

I. PUNISHMENT

A. Criminal Justice System

1. Criminal Law

- a. Use of state power to deliberately condemn and harm culpable individuals who have violated important state interests

2. Criminal Prosecution → Phases – 4x

a. Investigation

- i. Whether police decides to investigate
 - (A) Considerations
 - (1) Likelihood of conviction → based on facts/evidence available
 - (2) Seriousness of crime
 - (3) Other agencies available
 - (a) Ex. - DEA
 - (4) Historically neglected cases
 - (a) Ex. – domestic violence → private matter

- ii. If evidence is sufficient → booking

b. Charging

- i. Whether prosecutor decides to bring charges → ultimate discretion

(A) Considerations

- (1) Goal = Justice → NOT conviction at all costs
- (2) Media
- (3) Self-interest (prestige)
- (4) Ethical standards

- ii. Standard of Proof → Probable Cause

- iii. Before prosecution can go to trial – 2x

(A) Grand Jury Indictment → NOT check on prosecutor's power

- (1) Grand jury issues “true bill” if evidence meets standard

(B) Approval of Magistrate in Preliminary Hearing → check on prosecutor's power

- (1) Prosecutor files complaint (accusation) directly to court
- (2) Preliminary hearing is “mini-trial” w/ less procedural protections
 - (a) Ex. – hearsay allowed

c. Trial

i. Arraignment

(A) D informed of charges

(B) D enters plea of guilty or not guilty

(1) Plea Negotiations

- (a) Lighter sentences as incentive
- (b) Prosecutors have more leverage in plea bargaining
 - i. Unfairness → innocent person takes plea to avoid trial or risk of losing
 - ii. Bias → some offenders get better deals than others

ii. Pre-Trial Motions

(A) Ex. – *suppress evidence, validity of charging documents*

iii. Discovery

(A)

iv. Trial

(A) Misdemeanors → < 1 day + Felonies → longer

(B) D's constitutional rights

- (1) Amendment VI → right to jury trial unless waived
- (2) Amendment V → right to not be witness against self

- (a) D can testify but then P allowed to cross-examine
 - v. Verdict
 - (A) Unanimous Verdict → convict or acquit
 - (B) Hung jury → case dismissed
 - d. Sentencing
 - i. Judge decides sentence → constrained only by legislation
 - ii. Jury plays role only in DP cases
 - 3. D's Arguments
 - a. Challenge the facts
 - b. Challenge the interpretation of words in statute
 - c. Look to case law
 - d. Look to other statutes, legislative intent, rules of statutory construction
 - e. Look to legislative intent
 - f. Look to rules of statutory construction
 - i. Ex. – Rule of Lenity → if statute is ambiguous, interpret it in a way that protects D
 - g. Look to public policy issues
 - i. Fairness, equity, justice (social consequences)
- B. Traditional Purposes of Punishment**
- 1. Utilitarianism (Forward Looking → Future Acts of Society) → Cost / Benefit Analysis
 - a. Punishment is justified if benefits outweigh costs
 - i. Benefits → reducing crime, satisfaction of victim, benefit to society (safety, security), etc.
 - ii. Costs → costs of locking up, loss of productivity, loss of liberty to D, risk of wrongful conviction, costs to third parties and society, costs of process (trial, investigation), etc.
 - b. CRITICISM**
 - i. Does not take ethics into account → offenders as “means” to an “end”
 - ii. Risk of punishing innocent people for greater happiness of society
 - c. Justifications for Punishment – 3x
 - i. Rehabilitation → Future + Individual
 - (A) Reform D so D becomes a productive or useful member of society
 - (B) Through “forced” treatment → punishment
 - (1) Ex. – *indeterminate sentencing* - (C) CRITICISM**
 - (1) Offenders figure out the indeterminate sentencing system
 - (2) Something sinister about “rewiring” a person
 - ii. Incapacitation → Current + Individual
 - (A) Punish D so D cannot commit any crimes
 - (1) Ex. – *recidivist laws*
 - (B) CRITICISM**
 - (1) Replacement effect → if one person put in prison, another person will replace
 - (a) Limited effect on organized crime
 - (2) Inability to identify who is high risk offender and who is one-off criminal
 - iii. Deterrence → Future + Society
 - (A) Punish D in order to deter others from committing crimes
 - (1) Ex. – *higher sentences*
 - (B) CRITICISM**
 - (1) Assumption of rationality → some criminals are not rational
 - (2) Increases in sentences do not necessarily increase deterrence → stop taking cost/benefit analysis into account at some level → marginal utility
 - (a) Law of diminishing returns

(3) People are means to an end

2. Retribution (Backward Looking → Past Acts of Society)

a. Punishment is justified because D is blameworthy and deserves it

b. Just Deserts → Punishment fits the crime

i. Amount of harm caused → social harm

ii. Mental state / mens rea → culpability

(A) Free will → responsibility for own actions

(1) *Counter-Ex. // Alex Cabarga* → less culpable b/c not as free in making choices

(a) Determinism → *one's acts are determined by one's environment or genetics*

(b) Constrained Retributivism → *free will exists but other circumstances affect it*

iii. CRITICISM

(A) Assumption of free will

(B) Too much power in the state

(C) Public vengeance (mob mentality)

C. Constraints on Punishment

1. Determinate vs. Indeterminate Sentencing

a. Indeterminate Sentencing → up until 1970s

i. Sentencing → unguided, discretionary, and indeterminate

ii. CRITICISMS

(A) Inequality → those acquitted are not minorities

(B) Disparity → same crimes, different sentences

(C) Leniency → too many offenders being let out early

b. Determinate Sentencing → from 1980s and beyond

i. Sentencing → restriction on judicial discretion

2. Statutory Constraints

a. Mandatory Minimum Statutes

i. Types – 2x

(A) Offense-Related Laws

(1) Based on specific kind of offense

(a) *Ex. – drug crimes → possession and distribution of controlled substances*

(2) **CRITICISM**

(a) Aggravating or mitigating factors NOT taken into account

i. *Ex. – drug mule vs. drug lord → same sentence*

(B) Recidivism Laws

(1) Based on offenders who have significant prior history

(a) *Ex. – CA's Three Strikes Law*

i. *D has two prior "serious" felony convictions*

ii. *D's current offense is "any" felony (one year minimum sentence)*

iii. *D gets sentence of 25 years to life*

(2) **CRITICISM**

(a) Overbreadth → any felony (non-serious + nonviolent) triggers third strike

i. *Ex. – 2/3 of offenders who trigger third strike commit non-serious felonies*

b. Sentencing Guidelines

i. Federal Sentencing Guidelines

(A) Sentencing Commission

(1) Established by Sentencing Reform Act (SRA) in 1984

(B) Sentence Determination

(1) Factors – 3x

(a) Seriousness of the Offense → current offense

(b) Criminal History → prior offense(s)

(c) Relevant Conduct → preponderance of the evidence

i. Criminal behavior or conduct that has not been proven at trial but that is "reasonably certain" can be taken into account during sentencing

(2) **CRITICISM**

(a) Evades trial protections → due process + jury trial

ii. CA Sentencing Guidelines

(A) *Pre-Blakely* → Sentencing Outcomes – 3x

(1) Mitigated Sentence

(2) Normal Sentence

(3) Aggravated Sentence

(B) *Post-Blakely* → Free Range Sentencing

(1) Judge can choose maximum without any further fact finding (SB40)

