though in vain, to deliver the warning telegram; judge's efforts could not have had any chance of affecting principals' conduct (no actual aid)
   b. Attempt liability, rather than accomplice liability, when D "attempted to be an accomplice"
      i. If D is a would-be accomplice, he can be liable for attempt (though not for accomplice liability), in situations where the principal does not commit either a crime or an attempted crime
         1. Ex: *Tally* variation (b) (pg. 620): judge stopped the warning telegram from being delivered, but the principals never succeeded in catching up with their intended victim; so warning had some effect on operation, but principals did not commit a crime, not even an attempted crime; judge is an attempted accomplice
            a. Trying, hoping to make a difference
      ii. Similar to factual impossibility in accomplice liability
      iii. MPC §5.01(3): D will be liable for attempt if his acts would otherwise satisfy accomplice liability standards
         1. MPC §2.06: only liable as an accomplice if principal commits the crime or attempts to commit the crime; if no crime is committed than accomplice has not aided in the commission of a crime
         2. MPC takes a broad view: accomplice is liable for attempting to be an accomplice
            a. Culpability-based retribution: accomplice is still dangerous/culpable even though the crime does not get committed – focus on what you planned to do/though would happen, rather than on the fortuity of whether the principal actually commits or attempts the crime

III. Grading Distinctions?
   a. Natural and probable consequences doctrine is somewhat crude and disproportionate
   b. Perhaps courts should take into account proportionality and accomplice should be held more or less liable than principal
      i. In a lot of cases, the actus reus for accomplice liability can be relatively minimal, so some people argue we should have grading distinctions
         1. Could grade based on a purpose vs. knowledge distinction
            a. But, maybe knowledge should be punished just as harshly (ex: parents just standing by and watching kid get beat or watching kid rape)
         2. Could grade based on the amount of assistance (minor vs. major)
   c. Mitigating and aggravating facts

IV. Conspiracy
   a. An agreement by two or more persons to commit a crime with some overt act also required that is a step towards committing a crime
      i. Conspiracy does not require much
   b. Punished separately from, and sometimes in addition to, the planned crime
      i. Partly because of the special danger of group criminality
   c. Many cases of accomplice liability are also cases of conspiracy (e.g. preconcert)
      i. Conspiracy is often punished less than the completed crime

d. Does not require that the final crime be committed
    i. It is the agreement/plan that makes the acts criminal

Exculpation

Justification

I. Self-Defense

a. Self-defense is used to prevent future harm – not OK for retaliation
    i. Two general requirements: proportionality and necessity
        1. So, can argue lack of necessity or lack of proportionality
    ii. Subjective & objective component: need to **honestly** believe the facts that give you a justification of self-defense and that you **reasonably** believe the facts and the threat
    iii. Cannot use self-defense if your property is threatened (might be necessary, but would not be proportional)
        1. Note: castle exception

b. General Requirements of Self-Defense
    i. **Proportionality**: force used must be proportional
        1. Attacked with non-deadly force, need to respond with non-deadly force
        2. Attacked with deadly force, can respond with deadly force
        3. Some diversity as to what is legally "proportionate" force
            a. NY permits deadly force to prevent robbery (but most jurisdictions do not), serious bodily injury, death, rape, kidnapping
            b. CL: death, rape, or kidnapping
        4. Proportionality is not applied super strictly
            a. As long as degree of force use is reasonably proportional – OK if the result is greater than you expected (i.e. not proportional)
            b. If you are threatened with deadly force, OK to kill multiple aggressors to prevent your own death
        5. Proportionality is often spelled out in the statute (like NY's)
        6. Note: castle exception
    ii. **Necessity**: no other alternative
        1. Often not spelled out in the statute
            a. Sometimes reference to retreat or imminence though
        2. Note: you do not have a duty to hand over your money to a robber, even though that is an alternative
    iii. Interaction of Necessity and Proportionality
        1. If there is a reasonable alternative of lesser force, must use lesser force
            a. Ex: if you can easily shove someone aside
        2. Must be necessary to prevent future harms (not for retaliation)
        3. Ex: elderly man in a wheelchair is being slapped around by kids, man keeps telling them to stop and they don't, so he pulls out a gun, they laugh and keep slapping him around, so he shots
            a. Necessary to shoot because he is too weak to defend himself otherwise, but not proportional to the slapping
    iv. Innocent Aggressors and Innocent Threats
        1. Focus on the rights of the victim – V still being threatened
            a. Does not matter if this is an "innocent" person (i.e. insane person or child with gun)
                i. Innocent person may not be liable for a crime (i.e. if NG by insanity), but that does not affect the V's right to self-defense, so long as it is proportional and necessary
        2. Includes innocent threats (person is not the aggressor & not a voluntary act, i.e. person gets thrown into a well and is going to kill you unless you use ray-gun)
            a. V still has a right to self-defense (even though unsettling)

v. Reasonableness Requirement [as to facts]
    1. Mistakes of law are no excuse
    2. Reasonableness appears as to mistakes of facts

c. Polices Behind Self-Defense Privilege
    i. Self-defense as a justification [majority approach]
        1. Utilitarian: Deterrence of future aggression: right of self-defense deters unlawful aggression
            a. A world with no legal right of self-defense may lead to increased unlawful aggression
        2. Utilitarian: Self-defense is the lesser evil on this occasion: D has chosen the lesser evil → D's causing harm to a wrongful aggressor is a lesser evil or harm than the harm that D, an innocent victim, would otherwise suffer from the aggressor
            a. May not reflect the proportionality rule of self-defense because self-defense allows deadly force against kidnapping, rape or robbery – and – one person can kill multiple aggressors to prevent his own death
        3. Non-Utilitarian: D has an autonomy right to resist aggression: every person has an autonomy right (zone of immunity against serious threats to their physical safety and integrity)
            a. Explains why D can chose the "greater" evil of killing someone over the "lesser" evil of being raped or kidnapped
            b. Counter: autonomy right is vague and might justify a (too) broad right of self-defense
        4. Non-Utilitarian: Aggressor forfeits his right to life (or right not to be injured) because of his culpable and wrongful acts
            a. Cannot legitimately complain if the person he attacks employs self-defense
            b. Counter: why can't a D retaliate against an unlawful aggressor after the threat has ended?
            c. Counter: why can a D employ self-defense every against an innocent aggressor?
    ii. Self-defense as an excuse [minority approach]
        1. Instinct of self-preservation: a person whose very life or health is imperiled will understandably react with defensive force when attacked because of a strong human instinct of self-preservation
        2. Sudden emergency: a person who is suddenly attacked will understandably react quickly and without careful though
        3. These reactions are understandable and excusable, but may not always be justifiable
            a. Sometimes D's use of defensive force might not have been the better choice, or even a permissible choice