3. Constitutional Constraints

- a. AMENDMENT VIII – Cruel and Unusual Punishment
- i. Proportionality
- (A) Capital Punishment
- (1) NOT cruel and unusual
- (B) Non-Capital Punishment → Narrow Proportionality Principle
- (1) Amendment VIII only forbids extreme sentences that are grossly disproportionate to crime
- (a) NOT strict proportionality
- (2) Steps – 2x
- (a) Whether statute enacted with (any) purpose of punishment
- i. Deference to legislature
- (b) Whether punishment is grossly disproportionate to that purpose
- ii. Case Law
- (A) Ex. // Ewing v. California (p. 75) (2003)
- (1) CA Three Strikes Law → NOT unconstitutional
- (2) Gravity of Offense → current felony + history of felony recidivism
- (a) Current → Shoplifting three golf clubs (\$399 each) → grand theft (“serious”)
- (3) Retribution = grossly disproportionate → culpability for current offense
- (4) Utilitarian = proportionate → recidivist (committed multiple crimes)
- (B) Ex. // Rummell v. Estelle (p. 79) (1980) → constitutional
- (1) D receives life with possibility of parole
- (a) Previous and current offenses → three fraud offenses totally \$230
- (2) Proportionate
- (a) Possibility of parole
- (C) Counter-Ex. // Solem v. Helm (p. 79) (1983) → unconstitutional
- (1) D receives life without possibility of parole
- (a) Previous offenses → six felonies (none was a crime against person)
- (b) Current offense → passing bad check for \$100 → “passive”
- (2) Grossly disproportionate
- (a) No possibility of parole
- (b) Gravity of offense
- i. Relative harmlessness of crime issuing bad check
- ii. Lack of violence in criminal record
- (c) Severe compared to criminals within state and outside of state
- (D) Ex. // Harmelin v. Michigan (p. 80) (1991) → constitutional
- (1) D receives life without possibility of parole
- (a) Current offense → possession of 672 grams of cocaine
- (2) Proportionate
- (a) Gravity of offense → serious

b. **AMENDMENT V + XIV + VI – Due Process + Jury Trial**

- i. Due Process
 - (A) “Beyond a Reasonable Doubt” vs. “Preponderance of the Evidence”
- ii. Jury Trial
 - (A) Judge vs. Jury
- iii. Case Law
 - (A) **Apprendi v. New Jersey** (p. 91) (2000)
 - (1) Any fact that increases a sentence above the statutory maximum for a crime must be submitted to a jury and proven beyond a reasonable doubt
 - (a) **EXCEPTION** → prior convictions
 - (B) **Blakely v. Washington** (p. 96) (2004)
 - (1) “Statutory Maximum” defined
 - (a) Maximum that a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant
 - (b) Test → whether jury’s verdict or D’s plea alone authorizes sentence
 - (2) All sentencing guidelines are unconstitutional
 - (C) **Cunningham v. California** (p. 96) (2007)
 - (1) Blakely applies to CA’s Sentencing System → unconstitutional
 - (2) CA legislature enacted SB40 → discretionary guidelines
 - (D) **United States v. Booker** (p. 99) (2005)
 - (1) Sentencing guidelines become advisory → NOT binding
 - (a) **CRITICISM** → no more uniformity

- c. AMENDMENT V - Double Jeopardy / Ex Post Facto
 - i. Double Jeopardy
 - (A) D cannot be punished twice for same crime
 - ii. Civil Commitment vs. Criminal Punishment
 - (A) Factors – 2x
 - (1) Legislative Intent
 - (2) Purpose of “Punishment”
 - (a) Civil or Criminal
 - i. Incapacitation
 - ii. Rehabilitation
 - (b) Uniquely Criminal
 - i. Deterrence
 - ii. Retribution
 - (B) Ex. // *Kansas v. Hendricks* (p. 1.31)
 - (1) NOT deterrence → *sexual predators do not have self-control*
 - (a) *Not deterred by threat of confinement*
 - (2) NOT retribution → *not assigning blame to D*
 - (a) *Only using prior conduct to support finding of future dangerousness*

II. ELEMENTS OF THE OFFENSE

A. Actus Reus

1. Bad act or conduct

B. Mens Rea

1. Culpable mental state

C. Concurrence of Act and Mental State

1. Actus reus and mens rea must occur at same time

D. Time Framing → result-oriented crimes

1. Moving back to an earlier act where actus reus and mens rea occur at same time

III. ACTUS REUS

A. General Rule

1. All crimes must have a prohibited act
 - a. Omission or Commission

B. Qualifications of Rule – 5x

1. An innocent, lawful, “common,” “everyday” act will not suffice

- a. *Counter-Ex.* // Proctor v. State (p. 107)
 - i. *Keeping of a place* → innocent act

2. Act must be “voluntary”

- a. Voluntary → consciously willed

- i. Any action that is the result of individual’s conscious direction or will regardless of the motivation or objection of the action

- b. Involuntary → NOT consciously willed

- i. Result of external forces

(A) *Ex.* – if A threw B onto C’s property → no trespass

- ii. Mental or biological defects

(A) Uncontrollable physical actions

(1) *Ex.* – convulsions, seizures, reflexes

(2) *Counter-Ex.* – sleepwalking (if tasks too complicated)

(3) *Counter-Ex.* // People v. Decina (p. 139)

(a) D had epileptic seizure while driving and killed 4 Vs

(b) D made voluntary choice to get into car → aware of condition and consequences

- iii. MPC → Involuntary Acts [2.01(2)]

(A) Reflex or convulsion

(B) Movement when unconscious or asleep

(C) Conduct under hypnosis

(D) Movement that is not product of effort or determination of actor

3. Possession is an act

- a. Actual Possession

- i. Immediate AND hands-on (physical) possession

- b. Constructive Possession
 - i. Elements – 2x
 - (A) Effective power to control the thing possessed
 - (1) Proximity → location where object is specially accessible to D
 - (a) *Ex. – D’s knowledge of thing is admitted or inferred*
 - (2) Joint Possession → joint partners OR competitors
 - (B) Intent to control thing possessed
 - (1) Circumstances → intention
 - (a) *Ex. // **United States v. Maldonado** (p. 115)*
 - i. *D’s phone calls and statements → D intended to have drugs stored in room and intended to assist in transmission of drugs*
 - (b) *Counter-Ex – mere proximity, mere presence on property, mere association with person who does control*
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4. Specificity
 - a. Actus reus listed in statute → requires definiteness + clarity
 - i. Law is excessively vague if
 - (A) It fails to provide kind of notice that will enable ordinary person to understand what conduct it prohibits
OR
 - (B) It authorizes or encourages arbitrary and discriminatory enforcement
 - b. *Ex. // **Chicago v. Morales** (p. 163)*
 - i. *Ordinance failed to distinguish between innocent conduct and harmful conduct for loitering*
 - ii. *Ordinance gave police officers absolute discretion to determine what constitutes loitering*
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5. Omission Liability
 - a. **CL** – General Rule
 - i. No duty to rescue or act
 - (A) Rationale
 - (1) Individualism
 - (2) Misjudgments
 - ii. **EXCEPTIONS** – 5x
 - (A) Statute imposes duty
 - (1) *Ex. - Good Samaritan Statute*
 - (B) Status relationship
 - (1) One party is dependent on other party
OR
 - (2) Mutually dependent parties
 - (a) *Counter-Ex. // **Pope v. State** (p. 2.1)*
 - i. *D was not child’s parent, adoptive parent, guardian or caretaker*
 - (C) Contractual relationship
 - (1) Civil K
 - (D) D voluntarily assumed care of person and secluded the person from others rendering aid
 - (1) V’s reliance
 - (E) D created the peril
 - (1) Increased risk to V
 - b. **CA** – General Duty to Strangers
 - i. Good Samaritan Law
 - (A) Duty to report a crime in limited situations
 - (1) Punishment → misdemeanor
 - (B) *Ex. // David Cash*

IV. MENS REA

A. Rationale for Mens Rea

1. Retribution
 - a. People have differing levels of culpability
2. Utilitarian
 - a. Better deterrence results when you punish intentional criminal vs. accidental criminal

B. MPC – Mens Rea – 4x [2.02(2)]

1. Element Analysis
 - a. Material Elements of the Offense
 - i. Conduct
 - ii. Result
 - iii. Circumstance
2. Purpose → (subjective) → viciousness
 - a. Conduct + Result
 - i. D's conscious object
 - (A) For event to occur
 - (B) To engage in conduct
 - b. Circumstance
 - i. D is aware
 - (A) Of existence of circumstance
 - OR
 - ii. D believes or hopes
 - (A) Circumstance exist
3. Knowledge → (subjective) → callousness
 - a. Result
 - i. D is practically certain
 - (A) That event will occur → even if not D's goal
 - b. Conduct + Circumstance
 - i. D is aware
 - (A) Of nature of conduct
 - (B) Of existence of circumstance
4. Recklessness → (subjective + objective)
 - a. Conduct + Result + Circumstance
 - i. D is consciously aware of substantial AND unjustifiable risk
 - (A) Awareness
 - (1) D is aware of risk that material element exist OR will result from D's conduct
 - AND
 - (2) D is aware that risk is substantial and unjustifiable
 - AND
 - ii. D disregards it
 - (A) Gross deviation from standard of conduct
 - (1) Objective → law-abiding person under the circumstances
 - AND
 - iii. Actual risk is substantial AND unjustifiable

5. [Criminal] Negligence → (objective)
 - a. Conduct + Result + Circumstance
 - i. D's act causes risk that is substantial AND unjustifiable
AND
 - ii. D (or reasonable person) should have been aware of substantial AND unjustifiable risk
(A) Objective → reasonable person under the circumstances
 - iii. Criminal Negligence vs. Civil Negligence
(A) Criminal → gross deviation from standard of conduct
(B) Civil → mere deviation from standard of conduct

b. Rationale for Negligence Mens Rea

- i.

6. Statutory Construction
 - a. Traveling Rule [Section 2.02(4)]
 - i. Mens rea applies to all elements that follow
 - b. Default Mens Rea [Section 2.02(3)]
 - i. Recklessness OR knowledge OR purpose

C. **CL / CA** – Mens Rea

1. Common Terms
 - a. “intent” → purpose + knowledge (of MPC)
 - i. Conscious object
 - ii. Practically certain
 - b. “negligence” → criminal negligence (of MPC)
 - i. Gross deviation
 - c. “recklessness” → no uniform meaning
2. Specific Intent Offense → actus reus + specific mens rea to do something further
 - a. Conduct + Result
 - i. Intent (purpose) → “with intent to”
(A) Intent to do some further act
OR
(B) Intent to achieve some further consequence
(C) Beyond conduct or result that constitutes actus reus of offense
 - b. Circumstance
 - i. Awareness (knowledge) → “with knowledge that”
(A) Awareness of circumstance
 - c. Anything before specific mens rea → treat as general intent
3. General Intent Offense → actus reus w/o reference to specific mens rea to do something further
 - a. Conduct
 - i. Voluntary + Conscious Awareness
 - b. Result + Circumstance
 - i. Civil Negligence

2. Intoxication
 - a. Types – 2x
 - i. Involuntary
(A) NO mens rea
 - ii. Voluntary
 - b. **MPC** - Voluntary Intoxication [2.08]
 - i. Purpose + Knowledge
(A) Intoxication is a defense if
 - (1) It negates the element of the offense
(a) Ex. // **State v. Cameron** (p. 252)
 - ii. Recklessness
(A) Intoxication is NOT a defense if
 - (1) Due to self-induced intoxication
 - (2) D is unaware of a substantial and unjustifiable risk of which he would have been aware had he been sober
 - (a) Time Framing → move back to prior act
 - i. If while sober, D is NOT aware of risk → no recklessness
 - iii. Negligence
(A) Intoxication is NOT a defense
 - c. **CL / CA / Majority**
 - i. Specific Intent Crime
(A) Intoxication is a defense if
 - (1) Intoxication makes it impossible for D to satisfy intent required
 - ii. General Intent Crime
(A) Intoxication is NOT a defense
 - d. **Minority**
 - i. Intoxication is NOT a defense for all crimes
3. Diminished Capacity → limited success (D should use insanity defense instead)
 - a. **CL / CA**
 - i. Specific Intent Crime
(A) Mental illness is a defense if
 - (1) Mental illness makes it impossible for D to satisfy intent required
 - ii. General Intent Crime
(A) Mental illness is NOT a defense
 - b. **MPC** → NOT influential
 - i. Mental illness is a defense if
(A) It negates the element of the offense
 - ii. D can challenge ALL mens rea

V. STRICT LIABILITY (no mens rea required)

A. Rationale

1. Strictly Utilitarian → people will be more cautious
2. Industrial Revolution → need to address serious harms
3. Easier to prosecute for certain crimes

B. CL / CA

1. Determination → Common Law Crime vs. Public Welfare Offense
 - a. Common Law Crime
 - i. If traditional common law crime
(A) Silence → presumption of mens rea
 - ii. If no mens rea required → requires explicit mention in statute
(A) Clear legislative intent contrary to presumption
 - b. Public Welfare Offense → offenses that affect health, safety, or welfare of public
 - i. Silence → NO presumption of mens rea
 - ii. Strict liability offenses → NOT violate due process (Amendment V)
(A) Ex. // U.S. v. Balint (p. 3.53)
(1) *Public policy interests in eradicating drug trade > putting D on notice*
 - c. Factors – 4x
 - i. Traditional common law crime
(A) Whether derived from common law
(1) Ex. // Morissette v. U.S. (p. 3.55)
(a) *Theft* → “knowingly converting equipment that is government property”
 - ii. Degree of social harm
(A) Whether single violation harms large scale of people
(1) *Counter-Ex. – harms one individual*
 - iii. Severity of punishment
(A) Whether penalty is relatively minor
(1) Ex. – *finer, infractions vs. prison, serious sanctions*
 - iv. Difficulty of detecting offense

C. MPC

1. General Rule → no strict liability
 - a. Requires mens rea for each element of offense
 - i. UNLESS absolutely clear in statute
 - b. If ambiguous mens rea → recklessness OR knowledge OR purpose
2. **EXCEPTION** [2.05]
 - a. Offenses graded as “violations” → NOT “crimes”
 - i. Results in finer
(A) NOT in imprisonment
(B) NOT in probation

VI. HOMICIDE

A. Actus Reus

1. Causing the death of another human being

B. Malice

1. Express
2. Implied

C. CL – Murder

1. Felony Murder

a. Rationale for Felony Murder – 4x

- i. Underlying felony establishes that D acted with sort of mens rea that would otherwise establish murder liability
- ii. Intention to commit felony is as “malicious” a mental state as intention to kill
(A) Transferred Intent
- iii. Felony murder rule will deter prospective criminals from committing felony
- iv. Felony murder rule will induce those who will commit felonies to take greatest pains to commit those felonies safely

b. NO Mens Rea → Strict Liability

- i. Only mens rea for underlying felony is required
- ii. Transferred Intent → felony to murder

c. Actus Reus → Elements – 3x

- i. D or accomplice
(A) Accomplice → one who intentionally aids in commission of crime
- ii. Commits or attempts to commit a felony
(A) Attempt →
- iii. That causes death of another human being
(A) Causation → but for the underlying felony, the death would not have occurred

(1) Causal relationship

- (a) Logical nexus → beyond mere coincidence of time and place
 - i. Death NOT required to be part of felony OR promote felony
- (b) **EXCEPTION** → NO relationship → occurs while NOT engaged in commission
 - i. *Ex. – burglar sees lifelong enemy across house he is in*
- (c) *Ex. // People v. Stamp (p. 3.12)*
 - i. *D is still liable even if not only cause of death*
 - ii. *D’s bank robbery AND V’s poor health caused V’s heart attack*

(2) Temporal relationship

- (a) One continuous transaction → death occurs during the felony
- (b) *Ex. // People v. Cavitt (p. 436)*
 - i. *One accomplice still at crime scene when killed V while others left*

d. Limitations – 4x

i. Predicate Felonies

(A) Felony Murder, First Degree

(1) Enumerated in statute under First Degree Murder

(a) BARRK

i. Burglary

ii. Arson

iii. Rape

iv. Robbery

v. Kidnapping

(B) Felony Murder, Second Degree

(1) Unenumerated

AND

(2) CA / Majority → felony is inherently dangerous in the abstract

(a) Look at typical case of felony → NOT specific facts of case

i. Whether high probability that death will result

(b) *Ex. // People v. Hansen (p. 3.16)*

i. *Shooting into a home is inherently dangerous*

OR

(3) Minority → mens rea b/w D's thought process and ultimate death required

(a) Civil Negligence → felony has a foreseeable risk of death

ii. Duration Rule

(A) Only deaths matter are deaths that occur during the felony

(1) Beginning of Felony → Attempt

(a) D can be convicted of attempt to commit felony

i. D engages in substantial step towards completion of crime

(2) End of Felony

(a) CA / Majority → Res Gestae

i. D reaches point of temporary safety

(b) NY / Minority → Immediate Flight

i. D is no longer in immediate flight

ii. *Ex. // People v. Gladman (p. 432)*

iii. *D was hiding underneath car and then shot police officer*

iii. Agency Limit

(A) Close causal connection b/w felony and ultimate death

(1) D or accomplice MUST be direct or immediate cause of death

(a) Irrelevant Factors

i. Status of person killed → third party OR accomplice

ii. Nature of killing → accidental OR intentional

(B) If death caused by innocent bystander OR third party

(1) D is NOT liable for felony murder

BUT

(2) D may be liable for reckless murder

(a) Actus Reus

i. D caused death of V by provoking third party to kill

(b) Mens Rea

i. D was subjectively aware of risk of death or serious bodily injury

(3) *Ex. // **People v. Washington** (p. 430)*

(a) *Gas station owner kills accomplice*

(C) CA - Provocative Act Doctrine

(1) D is liable for reckless murder if

(a) D or accomplice commits provocative act

i. “provocative act” → D acts with conscious disregard for human life that has natural consequences dangerous to human life

ii. *Ex. – D initiates a gun battle*

(b) D’s victim OR police officer kills a third-party in reasonable response to that act

i. Death of third-party → NOT accomplice [??]