d. Objective vs. Subjective Test of Beliefs
    i. "Objective" – 2 different senses
        1. Objectively correct (i.e. D's beliefs correspond to actual facts, viewed ex post)
            a. Objectively, was there a threat of deadly harm?
        2. Objectively justifiable (i.e. D's beliefs about the facts were based on reasonable perceptions and judgments, viewed ex ante)
            a. From an objective, reasonable person perspective, was there such a threat?
            b. This second sense if the standard used in self-defense

e. Reasonable Person Standard – how individualized is the "objective" standard? (*People v. Goetz*)
    i. Court requires an objective test – not enough that D honestly, subjectively believed the set of facts

1. However, some individualization is allowed

ii. Various Factors Considered:
   1. Sudden approach of aggressor
   2. Physical circumstances (crowd, lighting, e.g.)
   3. Physical capability/strength or frailty of D
      a. but, just because you are frail and elderly does not meant you can use disproportionate force; rather if someone is frail and they are at great risk for serious bodily injury or death, might turn the force used from non-deadly force to deadly, e.g.
   4. D's past muggings – notion is that D may have special insight
      a. "D's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure/rob him or that the use of deadly force was necessary under the circumstances" (i.e. better able to figure out if someone is likely to mug him)
         i. Court willing to subjectivize the test a little bit here
      b. Is this valid? Has D really gained "expertise"?
   5. <u>Cannot</u> consider D's unusual jumpiness or paranoia
      a. Do not want to exonerate people no matter how bizarre their thoughts patterns are

iii. MPC Test: similar to the *Goetz* reasonable person test (frailty, yes; mental characteristics, no)
   1. §3.04(1) [subjective]: use of force is justifiable when the actor **believes** that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force
   2. §3.09(2) [objective]: actor believes that use of force is necessary, but the actor is reckless or negligent in having such believe, justification is unavailable in a prosecution for an offense that requires reckless or negligence to establish culpability
   3. Reasonableness judged from someone in the actor's situation (circumstances)

iv. Is race legally relevant?
   1. Arguments for:
      a. Courts make judgments based on other stereotypes such as age, gender, or how someone is dressed to help justify that a threat is reasonably posed
      b. Customary or ordinary – how most people would react
         i. Certain areas are known for harming black people, so not unreasonable for a black person to be fearful if surrounded by 6 white men (and vice versa)
   2. Arguments against:
      a. Normative – must use some normative standard in the law
         i. Even if it seems relevant to most people, it should not be taken into account
         ii. Could reinforce racist message; stereotypes – large social costs – pretty controversial
   3. Most courts would <u>not</u> give instructions on race
   4. Did race play a role in the actual judgment? 2 blacks on the jury that acquitted D; enormous fear of crime in NY; after the crime, both blacks and whites thought D was a hero

f. Mistake and the Grading of Homicide
   i. To get a full defense, <u>D must both honestly and reasonably believe a set of facts that justify his use of self-defense</u>
      1. But, <u>D's beliefs need not be correct</u>

a. Even if D is mistaken, he gets a full defense if his beliefs are reasonable

ii. **If D makes a reasonable mistake**: full defense to murder and attempted murder under NY "all or nothing"; MPC "rough symmetry," and imperfect self-defense approaches

iii. **If D makes an unreasonable mistake** about facts justifying self-defense (as applied to murder and attempted murder; assuming D used deadly force) [HO 21]

1. Purely subjective test: full defense to murder and attempted murder
2. NY "all or nothing" approach (Goetz): no defense – D guilty of murder or attempted murder (depending on result)
    a. If D makes an unreasonable mistake, tough luck – self-defense not justified, so if you cause a death you will be convicted of murder
3. MPC "rough symmetry" approach (MPC §3.09(2)):
    a. Murder: partial defense – if negligent, guilty of negligent homicide; if reckless, guilty of reckless manslaughter
    b. Attempted murder: full defense – essentially, MPC employs a purely subjective test of self-defense when death does not occur
        i. Even if D makes an unreasonable (negligent or reckless) mistake, he is not guilty if he honestly, subjectively believes he faced a threat that the law considers adequate and if he honestly believes that he must use deadly force
4. Imperfect self-defense (some CL courts endorse): partial defense for murder – D guilty of manslaughter (voluntary or involuntary)
    a. A mitigation doctrine when D has an honest belief, but not a reasonable belief
    b. Some courts hold D liable for voluntary manslaughter
    c. Some courts hold D liable for involuntary manslaughter
        i. Problematic because involuntary manslaughter is usually and unintentional killing, and self-defense is usually intentional
        ii. Justification: actor's culpability more closely resembles involuntary manslaughter
5. **Note**: MPC and the imperfect self-defense approaches punish an unreasonable mistaken D less harshly than a D who was not even honestly mistake (i.e. a D who did not even honestly believe both that he faced a threat that the law treats as adequate, and that it was necessary to use deadly force immediately)
    a. Although the MPC and imperfect self-defense approaches ordinarily do not give a full defense for a subjectively mistaken actor, they sometimes give a partial defense

g. BWS and Subjective Reasonableness Tests

i. BWS evidence is relevant to the honesty of D's belief (subjective)