iv. Merger Rule

(A) Independent felony required as predicate offense

(B) Certain felonies merged into felony murder rule

(1) Involuntary manslaughter

(2) Voluntary manslaughter

(3) Reckless murder

(4) Assault

2. First Degree Murder → Intentional Killing
 - a. Mens Rea → Intent [+]
 - i. D had intent to kill
AND
 - ii. Premeditation AND Deliberation
 - (A) Aggravating Factors – 2x
 - (1) Time to reflect on decision to kill
 - (a) Some appreciable amount of time to reflect before K killed
 - (2) Emotional state of D at time of killing
 - (a) D acted calmly and coolly → NOT impulsive or agitated
 - i. Cold-blooded killing
 - b. Ex. // United States v. Watson (p. 330)
 - i. *Seconds b/w decision to kill and act* → *sufficient*
 - (A) *Police officer made a plea for life* → *D had seconds to reflect*
 - ii. *D only fired one shot* → *D had self-control (no panicking)*- 3. Second Degree Murder → Intentional Killing
 - i. Mens Rea → Intent []
 - (A) D had intent to kill
AND
 - (B) NOT premeditated and deliberate
 - (1) No reflection + w/o provocation

4. Second Degree Murder → Unintentional Killing
 - a. Abandoned and Malignant Heart / Reckless Murder → Implied Malice
 - i. Mens Rea → Extreme Recklessness
 - ii. Elements – 3x
 - (A) D is subjectively aware of risk of death or serious bodily injury AND disregards it
 - (1) Subjective Standard
 - (B) D's conduct has high likelihood of death OR serious bodily injury
 - (1) Objective Standard
 - (C) D has base AND anti-social motive
 - (1) NO justification for D's conduct
 - b. Ex. // Mayes v. The People (p. 400)
 - i. *Drunk K threw beer mug in direction of wife and ignites oil lamp*
 - c. Ex. // People v. Protopoulos (p. 406)
 - i. *D deviated from safe medical practice → overwhelmingly dangerous*
 - ii. *D was aware of patient's medical problem, but gave anesthesia anyways*
 - iii. *Controversial → Dr has base and antisocial motive?*
 - d. Ex. // Berry v. Superior Court (p. 406)
 - i. *D raised fighting dogs*
 - ii. *D's possible defense → dog never attacked child before*
 - e. Ex. // Commonwealth v. Malone (p. 404)
 - i. *Russian Roulette → D pointed revolver at V and third shot killed V*
 - ii. *D not intend to harm friend (V) → "any evil design in general"*
 - iii. *60% certainty that gun would fire → 3 shots / 5 chambers*
 - f. Ex. // People v. Watson (p. 411)
 - i. *Drunk driving → intoxication cannot be used as defense (CA General Intent)*
 - g. Ex. // Diane Whipple case (People v. Knoller)
 - i. CA - Subjective Standard
 - (A) D is aware of risk that endangers life of another

D. CL – Manslaughter

1. Voluntary Manslaughter → Intentional Killing
 - a. Mens Rea → Intent [-]
 - i. D had intent to kill
 - b. Mitigating Factors – 2x
 - i. Heat of Passion (subjective + objective)
 - (A) D was subjectively in the heat of passion
 - (B) Enough time had passed that reasonably prudent person would not have “cooled off”
 - (1) Ex. // People v. Walker (p. 340)
 - (a) No time for D to stop and cool off → not enough time for voice of reason to speak
 - (2) Counter-Ex. // Ex parte Fraley (p. 346)
 - (a) D killed ten months after V killed D’s son
 - ii. Adequate Provocation (subjective + objective)
 - (A) D was subjectively provoked
 - (1) D acted in response to provocation → NOT previously settled intention to kill
 - (a) Ex. – rage, fear, or any violent and intense emotion sufficient to dethrone reason
 - (B) Reasonable provocation
 - (1) **CL** → Categories – 4x
 - (a) Physical Attack
 - i. Serious bodily injury
 - ii. Threat of physical attack (possibly)
 - (b) Adultery
 - i. Caught spouse in the act of adultery
 - ii. Line of Sight Rule → good belief to suspect adultery
 - iii. Transferred Intent → spouse’s lover
 - iv. Ex. // Rowland v. State (p. 350)
 - (c) Mutual Combat
 - i. Chance Medley
 - (d) Violent or Sexual Assault on a Close Relative
 - i. NOT extended to distant cousin OR friend
 - (e) NOT reasonable provocation → words alone
 - (C) **CA / Minority / Reform Rule** → Elimination of Categories
 - (1) Reasonable provocation → jury determination
 - (a) Ex. – verbal provocation
 - (2) Ex. // People v. Berry (p. 358)
 - (a) D’s sudden and uncontrollable rage → D’s wife told D that she was in love with another man and provoked D with sexual taunts and incitements
 - (b) Wife’s long course of provocation in aggregate caused D’s act in heat of passion
 - (3) Subjectivizing the Reasonable Person
 - (a) Physical traits that are beyond D’s control
 - i. Ex. – blindness, age, illness
 - (b) NOT personality traits
 - i. Ex. – impulsiveness

c. Involuntary Manslaughter → Unintentional Killing

i. CA / Majority

(A) Mens Rea → Criminal Negligence []

(1) Gross deviation from standard of conduct

(a) D was not aware of risk but should have been aware

ii. MA / Minority

(A) Mens Rea → Criminal Negligence [+]

(1) Wanton and Reckless Conduct

(a) D was aware of risk of probable harmful consequences and disregarded it

(B) Ex. // Commonwealth v. Welansky (p. 381)

(1) *Fire at the night club* → patrons had no access to all five emergency exits

(2) *D's wanton and reckless conduct* → affirmative act or intentional failure to take care in disregard of probable harmful consequences

iii. WA (Previously) / Minority

(A) Mens Rea → Criminal Negligence [-] / Ordinary Negligence

(1) Mere deviation from standard of conduct

(a) D was aware of risk but should have been aware

(B) Ex. // State v. Williams (p. 390)

(1) *Native American Ds did not realize how sick baby was*

(2) *Ds thought it was toothache* → did not understand significance or seriousness

E. MPC – Homicide

1. Murder [Section 210.2] → (no first degree / second degree distinction)
 - a. Intentional Killing
 - i. Mens Rea → purpose OR knowledge
 - b. Reckless Murder
 - i. Mens Rea → extreme recklessness
(A) “reckless, manifesting extreme indifference to human life”
 - ii. Felony Murder
(A) Mens Rea → rebuttable presumption of extreme recklessness
(1) “reckless, manifesting extreme indifference to human life”
(B) Enumerated Offense → death occurs during or flight after committing or attempting
(1) BARRK + felonious escape
2. Manslaughter [Section 210.3]
 - a. Intentional Killing with Mitigation
 - i. Killing that otherwise would be murder
(A) Mens Rea → purpose OR knowledge OR extreme recklessness
 - i. Except committed under extreme emotional disturbance
(A) Subjective Standard
 - ii. For which there is a reasonable explanation
(A) Subjectivized Objective Standard
(1) “from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be”
(2) Jury Determination → no categorical rules (similar to CA)
 - b. Involuntary Manslaughter
 - i. Mens rea → recklessness
2. Negligent Homicide [Section 210.4]
 - a. Mens Rea → negligence
 - i. Ex. – vehicular homicide

II. DEATH PENALTY

A. Constitutional Restraints

1. Amendment VIII – Cruel and Unusual Punishment
 - a. DP → NOT cruel and unusual
 - i. Purposes → deterrence + retribution
 - (A) People in society fear death
 - (B) Eye for an eye
 2. Amendment V + XIV – Due Process
 - a. DP → guided discretion approach

B. Categorical Rules – 4x

1. Type of Offenses

- a. Homicide → DP is constitutional
 - i. DP → requires dead bodies
- b. NOT Non-Homicidal Crimes → DP is unconstitutional
 - i. Rape
 - (A) Ex. // Coker v. Georgia (p. 4.30)
 - (1) Violates Amendment VIII (Cruel and Unusual Punishment)
 - (2) Don't want to encourage D to kill V after rape
 - (B) Even if egregious → ex. – rape of woman or child
 - ii. (Potential) **EXCEPTIONS**
 - (A) Treason

2. Type of Mens Rea

- a. Intent to Cause Death (Intentional)
 - i. Ex. // Enmund v. Florida (p. 4.31)
 - (A) NO DP for felony murder → D did not actually perform killings
 - (1) Accomplices robbed and murdered couple → intentionally causing harm
 - (2) D waited in getaway → unintentionally causing same harm
- b. Extreme Recklessness (Unintentional)
 - i. Ex. // Tison v. Arizona (p. 4.31)
 - (A) DP for felony murder → Ds did not actually perform killings
 - (1) Elements – 2x
 - (a) Reckless indifference to human life
 - (b) Major participation in felony committed
 - (B) Ds stood by while father shot four people after helping father escape from prison
 - (C) Ds → major participation in felony + reckless indifference

3. Type of Offenders
 - a. Mental Illness
 - i. NO DP → D is insane at time of offense
(A) D is not guilty of crime by reason of insanity
 - ii. NO DP → D is sane at time of offense BUT D later becomes insane
(A) D is too mentally ill to understand significance of his punishment
(1) Ex. // **Ford v. Wainwright** (p. 3.52)
(B) EXCEPTION
(1) DP → medicate D to become sane again (ex. - 8th Circuit)
 - b. Mental Retardation
 - i. NO DP → D is mentally retarded
(A) Ex. // **Atkins v. Virginia** (p. 3.39)
(1) National Consensus → Shift in Societal Views
(a) Most reliable objective evidence of contemporary values → legislation enacted
(b) Trend → number of states + consistency of direction of change (most significant)
(2) Judge → any reason to disagree with judgment reached by citizenry and legislators
(3) NO purposes
(a) Mentally retarded cannot be deterred → act impulsively not premeditated
(b) Mentally retarded are less culpable → know less than most serious criminals
 - ii. Definition of “mental retardation” → up to state legislatures
 - c. Age (Youth)
 - i. NO DP → D is under 18 years old at time of offense
(A) Ex. // **Roper v. Simmons** (p. 491)
(1) National Consensus (again)
4. Type of Method of Execution
 - a. No method declared cruel and unusual
 - i. Dominant → Lethal Injection
(A) Three Drug Cocktail
(1) Barbiturate (unconscious)
(2) Paralytic
(3) Cardiac arrest
 - ii. Others → Gas chamber, hanging, electric chair, firing squad
 - b. Ex. // **Baze v. Rees** (p. 4.33)
 - i. D challenged lethal injection as cruel and unusual punishment
(A) Amendment VIII does not require avoidance of ALL risk of pain in execution
 - ii. Cruel and unusual only if
(A) Deliberate infliction of pain for sake of pain
(1) Ex. – torture
OR
(B) Current procedure has substantial risk of serious harm AND alternative procedure that is
(1) Feasible
(2) Readily implemented
(3) Significantly reduces substantial risk of serious harm

C. Procedural Rules

1. Previous Approaches

- a. Unguided Discretion for DP Determination
 - i. Jury determine whether sentence DP or not
 - (A) Arbitrary and biased → DP freakishly imposed
 - ii. Ex. // *Furman v. Georgia* (p. 3.28) (1972)
 - (A) *Exercise of standardless discretion violates Amendment VIII*
- b. Mandatory DP for First Degree Murder
 - i. Jury nullification → jury hesitant to convict D of first murder degree
 - ii. Ex. // *Woodson v. North Carolina* (p. 3.29) (1976)
 - (A) *Mandatory DP was inconsistent with contemporary standards of society*

2. Guided Discretion Approach

- a. Bifurcated Trial → Separate DP Hearing
 - i. Guilt Phase → “beyond a reasonable doubt”
 - ii. Sentencing Phase → “preponderance of the evidence”
- b. DP Statute → Statutory Guidance
 - i. Steps – 2x
 - (A) Threshold Determination
 - (1) DP can only be given if
 - (a) At least one aggravating factor is found
 - (B) Balancing Determination
 - (1) DP can only be given if
 - (a) Aggravating factors outweigh mitigating factors
 - (2) Jury’s discretion → give different weight to each factor
 - ii. Mitigating Factors
 - (A) Amendment VIII + XIV
 - (1) Allowed to introduce ANY relevant mitigating evidence
 - (a) Ex. // *Lockett v. Ohio* (p. 4.46)
 - i. *Amendment VIII + XIV → individualized sentencing*
 - ii. *Any aspect of D’s character or record*
 - iii. *Any circumstance of offense*
 - (B) Ex. – *character, prior record, age, lack of specific intent, relatively minor part in crime*
 - iii. Aggravating Factors
 - (A) NO Amendment VIII Right for Prosecutors
 - (1) Not allowed to introduce aggravating evidence UNLESS specifically listed in statute
 - (a) **EXCEPTION** → Victim Impact Evidence
 - i. V’s personal characteristics + emotional impact on family
 - (B) Ex – *killing for financial gain, killing police officer or prison guard, killing more than one person, killing in order to escape from lawful custody or to avoid arrest, history of violence*

3. Victim/Race Discrimination

a. Ex. // *McCleskey v. Kemp* (p. 497)

i. P (black person) murdered white police officer → DP

ii. Equal Protection – Amendment XIV

(A) No Evidence that state or prosecutor acted with discriminatory intent

(1) Disparities in statistics → inevitable part of criminal justice system + other unexplained discrepancy

iii. Cruel and Unusual Punishment – Amendment VIII

(A) No evidence that capital punishment system operated in arbitrary and capricious manner

(1) Guided Discretion Approach → less opportunity

(a) Bifurcated trial + balancing mitigating/aggravating

(2) Discretion → individualized sentencing

(a) Particularized nature of crime

(b) Particularized characteristics of individual D

(B) No evidence that other similarly situated Ds did NOT receive DP

III. CAUSATION

A. Actus Reus → result-oriented crimes

B. CL – Criminal Cause – 2x

1. Factual Cause

a. “But For” Cause

i. But for D’s voluntary act, resulting harm would not have occurred

b. Multiple Actual Causes

i. Accelerating a Result

(A) If D’s act accelerates V’s death even if V is already dying → still “but for” cause

ii. **EXCEPTION**

(A) Concurrent Sufficient Causes

(1) If two or more people cause death at same time but each person’s act has ability to cause death → both are still “but for” causes

AND

2. Proximate Cause

a. Direct Cause = Proximate Cause → no unusual, surprising, or special events

i. Cause in which natural and continuous sequence produces death

AND

ii. Without which death would not have occurred

VERSUS

b. Intervening Act

i. Independent Intervening Act → will disrupt chain of causation → D NOT proximate cause

(A) Third-Party Acts

(1) Third party’s act accelerates V’s death through

(a) Free, deliberate, and informed action

(2) Ex. – A shoots C, then B stabs C before C could have died from gunshot wound

(3) Ex. // People v. Kevorkian (p. 297)

(a) Murder → active participation

i. D actually performs or actively assists in performing final act

(b) Assisting Suicide → passive participation

i. D involved in events leading up to commission of final overt act

ii. D furnishing the means

(B) V Acts

(1) V’s conduct caused own death w/o D’s assistance

(a) Even if foreseeable, D is not liable if V becomes intervening act

(2) Ex. // Commonwealth v. Root (p. 281)

(a) Racing → V crashed into truck after driving on the wrong side

(C) **EXCEPTION** → Extremely Foreseeable (Result) → proximate cause

(1) Ex. – D carjacks a car with V in it, V is a member of a gang, D forces V out of car and leaves V in rival gang territory, and V gets killed by gang

VERSUS

ii. Dependent Intervening Acts → will NOT disrupt chain of causation → D proximate cause

(A) Third-Party Acts

(1) Third party’s act is in response to D’s conduct

(a) NOT free, deliberate and informed action

(2) Ex. // U.S. v. Hamilton (p. 287)

(a) D beats up V very badly, V pulls out the tubes at hospital and dies

(b) D’s act is still proximate cause even if V negligently fails to take care of himself

(B) V Acts

(1) D is still proximate cause if V brought own death sooner in response

(C) Classic Examples → D proximate cause

(1) Medical Care

- (a) Medical care after D's harmful act
- (b) Even if medical professionals are negligent
 - i. **EXCEPTION** → gross negligence

(2) Pre-Existing Condition (Eggshell Skull Rule)

- (a) Medical or physical condition
- (b) D takes V as he finds him
 - i. **EXCEPTION** → ultimate harm is grossly disproportionate AND after certain amount of time has elapsed