1. Some courts admit the evidence re: special insight to go to the reasonableness of D's belief (objective) – requires varying the reasonable person test though [minority]

ii. Ex: *State v. Kelly* (battered woman killed husband in street with scissors): BWS evidence should be relevant to the honesty of D's belief that there was an imminent threat of harm or deadly force

1. Relevant to D's credibility
2. Why D stayed with her husband if D feared honestly feared for her life (i.e. the BWS cycle, learned helplessness, might feel helpless with no other options)
    a. Necessity: honestly believed death was necessary and D had no alternatives
    b. Proportionality: honestly believed husband would kill her

iii. BWS evidence relevant because D is better able to perceive when husband would actually rise to an extreme level of violence

1. Special insight

iv. Most courts do not apply a "reasonable battered woman test"
    1. Majority: a reasonable person/objective standard
        a. Majority does not vary the reasonable person test
    2. Minority: will vary the reasonable person test for BWS
        a. Ex: *State v. Edwards*: "a battered woman is a terror-stricken person whose mental state is distorted; if the jury believes the defendant was suffering from BWS, it must weigh the evidence in light of how an otherwise reasonable person who is suffering from BWS would have perceived and reacted in view of the prolonged history of physical abuse"
        b. Ex: *State v. Leidholm*: "the D's conduct is not to be judged by what a reasonably cautious person might or might not do; juries instead should assume the physical *and psychological* properties peculiar to the accused and then decide whether or not the particular circumstances were sufficient to create a reasonable belief that the use of force was necessary"
        c. Concern with varying the test: slippery slope – could lead to considering a reasonable paranoid rapist, e.g.
            i. Counter: limit the slope to psychological conditions that d suffers through no fault of her own
                1. Non-culpable reason for being in this psychological state
v. BWS: 3 phases of battering cycles
    1. Tension building: battering male engages in minor battling incidents and verbal abuse; woman attempts to placate him to ward off more violence
    2. Acute battering: more serious battering; sometimes woman becomes more anxious and angry, which provokes male
    3. Loving behavior from male: promises to seek help/stop drinking; can last for a few months, but phase one inevitably starts again
vi. Women stay in the relationship because: relationship might seem normal if woman comes from an abusive household; woman might feel paralyzed and fearful of husband; woman might not have independent means to leave husband; woman might be worried about stigmas
vii. Non-confrontational killings (*State v. Norman*)
    1. Courts are worried about preemptive self-defense and require imminence and proportionality
        a. Counter: some women suffer from learned helplessness and cannot seek help; reasonable battered woman test could account for this problem
    2. D cannot kill husband (i.e. use self-defense) unless:
        a. Husband threatens deadly force, <u>and</u>
        b. Threat of deadly force was imminent
            i. So, D wants to bring in BWS evidence to show that she subjectively and reasonably believed that he actions were necessary to combat an imminent deadly assault, notwithstanding the lack of an actual immediate threat
    3. **Perfect self-defense**: D must <u>honestly and reasonably</u> believe it necessary to kill her husband to save herself from imminent death or great bodily harm
        a. Reasonableness is determined from an objective standard
        b. Court did not find perfect self-defense because did not think the threat was imminent (threat was earlier in the day; at the time of the killing, husband was sleeping) and D could have resorted to other means (really?)

4. **Imperfect self-defense**: D has an honest belief, but not a reasonable belief
    a. Court did not find imperfect self-defense because at the time of the killing D did not have an honest belief he would kill her (i.e. no imminence because he was sleeping)
        i. Rather, D had an honest belief he would eventually kill her (not imminent enough)
5. Minority of jurisdictions allow some flexibility
    a. Ex: *Robinson v. State*: "even when the batterer is asleep, where torture appears interminable and escape impossible, the belief that only the death of the batterer can provide relief may be reasonable in the mind of a person of ordinary firmness"

viii. Imminence (CL) vs. Immediately Necessary (MPC)
1. Imminence: did you have any alternatives – could you have gone to a shelter, the police, family members, e.g.?
    a. Courts do tend to be fairly strict about imminence
2. Immediately Necessary: broader/more relaxed than imminence (but not too much broader)
    a. MPC §3.04(1): sufficient if actor reasonably believed that the use of defensive force was "immediately necessary"
    b. OK to use deadly force when it is inevitable, will happen fairly soon, and is necessary (no other alternatives)
        i. Note: *Norman* might not have even satisfied the MPC immediately necessary test because D had alternatives (could leave, go to authorities, e.g.)
            1. MPC immediately necessary test is not an inevitable harm, broad necessity test
3. Ex: D fires a gun at V in the house, runs out of bullets and clearly indicates he is going to the next room to get more; while D is in the other room, V finds a weapon and kills him
    a. Under the MPC, this is immediately necessary – threat is inevitable in a second/minute; whereas this may not satisfy the imminence test
4. Ex: D credibly threatens to kill V when he wakes up and, suppose, D has locked the house so V cannot leave; this is not imminent because D is sleeping; this is immediately necessary because the killing is immediately inevitable in the morning and there are not other options (since cannot leave the house; kidnapping analogy)
5. If threat is not imminent or immediately necessary, D should go to the police
6. While the MPC is a little broader in allowing defensive force, neither test is as broad as a simple "necessity" test that would allow defensive force if the threat is inevitable and there are no reasonably alternative ways of avoiding the threat
    a. Policy argument for not broadening the tests: even the worst abuser might change his mind, so D should not be able to use deadly force without imminence
        i. A broad necessity test does not take into account the reality that should not be able to use deadly force when there are other alternatives

ix. BWS and a hired killer: courts routinely reject self-defense when the battered woman hires someone else to do the killing

x. BWS and Third Parties
1. If battered woman would be not guilty if use she used defensive force, because she is justified, then

a. Third party who assists D in defending herself is justified (i.e. third party = not guilty)
b. Third party who acts in the defense of D is justified by defense of others (i.e. third party = not guilty)
c. JUSTIFICATION travels to third parties