(3) Police Pursuit & Rescue

- (a) All specific harms that occur in a police pursuit or rescue
- (b) Even if police are negligent

(4) Escape

- (a) V attempts to escape in response to D's harmful actions
 - i. **EXCEPTION** → D's actions are minor and V overreacts in response
- (b) *Ex. // Stevenson v. State (p. 293)*
 - i. *D attempted to rape, V was distracted and mentally irresponsible*
 - ii. *V ingested poison in response to D's actions*

(D) **EXCEPTION** → Highly Unusual (Act) → NOT proximate cause

C. MPC – Criminal Cause [2.03]

1. Elements – 1x

- a. “But For” Cause
- b. [NO Proximate Cause]
 - i. Narrow “but for” causes as criminal cause → mens rea

2. Intervening Acts → jury determination

- a. Offense requires mens rea of purpose OR knowledge [2.03(2)]
 - i. D's act is NOT criminal cause if
 - (A) Actual result was NOT same as intended or contemplated result
 - (1) **UNLESS**
 - (a) Actual result → different V
 - (b) Actual result → less serious injury
 - (c) Actual result → same kind of injury BUT not too remote or accidental
- b. Offense requires mens rea of recklessness OR negligence [2.03(2)]
 - i. D's act is NOT criminal cause if
 - (A) Actual result was NOT within risk that D was aware or should be aware
 - (1) **UNLESS**
 - (a) Actual result → different V
 - (b) Actual result → less serious injury
 - (c) Actual result → same kind of injury BUT not too remote or accidental

IV. RAPE

A. CL (Traditional) – Law of Forcible Rape

1. Rape – defined
 - a. “carnal knowledge of a woman forcibly and against her will”
2. Elements – 3x (4x)
 - a. Sexual intercourse
 - i. Male penetration of female sex organ
(A) Anything less → sexual assault
 - b. Force
 - i. D uses force to require victim to submit
(A) Ex. - threats of economic ruin
 - c. Without consent
 - i. V’s state of mind → relevant
(A) Unique to crime of rape
3. Additional Element → Resistance
 - a. V must physically resist
 - i. Some Jx → requirement included in statute
 - ii. Other Jx → requirement used as evidentiary standard to prove non-consent + force

B. Resistance Requirement

1. **Traditional CL - Utmost Resistance**

- a. Elements – 2x
 - i. V must physically resist w/ all energy
(A) NOT enough for V to verbally resist
AND
 - ii. V must resist until the end
(1) *Counter-Ex. // **Brown v. State** (p. 869)*
(a) *V only used verbal resistance + no marks on face or clothes to suggest struggle*
- b. **EXCEPTION** (narrow)
 - i. Explicit threat of serious bodily injury of death
(A) NOT speculative
(B) NOT implicit

2. **CL / Majority - Reasonable / Earnest Resistance** → Objective Standard

- a. V’s resistance is of a type reasonably expected from a person under the circumstances
 - i. “circumstances”
 - (A) Degree of physical force used by D
 - (B) Physical size difference
 - (C) Lack of escape / ability to flee
 - (D) Threats
 - (1) Explicit
 - (2) Implied
 - (a) *Ex. - presence of weapon*
 - (b) *Ex. - secluded area*

- b. V NOT required to manifest resistance if
 - i. Fear of immediate death or serious bodily injury due to threat from D
 - (A) Threat → implied OR explicit
 - (1) Ex. // People v. Dorsey (p. 872)
 - (a) V trapped in elevator → nowhere to go + big D
 - (2) Counter-Ex. // State v. Powell (p. 876)
 - (a) D said gun underneath seat of car → no evidence of gun OR physical marks on D
 - (3) Counter-Ex. // People v. Warren (p. 4.10)
 - (a) “I don’t want to hurt you” → not implicit threat
 - (b) No resistance → no attempt to flee + no yelling + pulled pants down

C. Reformed Statutes

1. CA

- a. Elements – 3x
 - i. Sexual Intercourse
 - ii. Force
 - (A) Resistance → evidence of force
 - iii. Non-consent
 - iv. [NO resistance requirement]
 - (A) Resistance might cause injury to V
 - (B) V has frozen fright response → reasonable response
 - (1) Ex. // People v. Barnes (p. 878)
 - (a) V’s compliance + exchanging of kisses → V’s effort to avoid physical violence

2. WA

- a. Elements – 2x
 - i. Sexual Intercourse
 - ii. Force
 - (A) Physical force
 - (B) Threat of physical force
 - iii. [NO non-consent requirement]
 - (A) Presumption of non-consent → if D uses force
 - (B) Affirmative Defense for D → V consented
 - (1) Counter-Ex. // Commonwealth v. Berkowitz (p. 4.13)
 - (a) “no” → NOT relevant to issue of force

3. CT

- a. Elements – 2x
 - i. Sexual Intercourse
 - ii. Non-consent
 - (A) Reasonable person standard
 - (1) Any verbal OR physical resistance by V
 - iii. [NO force requirement]

4. CT + Clarification / “Red Light Rule”

- a. Elements – 2x
 - i. Sexual Intercourse
 - ii. Non-Consent
 - (A) NOT reasonable person standard
 - (1) Clarification → “no means no”
 - (a) Silence means consent

5. **NJ** / “**Green Light Rule**”

- a. Elements – 2x
 - i. Sexual Intercourse
 - ii. [NO force requirement]
 - iii. [NO non-consent requirement]
 - iv. Lack of Affirmative AND Freely Given Consent
 - (A) Reasonable person standard
 - (1) Consent inferred from acts or statements by V → “yes means yes”
 - (a) Ex. // In the Interest of MTS (p. 896)
 - i. D never got affirmative “yes” from V

D. **MPC** – Rape [213]

1. Elements – 2x → **WA**
 - a. Sexual intercourse
 - b. Force
 - c. [NO non-consent requirement]
2. 1st Degree
 - a. D inflicts serious bodily injury
 - b. D does not know V → stranger
3. 2nd Degree
 - a. Normal circumstances
4. 3rd Degree
 - a. V mistakenly believes that D is her husband

E. **Mens Rea**

1. Non-Consent Element
 - a. D’s Mental State → D thinks that V is consenting
2. **CA / Majority** → Rape as General Intent Crime
 - a. Non-Consent → circumstance element
 - i. Mens Rea → civil negligence
 - (A) D’s Mistake → honest AND reasonable belief
3. **MA / Minority** → Rape as Strict Liability Crime
 - a. No defense available for D → if V does not consent
 - i. Ex. // Commonwealth v. Lopez (p. 4.17)

F. Reforms

1. “Sexual Intercourse”
 - a. Traditionally
 - i. Male penetration of female vagina
 - b. Reformed
 - i. Oral sex, anal sex, and foreign objects
 - ii. Gender-neutral terms (all states except three)
 - iii. Same-sex rape prosecution (all states except one)

 2. “Force”
 - a. Traditionally
 - i. Physical force
 - ii. Threats of physical force
 - b. Reformed
 - i. Rape by Non-Physical Coercion
 - (A) Rape by Fraud
 - (1) Fraudulent inducement is NOT rape → not using force
 - (a) *Ex. - extortion → monetary or economic harms → not force*
 - (2) **EXCEPTIONS** – 2x
 - (a) Doctor deceives V during medical exam → no consent
 - (b) D deceives V into believing that he is V’s husband → no consent
 - (B) **PA** – Extreme Psychological Coercion → involuntary act
 - (1) *Ex. // Commonwealth v. Mlinarich (p. 4.14)*
 - (a) V under threat of going back to juvenile detention
 - (C) **Some States** - Clearly Defined Settings
 - (1) When threat of coercion is so high
 - (a) Therapist-patient
 - (b) Doctor-patient
 - (c) Clergy-member
 - (D) **CA** – Public Official
 - (1) When threat to use authority as public official to arrest V
AND
 - (2) V has reasonable belief that D is public official
 - (a) D not required to actually be public official
 - i. *Ex. – police officer*
-
3. “Consent”
 - a. When V is deemed incapable of consenting
 - i. Statutory Rape (impossible for minors to consent)
 - (A) Elements – 2x
 - (1) Sexual Intercourse
 - (2) Age
 - (B) **Traditionally** - Strict Liability Crime
 - (1) No defense for D
 - (C) **CA / Some States** → General Intent Crime
 - (1) Mens Rea → civil negligence
 - (a) D’s Defense → honest AND reasonably belief that V was over 18

ii. Unconscious / Sleeping

(A) Elements – 2x

- (1) Sexual Intercourse
- (2) V is unconscious OR sleeping

(B) **CA**

- (1) Mens Rea → D knew that V is unconscious OR sleeping

iii. Mentally Deficient

(A) Elements – 2x

- (1) Sexual Intercourse
- (2) Mental (or Physical) Disability

(B) **CA**

- (1) Mens Rea → D knew or should have known that V was mentally disabled
 - (a) D's Defense → V is willing participant

iv. Intoxication

(A) If V has lost consciousness

- (1) Unconscious / Sleeping Rule

(B) If V is debilitated with alcohol

(1) Elements – 2x

- (a) Sexual Intercourse
- (b) V is intoxicated
 - i. **CA / Some States** → no voluntary/involuntary distinction
 - ii. **Other States** → D must give intoxicants to V

(2) **CA**

- (a) Mens Rea → D knew or should have known that V was intoxicated

b. When D assumed that V has consented

i. Marital Rape Exception

(A) **Traditional CL**

- (1) Spousal / Marital Exception
 - (a) Husband cannot be accused of raping wife
- (2) Corollary Rule
 - (a) D had defense if V agreed to marry him
- (3) Rationale
 - (a) Implied consent of marriage vows
 - (b) Promoting reconciliation of marriage
 - (c) Unwilling to get involved in marital privacy

(B) **Modern**

- (1) 12 states → no offense
- (2) 24 states → lesser offense
- (3) 15 states → eliminated exception entirely

4. Evidentiary Rules
 - a. Traditionally → Defenses for D
 - i. Hale Instruction
(A) Jury evaluates V's testimony with special care → skepticism
 - ii. Corroboration
(A) Independent corroboration besides V's testimony
 - iii. Psychiatric Testimony
(A) Testimony to determine whether allegation could be believed
 - iv. Prompt Complaint
(A) Negative inference if complaint was not filed promptly
 - v. Sexually Promiscuous Complainant
(A) Evidence of prior sexual conduct
 - b. Reformed
 - i. Rape Shield Laws → evidence of V's past sexual history CANNOT be introduced at trial
(A) **EXCEPTIONS** – 3x
 - (1) When different person was source of semen and engaged in sexual intercourse with V
 - (2) When V consented to sexual intercourse w/ D in the past
 - (3) When failure to introduce evidence would violate D's constitutional rights
 - (a) BUT only when highly relevant evidence
 - i. Ex. - Amendment VI → D's right to confront accuser + right to cross-examine

V. AFFIRMATIVE DEFENSES

A. Self-Defense (to Homicide)

1. CL

- a. Elements – 4x
 - i. D honestly AND reasonably believes → subjective + objective
 - ii. That deadly force
 - iii. Is necessary to repel
 - iv. Imminent use of deadly force by another
- b. Mistake
 - i. If honest BUT reasonable
 - (A) Majority → no defense
 - (B) CA / Minority → imperfect defense
 - (1) Mitigates charge → murder to manslaughter
- c. “deadly force”
 - i. Deadly Force → force intended to or likely to cause death or serious bodily injury
 - ii. Force → proportional in harm
 - (A) If non-deadly force is sufficient to repel → deadly force NOT allowed
 - (1) Even if deadly force is only way to prevent battery
- d. “necessary” to repel
 - i. D has no alternative to killing perpetrator (V)
 - (A) EXCEPTION → Retreat
 - (1) CA / Majority → NOT required to retreat even if possible
 - (2) Minority → D required retreat if feasible AND safe to do so
 - (a) EXCEPTION (TO EXCEPTION) → Castle Exception
 - i. D not required to retreat if attacked in home
- e. “imminent” harm
 - i. Instant → without delay
- f. Aggressor Exception
 - i. If initial aggressor’s attack was so severe that victim responds with deadly force
 - (A) Initial aggressor has no right to self-defense
 - (1) EXCEPTION
 - (a) Initial aggressor renounces initial aggressive attack
 - i. Clearly shown through words or conduct
- g. Raising the Stakes
 - i. If initial aggressor uses non-deadly force AND victim responds with deadly force
 - (A) CA / Majority → initial aggressor has right to self-defense
 - (1) Ex. // People v. Gleghorn (p. 520)
 - (a) D had right to use self defense until V is incapable of inflicting injury
 - i. If danger no long exists → further retaliation is NOT justified
 - (B) Minority → initial aggressor has imperfect self-defense
 - (1) Mitigating charges → murder to manslaughter

2. Reasonable Self Defender
 - a. Generally
 - i. Reasonable person in D's situation OR under the circumstances
 - b. **Majority** → Moderately Objective Standard (w/ some subjective aspects)
 - i. "situation" / "circumstances" – 4x
 - (A) Physical movements of potential assailant (V)
 - (B) Any relevant knowledge that D had about V
 - (C) Physical attributes of all persons involved (including D)
 - (D) Any prior experiences which would provide reasonable basis for belief that V's intentions were to harm D or that use of deadly force was necessary under the circumstances
 - (1) *Ex. // **People v. Geotz** (p. 545)*
 - (a) *V's smile told D that V wanted to "play with [him]"*
 - (b) *D's fear based on prior experiences where D got injured in mugging*
 - c. **Minority** → Subjectivized Objective Standard (w/ all subjective aspects)
 - i. "situation" / "circumstances"
 - (A) D's mental characteristics
 - (B) D's physical characteristics
 - (C) What D sees
 - (D) What D knows
 - (1) *Ex. // State v. Leidholm (p. 523)*
 - (a) *D kills husband due to severe mistreatment over the years*
 - ii. Expands self-defense to
 - (A) Battered women, prisoners, gang members, etc.
 - d. Battered Woman Syndrome → evidence for self-defense (NOT affirmative defense)
 - i. Characteristic behavioral response to being battered repeatedly over long period of time
 - (A) Key symptoms – 3x
 - (1) Low-self-esteem
 - (2) PTSD (similar)
 - (a) Fearful or panicky reactions to minor stimuli
 - (3) "learned helplessness"
 - (a) Sense that D cannot escape from abusive relationship
 - ii. Admissibility of Expert Testimony
 - (A) Elements – 2x
 - (1) Subject matter is beyond understanding of lay person
 - (2) Subject matter based on research that has been established in scientific community
 - (a) **CRITICISM** → BWS based on anecdotal research (NOT scientific)
 - iii. Reforms – 3x
 - (A) Creation of New Offenses → targeting domestic violence
 - (1) Anti-stalking laws
 - (2) Violence Against Women Act (Federal)
 - (a) Federal offense if D crosses state line to commit violence
 - (B) Adoption of New Arrest Policies
 - (1) Mandatory arrests → probable cause of domestic violence + no warrant
 - (a) WITHOUT evidence of external injuries + V filing complaint
 - (C) Development of New Prosecutorial Policies
 - (1) No-drop policies → once charges are brought, D faces trial or plea bargain
 - (a) EVEN IF V no longer wishes to press charges (as long as sufficient evidence)

3. **MPC** → Use of Force in Self-Protection [3.04 + 3.09]
 - a. D has right to self-defense if
 - i. D believes
 - ii. That force
 - iii. Is immediately necessary to repel
 - iv. Use of deadly force by another
 - b. Mistake
 - i. If reckless OR negligent belief
(A) D is guilty of offense with that mistaken mens rea
(1) Ex. – intentional killing (purpose) + D's negligent belief → negligent homicide
 - c. Retreat
 - i. If D knows that he can avoid using deadly force with complete safety
(A) D is required to
 - (1) Retreat
 - OR
 - (2) Surrender possession of thing
 - OR
 - (3) Comply with a demand**(B) EXCEPTION** (Castle)
 - (1) D is in home OR place of business
 - d. Aggressor Exception
 - i. D cannot use deadly force in response to V's use of deadly force if
(A) D is initial aggressor
AND
(B) D's actual purpose is to cause serious bodily injury or death

B. Necessity

1. CL

- a. Elements – 4x
 - i. D honestly AND reasonably believes
 - ii. That conduct is necessary
 - iii. To prevent greater harm
 - iv. To persons or property
- b. Mistake
 - i. If honest BUT unreasonable
(A) NO right to necessity defense
- c. “necessary”
 - i. Imminent danger
AND
 - ii. Unavoidable harm → NO other reasonable legal alternative
- d. “greater harm”
 - i. Harm → social OR moral harm
 - ii. Greater → harm must be greater than criminal conduct itself
(A) Objective standard → D’s idiosyncratic values are irrelevant
- e. Categorical Limitations – 4x
 - i. Clean Hands
(A) D has no right to necessity defense if
(1) D is negligent in bringing about situation
 - ii. No Legislative Pre-Determination
(A) D has no right to necessity defense if
(1) Legislature specifically stated that defense is not available
 - iii. Applicable to Natural or Human Forces
(1) *Ex. – wildfires*
 - iv. NOT Applicable to Homicide Crimes
(A) *Ex. // Queen v. Dudley & Stephens (p. 563)*