2. If battered woman would be not guilty if she used defensive force, because she is <u>excused</u> (but not justified), then
    a. Third party who assists D in defending herself is neither excused nor justified (i.e. third party is guilty as an unjustified accomplice)
    b. Third party who acts in the defense of D is neither excused nor justified (i.e. third party is guilty)
    c. EXCUSE that would mitigate or eliminate D's responsibility does not travel to a third party
        i. Third party is not under the same conditions, pressures, psychological stress

xi. BWS and Provocation
1. Some courts are surprising reluctant to allow BWS evidence in on provocation or passion (but some will allow)
    a. Provocation: person has to have a reasonable loss of self-control
        i. Unfortunately "reasonable" can mean a million different things
            1. Simons would prefer "understandable" loss of self-control
2. Even if battery (a categorical provocation) does not provide a self-defense, D could use BWS evidence to mitigate from murder to manslaughter
3. MPC – Extreme Emotional Disturbance
    a. Excuse that mitigates punishment
    b. Person that suffers from and act under an extreme emotional disturbance can mitigate killing to voluntary manslaughter
    c. Would a reasonable person suffering from an extreme emotional disturbance commit the crime?

h. Motive of Self-Defense is Required
i. D must actually act for the right reason
ii. D must subjectively believe the facts are such as to justify the use of self-defense
iii. D cannot kill V for motives unrelated to self-defense, find out V was actually planning on killing him (for ex) after the fact, and then claim self-defense retroactively

i. Risk of Injury to Others
i. If D is able to invoke self-defense justification, then D is excused from killing the injured party
1. Emergency of self-defense excuses the killing of third parties
2. Ex: *People v. Adams*: "if the circumstances are such that they would excuse the killing of an assailant in self-defense, the emergency will be held to excuse the person assailed from culpability, if in attempted to defend himself he unintentionally kills or injures a third person"

ii. Should we require reasonable response to assailant?
1. Ex: *Commonwealth v. Fowlin*: D was attacked and blinded by pepper spray; D shot wildly into a crowd in self-defense; D hit assailant, but wounded an innocent bystander
    a. Majority: if D meets the ordinary requirements of self-defense, he cannot be deemed reckless, regardless of the extent to which he endangers innocent bystanders
    b. Dissent: disagreed with the majority's blanket authority for the use of self-defense

2. MPC (agrees with dissent): D could conceivably be convicted of reckless endangerment, and if the bystander died reckless manslaughter or negligent homicide, if D is reckless or negligent as to the risk to others
    a. D must act "unjustified"
    b. MPC calculates reasonable response of actor in D's position
        i. Factor in circumstances: D blindfolded or how a person whose life is being threatened would respond

j. Duty to Retreat

i. The ability to retreat is relevant to the necessity of using force, but also, perhaps, to proportionality
    1. If the duty to retreat only applied to necessity – ability to flee – then the duty would also apply in non-deadly cases as well (which it does not
    2. Use of deadly force is proportional if you cannot retreat

ii. Even if a jurisdiction recognizes a duty to retreat, the duty is narrow:
    1. Applies only when D is using deadly force (not non-deadly force)
        a. So if someone is threatening you with non-deadly force, do not have a duty to retreat, even if you can do so in complete safety
            i. OK to use non-deadly force in self-defense (ex: guy keep shoving at a bar; D's only alternative is to leave the bar – D has a right to stand his ground)
    2. Applies only when D knows (purely subjective) he can retreat with complete safety
        a. Policy: feels unfair when a person is subjected to deadly force to impose additional duties on the V to retreat; proportionality argument: people have rights they should not have to give up; why is the burden on the innocent party to avoid harm when he likely has done nothing wrong
    3. Does not apply when D is in his home when attacked
        a. **But** the duty might still apply if D is attacked by a co-occupant
        b. Policy
            i. Excuse: instinct/fight or flight; not realistic in the home – people are not going to flee
            ii. Justification: no better option; in the home, nowhere to run; response is not wrong because attacked in your home (stronger rights to stay in your home than in the public streets, e.g.)
            iii. Maybe it would be better to have a simple rule: (i) never must retreat in the home, or (ii) always must retreat in the home
    4. As a practical reality, in a lot of cases, even where a duty to retreat is recognized, if the other party has a gun/knife and is relative nearby, very often the person will not have a duty to retreat because not sure that they can do so in complete safety

iii. Policy:
    1. Incentive effects: a duty to retreat will discourage violence, and a no-retreat rule will encourage violence
        a. Counter: not likely people will know, much less think about, the rule when the need for self-defense/retreat arises (doubtful there are incentive effects)

iv. Battered Women in the Home
    1. If the battered woman attacks husband while in his sleep – no defense because no imminent threat of deadly force, so no castle exception

2. If there is an imminent threat to kill husband which satisfied proportionality; D reasonably believes that deadly force is necessary; D honestly believes that deadly force is necessary – no duty to retreat from the home

k. Protection of Property
    i. Cannot use deadly force merely to protect your property
        1. Loss of property is not a weighty enough interest relative to the risk of causing death to the wrongdoer
        2. Exception: intrusions into the home ("stand your ground" statutes)
            a. Ex: CO statute (pg. 789): actor is able to use deadly force if he reasonably believes that there is an unlawful entry of any slight threat (broad)
            b. Ex: FL is even broader because it includes vehicles as well and does not require D to fear that the intruder threatens any risk of force to the person
                i. Actor is presumed to have had a reasonable fear of imminent death or great bodily harm if:
                    1. V was in process of unlawfully or forcibly entering
                    2. Actor had reason to believe that an unlawful or forcible entry was occurring or had occurred
            c. Tendency in these cases is to resolve doubts in favor of the homeowners

II. <u>Lesser Evils</u>
    a. Requirements:
        i. **Necessity** (no reasonable alternatives) <u>and</u>
        ii. **Choice of lesser evils** (proportionality: did D choose the lesser evil)
    b. MPC §3.02(1)(a): "provided that: the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged"
        i. Subjective belief: actor must believe his behavior will avoid evils
        ii. Necessity: actor must believe his behavior is necessary to avoid evils
            1. If there is a way to avoid the harm, the actor must choose that option
        iii. Balancing: harm avoided must be greater than the harm caused by commission of the offense
            1. Objective – not left to D's subjective judgment
            2. If the harm slightly outweighs – OK
                a. Harm does <u>not</u> have to clearly outweigh, like NY approach
        iv. MPC does not explicitly require imminence, so a broad necessity requirement
            1. Relaxed imminence standard
        v. Objective test: judge or jury decides
            1. D must show that his actions were justifiable by the law
        vi. Fault of the actor: no requirement re: "through no fault of the actor"
            1. MPC §3.02(2): "When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable in a prosecution for any offense for which recklessness or negligence suffices to establish culpability"
            2. <u>Rough symmetry</u>: might not be liable for purpose or knowing homicide, but could be on the hook for reckless or negligent homicide
                a. Reckless/Negligence: justifiability of D's crime is considered when determining whether he acted recklessly or negligently
                    i. D must consciously or negligently disregard a substantial and unjustifiable risk
                    ii. Does not mitigate the punishment because justifiability is factored when determining the punishment

b. Purpose/Knowledge: complete defense as to purpose or knowledge so long as there is the balancing of evils

c. NY (CL) Approach: "such conduct is necessary as an **emergency measure** to avoid an **imminent** public or private injury which is about to occur by reason of a situation occasioned or developed **through no fault of the actor**"
   i. Subjective belief: actor must believe his behavior will avoid evils
   ii. Necessity: actor must believe his behavior is necessary to avoid evils
      1. If there is a way to avoid the harm, the actor must choose that option
   iii. Harm avoided **must clearly outweigh** the harm caused by commission of the offense
      1. If it is a close call, jury will hold for the State
      2. Not a balancing test, like the MPC
   iv. Imminence requirement – threat must be an emergency and imminent
      1. A lack of imminence suggests it was not necessary
   v. Objective test: judge decides (want to avoid an overly sympathetic jury)
   vi. Fault of the actor: requires that D did not act with any fault (i.e. if D is negligent, he loses the defense)
      1. All or nothing

d. <u>Legislative Preclusion</u>: an independent ground to reject the necessity defense
   i. If the legislature made a deliberate policy decision not to allow the behavior in question, then even if the case otherwise would satisfy a necessity defense, it will not be granted
      1. Court will defer to the legislature if they have made a deliberate decision
      2. MPC §3.02(1)(c): choice of evils defense, provided that: "a legislative purpose to exclude the justification claimed does not otherwise plainly appear" [(b) also applies: legislature has already chosen to address this problem, so if your exception is not covered, sorry]
         a. Lesser evil defense cannot succeed if the issue of competing values has been previously foreclosed by a deliberate legislative choice
      3. NY (CL): "The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute"
   ii. Medical Necessity: Marijuana
      1. Courts remain divided over whether to permit a necessity defense for medical uses of marijuana to alleviate the symptoms of severe illness
         a. Several states have statutory exceptions for such cases
      2. Strict interpretation of the statute: if D's use is not within the enumerated categories of approved uses, no necessity defense (*expresio unius*)
         a. Legislature has made a judgment that marijuana use is prohibited, so if no legislative exceptions, Court will defer to the legislature (worry about overriding their interest/judgment)
      3. Balancing test: D bears the burden of proof re: benefits derived from use > harm caused to the public
         a. Court is worried about risk of abuse, so when balancing, going to focus on everyone – not just this individual D
            i. Utilitarian approach: looking at the long term consequences and possibility of abuse, rather than focusing on this single, individual D
      4. Policy:
         a. Retributive: if D can show necessity for use, then focus on just deserts
         b. Utilitarian: could lead to future social harms
         c. General deterrence: if we allow D this exception, then a lot more people will claim necessity defense as well – whether honestly or fraudulently
            i. Do not want to undermine enforcement of drug laws

5. Both MPC and NY would bar the necessity defense because of legislative preclusion – legislature has already spoken
    a. Also, NY's imminence requirement would likely not be satisfied and not clear whether the harm "clearly outweighs"

iii. Economic Necessity: stealing because starving, squatting because homeless
1. Courts are *extremely* reluctant to recognize a necessity defense here
2. Legislative preclusion: legislature has already used the legislative process to create social welfare programs and to determine how to allocate the resources (shelters, food stamps, e.g.)
    a. Legislature may not want to over tax the general population
3. Policy: worried about long term consequences

e. Prison Escape Cases: justification vs. excuse
i. Justification
1. MPC uses a justification approach: balancing the harms – broad approach
    a. If D is justified in escape, then accomplice to the escape is also justified?
    b. If D is justified in escape, prison guard (knowing the facts) is not allowed to prevent escape (seems incompatible because we want guards to do their job, protect public safety, and not have to balance)
2. Idea of universalizing justifications: most people tend to think that if all relevant actors are aware of the same facts and one party is entitled to do a particular act, then the other parties should be able to assist or act on their behalf

ii. Excuse
1. D's behavior is wrong, but based on the circumstances D had a good (excusable) reason for acting as he did – so punishment is mitigated or excused
2. If D is only excused in escaping (e.g. because of duress), then clearly the accomplice is not justified in helping the escape
3. Ex: *People v. Lovercamp*: narrow approach – need 5 factors
    a. Prisoner is faced with a specific threat of death, forcible sexual attach or substantial bodily injury in the immediate future
    b. No time for a complaint to the authorities or history of futile complaints
    c. No time or opportunity to resort to the courts
    d. No evidence of force or violence used towards prison personnel or other innocent persons in the escape
    e. Prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat

iii. Options for Prison Escapes & Lesser Evils
1. Never accept
2. *Lovercamp* – 5 factors (narrow)
3. MPC/*Unger* (broad)
    a. General balancing – no strict criteria
    b. Let credibility be decided by the jury

iv. Concerns: risk of abuse; long term consequences; might prefer bright line criteria since MPC/usual lesser-evils test is quite vague & broad); might favor MPC test because want to let it get to the jury – jury can always reject the defense
1. In reality, quite a few states do recognize a necessity defense for prison escape cases because it is not a huge problem because of prison discipline
    a. Also, juries tend to be unsympathetic to D if they have committed a serious crime, which is why D is behind bars in the first place

f. Vagueness and Generality of Lesser Evils Defense: the law is vague and general, so courts tend to construe the law narrowly

g. Crimes Requiring Negligence or Recklessness
    i. For such crimes, lack of justification is "built in" to the very concept of negligence or recklessness, so there is no need for a separate lesser evils defense
        1. Negligence and recklessness require an unjustifiable risk (whereas purpose and knowledge do not)
h. Political Protest Cases
    i. Courts generally reject the necessity defense
        1. Why? Legislative preclusion: legislature (elected representatives) has chosen the policy and did not mean for there to be exceptions/room for a necessity defense
        2. Sometimes courts will allow evidence in on necessity, but will not give an instruction on necessity (split the baby)
    ii. Options available to those upset about a government policy:
        1. Necessity defense: rarely wins
        2. Civil disobedience: protesting and accepting the penalty
            a. Direct: violating/protesting the specific law to bring attention/publicity to the cause
            b. Indirect: violating a law that is not the object of the protest
                i. Defense unlikely because (a) harm not imminent; (b) protest cannot effectively avert danger; (c) alternative legal methods; (d) inherent legislative preclusion
            c. Ex: *United States v. Schoon*: to invoke necessity defense, D must show: (1) faced with a choice of evils and chose the lesser evil; (2) acted to prevent imminent harm; (3) reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) had no legal alternatives to violating the law
        3. Legal challenge to the validity of the policy (i.e. as unconstitutional)
        4. Jury nullification: juries have the de facto 'power' to nullify the law, as a practical matter (i.e. acquit D even though the evidence clearly shows that D committed the crime)
            a. But, D has no "right" to ask juries to do so (i.e. no right to a jury instruction informing them of their power; and D's attorney cannot explicitly ask them to ignore the evidence and acquit D if they think the law is unjust)
            b. Jury nullification is very unpredictable, so not a realistic option to rely on
            c. Policy concerns: troublesome because jury is bypassing the legislative process; but laws are sometimes extremely strict, so need jury nullification; could send a message to legislature re: what the "people" actually think
i. Purposeful or Knowing Killing of Innocents
    i. Net savings of lives always justifies the act (strong utilitarian view)
        1. Ex: *Dudley v. Stephens*: Ds stranded at sea, sacrificed one to save the others
        2. Concern: may justify too much
    ii. It sometimes justifies the act, but not always (majority view)
        1. Ex: diverting a flood to save the town = justified under lesser evils
        2. MPC suggests killing another is justified only if a fair method of selection was used
    iii. It never justifies the act (strong deontological view – the view that respecting rights and duties is sometimes more important than maximizing social welfare)
        1. Morally permissible action does not depend only on maximizing the social good
        2. Concern: may be too strict

iv. Rationales: diverting a natural threat from one place to another is different than assaulting an innocent person
1. Might matter if D is acting with purpose or knowledge
a. But Simons thinks a purpose vs. knowledge distinction would not make much of a difference

j. Torture by the Government [did not talk about in detail, see RM 12]
i. Raises questions about both the balance of evils and legislative preclusion
1. Government is asserting a necessity defense – government is presumed to be acting for the public benefit, so might be an argument to be more deferential
a. Concern: line drawing problem
2. Legislative preclusion: there is a federal statute forbidding the use of torture – was arguably written with this kind of extreme in mind

<u>Excuse</u>

I. <u>Duress</u>

a. Duress vs. Involuntary Act
i. Duress: D is affirmatively, voluntarily acting
ii. Involuntary Act: narrowly defined – convulsion, sleepwalking, seizures, unconscious

b. Duress vs. Necessity (or Lesser Evils)
i. CL
1. Necessity/Lesser Evils: justification
a. Source of threat: human or natural
i. In some CL jurisdictions, defense only available when the source of the peril is "natural"
1. In these jurisdictions, **duress is a species of lesser evil – when the threat is human**
a. When the threat is natural = lesser evil/necessity)
2. Duress: unclear if CL uses a justification or excuse approach
a. In some states, the duress defense is treated as a justification: it is only available if D's decision to comply with the threat amounts to choosing the lesser evil
b. Source of threat: **must** be human
ii. MPC
1. Necessity: justification
a. Source of threat: human or natural
2. Duress: excuse
a. D need <u>not</u> have chosen a lesser evil (i.e. his conduct need not be justified)
i. If D satisfies both, though, can assert both
b. Excuse simply requires that your response was understandable considering the pressures you were under
c. Source of threat: **must** be human
3. Both doctrines allow balancing of the harm

c. Imminence
i. CL: imminent threat required
1. Seriousness of the threat: threat of death or great bodily injury required
2. Policy: want people to try to go to the police before giving in to duress; do not want to create incentives for military to give in to duress (trained to resist); if party assumes the risk they should not be able to use a duress defense; autonomy
ii. MPC: whether a person of reasonable firmness would be able to resist the threat
1. Imminence is not always required

        a. Less categorical – imminence is just one relevant factor, not determinative
    2. Seriousness of the threat: merely needs to be of "unlawful force" (so long as the threat and D's response otherwise satisfy the general test)
    3. Ex: *State v. Toscano*: D falsified a medical report because someone threatened D and his wife, told D they knew where he lived and would get them at night; D was clearly subjectively terrified; lower court dismissed for lack of imminence; court advocated a more flexible test; court was unsure whether D acted as a person of reasonable firmness in his situation, but decided to give the case to the jury
        a. Note: even though it looks like D chose the lesser of the evils, D would likely not have a lesser evils defense because he should have gone to the police – threat was not in, say, 15 minutes (so unjustifiable)