2. MPC → Choice of Evils [3.02]

- a. Elements
 - i. D honestly AND reasonably believes
 - ii. That conduct is necessary
 - iii. To prevent greater harm
 - iv. To persons or property
- b. Mistake Appraisal of Necessity
 - i. If honest BUT unreasonable → negligent OR reckless belief
(A) D can be charged for offense w/ mens rea of negligence or recklessness
(B) D cannot be charged for crimes w/ mens rea of purpose or knowledge
- c. “necessity”
 - i. Jury Determination → Factors (NOT requirements)
(A) Imminence, lack of reasonable legal alternatives, unavoidability

- d. Categorical Limitations – 4x
 - i. Clean Hands
 - (A) D has no right to necessity defense if
 - (1) D is negligent OR reckless in bringing about situation
 - (a) D is liable for negligent or reckless conduct
 - ii. No Legislative Pre-Determination
 - iii. Applicable to Natural or Human Forces
 - iv. Applicable to Homicide Crimes

- 3. Special Application of Necessity Defense
 - a. Prison Escape
 - i. **CA / Majority** → Lovercamp Factors – 5x
 - (A) Specific threat of death, serious bodily injury, or sexual attack in immediate future
 - (1) = imminent danger of greater harm
 - (B) No time for complaint to authorities OR history of futile complaints
 - (1) = no legal alternatives
 - (C) No time or opportunity to resort to courts
 - (1) = no legal alternatives
 - (D) No evidence of force or violence against prison personnel or innocent person in escape
 - (1) = additional factor
 - (E) Prisoner immediately reports to proper authorities once in position of safety
 - (1) = additional factor
 - ii. **CL / Minority** → CL Necessity Defense
 - (A) Ex. // **People v. Unger** (p. 574)
 - (1) *D wanted to escape prison rapes*
 - b. Political Protest
 - i. Counter-Ex. // **State v. Warshow** (p. 578)
 - (A) *NOT reasonable* → *protest cannot prevent danger*
 - (B) *NOT imminent danger* → *only speculative and uncertain danger of nuclear accident*
 - (1) *Chance of nuclear accident is NOT sufficient*
 - (C) *NOT necessary* → *other legal alternatives such as voting*
 - (D) *Legislative predetermination* → *legislature allowed the “wrongdoing”*
 - (1) *Legislature calculated comparative harms and its value determination cannot be overridden*

C. Insanity

1. Mental Illness

- a. Biological psychosis → out of touch w/ reality
 - i. Symptoms – 4x
 - (A) Hallucinations → D is internally preoccupied
 - (1) Ex. – hearing voices
 - (B) Delusions → D believes something impossible or unlikely to be true
 - (C) Disorganized Thinking → D engages in completely disorganized conversation
 - (D) Negative Symptoms
 - (1) Ex. – lack of response, prolonged withdrawal
- b. NOT mental illness if symptoms are results from drug use
 - i. **CA** → NOT mental illness if result from drug addiction or abuse
- c. Ex. – PTSD or post-partum psychosis

2. **CA / Federal** → M'Naghten Test

- a. Elements – 2x
 - i. Due to mental disease or defect at time of committing act
 - ii. D did not know nature AND quality of act
 - (A) Ex. – D thought he was squeezing towel but actually choking someone
 - OR**
 - iii. D did not know what he was doing was wrong
 - (A) Cognitive Test → D does not know act was legally or morally wrong
- b. D's Knowledge of Wrongfulness (subjective)
 - i. Legal vs. Moral
 - (A) Legal Wrong Test
 - (1) Whether D knew that conduct was against the law
 - (a) Counter-Ex. // **State v. Crenshaw** (p. 5.11)
 - i. D attempted to hide evidence of crime
 - (B) Moral Wrong Test
 - (1) Whether D knew that conduct violated society's moral code
 - (a) NOT individual's moral code
 - ii. **EXCEPTION** → Deific Decree
 - (A) Due to mental disease or defect at time of committing act
 - (B) D believes God is commanding D to commit act
 - (1) Even if D knows that act is morally and legally wrong
 - (C) Counter-Ex. // **State v. Crenshaw** (p. 5.11)
 - (1) Duty of Moscovite faith to kill unfaithful wife is not same as deific command

3. **MPC** → ALI Test

- a. Elements – 2x
 - i. Due to mental disease or defect
 - ii. D lacks substantial capacity to
 - (A) Appreciate criminality (wrongfulness) of conduct
 - (1) Cognitive Test → D does not know conduct was legally or morally wrong
 - OR**
 - (B) Conform conduct to requirements of law
 - (1) Volitional Test → D lacks control

D. Mistake of Law

1. CL - Mistake of Governing Law

- a. Ignorance of the law is no excuse
 - i. Knowledge of the law is presumed
- b. NO Defense → if D did not know that his conduct was violating law
 - i. Ex. // United States v. Baker (p. 235)
(A) D did not know that selling counterfeit watches was criminal

c. EXCEPTIONS – 3x

i. Mistake of Non-Governing Law → Elements of the Offense

(A) General Intent Crime

- (1) Mistake of law is NOT a defense

(B) Specific Intent Crime

- (1) Mistake of law is a defense if
 - (a) Mistake negates mens rea required in statute

(C) Ex. // People v. Bray (p. 231)

- (1) Statute → “conviction of a felony” + “ownership or possession of a firearm”
- (2) D did not know whether he was felon or not → challenges legal term “felony”
 - (a) D knew that he committed an offense
 - (b) D did not know whether offense was felony or misdemeanor

ii. Official Statement Exception

(A) Elements – 3x

- (1) Statement is an official statement of the law
- (2) Person is an agent responsible for administration, interpretation, or enforcement of the law
 - (a) Ex. – public officials
 - (b) Counter-Ex. – private attorneys (exception in NJ)
- (3) D actually AND reasonably relies on the official statement (subjective + objective)

(B) Ex. // Commonwealth v. Twitchell (p. 242)

- (1) D relied on Attorney General’s opinion published in Christian Science publication

iii. Cheek Exception → applicable to mistakes of governing law or non-governing law

(A) Elements – 4x

- (1) Statute is federal statute
- (2) Statute involves complex, regulatory laws
 - (a) Ex. – public welfare offenses
 - (b) Ex. // Cheek v. United States (p. 237)
 - i. Complexity of the tax law → difficult for citizens to understand
- (3) Statute contains “willfulness” as mens rea
 - (a) Willful
 - i. Statute imposes duty on D
 - ii. D knew of duty
 - iii. D voluntarily and intentionally violated duty
- (4) D has sincere belief of lawfulness (subjective ONLY)

2. **MPC** – Ignorance or Mistake (of Fact or Law) [2.04]
 - a. Knowledge of the Law = Element of the Offense
 - i. *Ex.* – “...*in a manner which he knows is unlawful...*”
 - ii. BUT knowledge that conduct is a crime is not ordinarily an element of offense
 - b. Unknown Statute
 - i. Statute not known to D
AND
 - ii. Statute has NOT been published or reasonably made available
 - c. Official Statement
 - i. D honestly AND reasonably relies on official statement of law contained in
 - (A) Statute
 - (B) Judicial decision, opinion, or judgment
 - (C) Administrative order
 - (D) Official interpretation of public officer

VI. ATTEMPT LIABILITY

A. Mens Rea

1. CL

- a. "intent to"
 - i. D has specific intent to commit acts constituting the offense → ALL elements
- b. Ex. // State v. Lyerla (p. 664)
 - i. Attempted reckless murder → logical impossibility
(A) D cannot intend to commit an unintended killing
(B) Attempt ≠ negligence

B. Actus Reus

1. Attempt vs. Preparation

- a. Preparation
 - i. D devises or arranges means or measures necessary for commission of crime
- b. Attempt → D has gone "beyond mere preparation"
 - i. D engages in direct movement toward commission after preparations are made
- c. NO Majority
 - i. Varying standards
- d. CA
 - i. D's conduct manifests specific intent to commit crime
AND
 - ii. D's conduct is direct BUT ineffectual act toward its commission
(A) Ex. // People v. Murray (p. 670)
(1) *No attempt until officer was engaged and parties stood before him ready to take vows*