d. What kinds of threats suffice?
    i. CL: human threat – of death of great bodily injury
        1. Serious threat
    ii. MPC: human threat of merely unlawful force
        1. Person of reasonable firmness would not have been able to resist
    iii. CL &MPC: threat of personal injury
    iv. CL & MPC: natural threats & threats to property ≠ duress defense
        1. Minority: a small number of CL jurisdictions have a broad situational defense, which would include natural threats (pg. 842)
    v. Rationale for human threat requirement: can prosecute a human, cannot prosecute God/natural threats; could lead to slippery slopes
        1. Counter: duress is supposed to be an excuse defense, so does not matter if there is not another party to prosecute
        2. Cf: inoperative brakes & *Dudley* are not duress situations, maybe lesser evils
e. Target of threat: need not be D or even a family member
f. Objective or Subjective Test?
    i. Objective Test:
        1. D was actually coerced by a threat of force, and
        2. The threat was "objectively" legally sufficient
            a. CL: the threat must be of death or great bodily harm and was imminent
            b. MPC: the threat was one that a person of reasonable firmness in D's situation would have been unable to resist
                i. MPC gives a lot of cases to the jury to decide whether a person of reasonable firmness would have been unable to resist
    ii. Subjective MPC test?
        1. Opposes individualizing the standard
        2. Considers physical, not mental defects & matters of temperament
            a. Mental defects are difficult to identify, quantify, and are more easily feigned
                i. MPC prefers individualizing that standard when the condition is "gross and verifiable" (so severe mental disability may qualify)
        3. Simons thinks it makes sense to vary the test for mental disorders/retardation and BWS/learned helplessness, e.g. since we focus on duress as an excuse (not a justification)
g. Duress defense to murder:
    i. CL: no
    ii. MPC: yes, if the threat and D's response otherwise satisfy the general test

h. Fault of the Actor:
    i. CL: always excludes the defense if D is at fault
    ii. MPC: sometimes excludes the defense
        1. If D recklessly placed himself in situation in which duress is probable (e.g. getting into a gang), the duress defense is unavailable
        2. If D negligently placed herself in a duress situation, the defense is still available for all offenses expect those for which negligence suffices to establish culpability
i. Duress and BWS (i.e. battered woman goes along with batterer's crimes because of duress/learned helplessness)
    i. D wants to bring in BWS evidence re: duress defense to show that she subjectively feared her abuser even in the absence of a direct threat, and that such fear of imminent harm was reasonable
        1. In order to explain her failure to escape, expert can testify re: learned helplessness
    ii. BWS evidence is less likely to be admitted if jurisdiction excludes matters of temperament in applying the reasonable person test (i.e. in assessing D's situation under MPC approach)
        1. Would be admissible if the jurisdiction is flexible in individualizing the standard
            a. Simons thinks it makes sense to vary the test for BWS & learned helplessness since duress is an excuse (versus a justification)
        2. Policy: members of the public are at risk and that seems worse; since crime is against innocent people, don't want a broad defense (whereas self-defense is against the abuser)
j. Prison Escape Cases
    i. Some CL jurisdictions require "do-it-or-die" threat from coercer, so duress would not be available for prison escapes
    ii. MPC would allow duress claim here
k. Policy Arguments:
    i. Specific deterrence: undeterrable – D is under so much pressure that the criminal law will not be considered; rather, D is considering his health and safety
    ii. General deterrence: possible that the general public will also be undeterrable
        1. Counter: incentive on all actors (i.e. gang members might feel emboldened/more comfortable threatening innocent Ds to do something, assuring them they will not be punished
            a. Worried about long term effects of allowing a full duress defense
    iii. Retributive: D did not willingly commit the crime
        1. D is not blameworthy because he made his choice under such coercive pressure – most people would not have been able to resist
        2. Natural tendency towards self preservation [D definitely has MR for the crime because did so knowingly, but under non-culpable reasons]
    iv. MPC: law is ineffective and hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise
    v. Note: some duress should be treated as a partial excuse like provocation
        1. Someone fears for their life, so crime should be mitigated
    vi. Restrictions: concerns about line drawing/fraud/abuse
        1. Courts are cautious about allowing a full defense as to excuse when person chooses the wrong thing to do

II. <u>Insanity</u>
a. Mental disorder relevant to MR?
    i. Narrow sense (of MR required for the crime):

1. Yes, mental disorder is admissible to negate MR under MPC §4.02(1)
    a. "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform to the requirements of law"
    b. D might not be guilty of recklessness if he lacked awareness for the crime
    c. D would be guilty of negligence, because it is not a reasonable mentally insane person standard
        i. MPC tends not to individualize according to mental illness
2. Non-MPC jurisdictions differ on whether it is admissible to negate MR
    a. Some courts allow the evidence
    b. Some courts allow the evidence for specific, not general, intent crimes
    c. Just must decide whether they believe the experts
    d. Many jurisdictions might not allow expert testimony on MR of the crime
    e. Note: that means some CL jurisdictions will allow evidence of intoxication but not mental illness
        i. Shows serious worry legislatures & courts have re: mental illness evidence

ii. Broad sense of MR (as referring to D's culpability)
1. Mental disorder is relevant, even if it does not negate D's MR, to whether D is not guilty by reason of insanity

b. Insanity – Competence to Stand Trial – Mental Illness
i. Insanity: a legal term that refers to a person's mental state at the time of the crime when that mental state legally precludes a finding of criminal responsibility
1. Insanity is a defense
ii. Mental Illness: a medical term to describe someone who has serious mental defects/disease
1. Mental illness is not a defense, just brought into the insanity defense
iii. Incompetent to Stand Trial: is a legal term that refers to a person's mental state at the time of a legal proceeding
1. Concern that people who are on trial know what is happening to them
    a. Unjust to prosecute if at the time of trial D does not know what is happening
iv. D can be insane at the time of the crime, but competent to stand trial
v. D can be sane at the time of the crime, but incompetent to stand trial

c. Insanity vs. Guilty
i. Not guilty by reason of insanity: could be a long period of commitment to a mental institution (possibly indefinite), which means no jail
1. Possibility to get treatment
2. No stigma of being classified a criminal
ii. Guilty: will serve jail time (liable for whatever penalty is associated with the crime), but might be shorter than civil commitment
1. No stigma of being classified as insane

d. Rationale for Insanity Defense
i. Pro:
1. Retributive: D did not have the MR for just deserts; D is not sufficiently culpable
2. Deterrence: D does not understand what he is doing and will not be moved by punishment
ii. Against:
1. General deterrence: if we punish D, might incentivize third parties to pay more attention to D and make sure D is on medication, e.g.

2. General deterrence: people might be emboldened to fake insanity
3. Utilitarian: maximize public good if D is incapacitated because he will not pose a threat to society; mental institutions might not be able to do a good enough job from protecting the general public

e. Burden of Proof: insanity is an affirmative defense
   i. D has the initial burden of producing evidence regarding her mental condition in order to raise the insanity defense

f. Tests
   i. M'Naghten/CL (cognitive): due to mental disease, (1) D does not know the nature or quality of his act, or (2) even if he did know this, he did not know what he was doing was wrong
      1. D has a lack of intellectual knowledge of "wrong"
      2. Requires **complete** incapacity
      3. Only cognitive – have to have the capacity to know what you are doing is wrong
         a. You lose the insanity defense if you know what you are doing is illegal
            i. Because then you are affected by the law and can be incentivized (evidence of concealment, e.g.)
   ii. Irresistible Impulse: some CL courts endorse this test of **volitional** impairment
      1. D compelled to act due to mental illness
         a. Not an issue of understanding the difference between right and wrong
      2. D is aware that what he is doing is wrong, but he may have an irresistible impulse to control it
      3. Very narrow test ("policeman at shoulder" criterion)
         a. Even if policeman was at D's shoulder, D still would have acted (anything short of this, and D does not get the defense)
   iii. MPC §4.01 (cognitive & volitional): A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct <cognitive> **or** to conform his conduct to the requirements of the law <volitional>
      1. Substantial capacity is less than the "complete incapacity" M'Naghten standard
      2. MPC leaves it up to the court to decide whether the requirement is that it is criminal/illegal or that D knows it is wrongful (i.e. open-ended re: legally or morally wrong)

g. M'Naghten v. MPC
   i. M'Naghten:
      1. Only cognitive impairment provides a defense
      2. **Complete** incapacity is required for defense
      3. Lack of intellectual knowledge of "wrong" provides a defense
   ii. MPC:
      1. Cognitive or volitional impairment provides a defense
      2. Only **substantial** incapacity is required
         a. Still not guilty by insanity even if D retains very slight capacity
      3. Lack of intellectual or of "affective" knowledge (i.e. D does not "appreciate" wrongfulness) provides a defense
         a. Affective knowledge: D might intellectually understand what he is doing is wrong, but D cannot integrate that knowledge into the situation (cannot appreciate it) – the knowledge does not affect D and D's behavior

h. The meaning of "**wrong**" under a cognitive test: (courts are divided on the issue)
   i. Contrary to law (legally wrong)
      1. Knowledge of criminality: so long as D is aware that what he is doing is illegal than D loses the insanity defense
   ii. Contrary to social morality (morally wrong))

1. D could know what the act is a crime, but is not aware that it is actually wrong
    a. Out of touch beliefs
        i. Ex: D knows wrong to kill wife, but thinks it will lead to greater good of saving the world

iii. Contrary to personal moral beliefs
    1. Most courts would say this is not enough

iv. Deific decree exception: court gives mitigation if D claims he acted because of a deific decree (i.e. God told him to do so) versus some made up reason or delusion
    1. Hard to defend – why does it matter if the irrational reason you did something was because God said so?

i. Cognitive test is more accepted than the volitional test
    i. Volitional test: been a trend lately to limit it because it is potentially especially broad
        1. Hard to draw a line around
        2. Hard to differentiate between an irresistible impulse and an impulse D just did not resist even though he had the capacity to do so

j. Insanity must be established and proven – at the time of the crime D acted under insanity
    i. Threshold of seriousness that the mental disease or defect must rise to
        1. Mere excitability (e.g.) is not enough

k. Abolition of the Insanity Defense?
    i. <u>Guilty but mentally ill verdict</u>: an attempt to narrow the insanity defense as a practical matter
        1. Problem insanity defense advocates have though, is this option is given to the juries and often chosen
            a. D is sentenced to the same term of imprisonment as they would under a guilty verdict and often required to get treatment; even if treatment is not working/helping, D still has to serve the prison sentence
            b. Criticism is that jurors are less likely to choose not guilty by reason of insanity so D ended up serving a long prison term
                i. If not guilty by reason of insanity, D would be civilly committed and get treatment, or not be committed for as long as they are for a prison term for the crime

l. [Note: MR is a separate inquiry from insanity]

<u>Defenses</u>

(1) Failure of Proof Defense: D contends that the State failed to prove an essential element of the offense charged
Ex: lack of MR, lack of some AR requirement, mistake of fact, (in)voluntary act, involuntary unconsciousness (complete defense)

(2) Justification Defenses: D contends that his act is justified; therefore it is right or, at least, not wrong
Ex: self defense, lesser evils/necessity

(3) Excuse Defenses: D presents evidence re: D is not morally culpable for his wrongful conduct
Ex: duress, insanity

(4) Specialized Defenses
Ex: legal impossibility & attempt, abandonment & attempt