

Super Exam Outline

1. Justification Defenses

a. Self Defense

i. Common Law

- 1) **General Rule** -- A non-aggressor is justified in using deadly force upon another if he reasonably believes that such force is necessary to protect himself from imminent use (actual or apparent) of unlawful deadly force by the other person.
 - a) Losing Aggressor Status
 - i) Non-deadly Aggressors -- If the victim of an aggressor responds with excessive (deadly -- unlawful) force, the aggressor loses the aggressor status 2 rules:
 - (1) Majority Rule -- The aggressor immediately regains her right of self-defense, as soon as the victim threatens excessive force.
 - (2) Minority Rule -- If victim responds with deadly force the aggressor must attempt to retreat or have no safe retreat possible before using deadly force.
 - ii) Deadly Aggressors -- The deadly aggressor only gains a right to self defense after she has abandoned her deadly design and communicates this fact to the person defending.
 - b) Reasonable Belief -- Belief is objectively reasonable in light of the surrounding circumstances.
 - i) Physical Characteristics -- Defendants physical characteristics may be incorporated into the reasonable person standard here.
 - ii) Defenders Experience -- Prior experience of the defendant is relevant, generally.
- 2) **Retreat**
 - a) Majority -- May stand ground when reasonably necessary to save self.
 - b) Minority -- Must retreat to a safe place if one is available.
 - i) Exception -- Must not retreat if it would jeopardize life by doing so.
 - c) General Exception (Castle Doctrine) -- If defender is attacked in his home through no fault of his own, he need not retreat. Some courts extend to the area surrounding the dwelling.

ii. Model Penal Code

- 1) **General Rule** -- A person is justified in using force on another if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force by the other on the present occasion.
 - a) Deadly Force -- Deadly force is permissible when the actor believes such force is necessary to protect himself against death, serious bodily injury, kidnapping, sexual intercourse compelled by force or threat of force.
- 2) **Retreat** -- If the defendant knows of retreat with complete safety, then he must retreat.
 - a) Exception -- Does not apply to dwelling unless defendant was the aggressor. Does not apply to place of work unless defendant was the aggressor or if attacked by a co-worker.

b. Defense of Another

i. Common Law

- 1) **Modern Rule; Reasonable Appearance** -- The intervenor may use force that reasonably appears to the intervenor to be justified.
- 2) **Old Rule; In the Others Shoes** -- The intervenor can only use the force that would have been justified if the third party would have been justified.

ii. Model Penal Code

- 1) **Three Aspects that Limit Force** --
 - a) Self Protection -- Intervenor uses no more force that he would be entitled to use in self protection, based on the circumstances as he believes them to be.
 - b) Reasonable Appearance -- Under the circumstances as he believes them to be, the third party would be justified in using such force in self-defense; and
 - c) Necessary for Protection -- He believes that intervention is necessary for the third party's protection

c. Defense of Property

i. Common Law

- 1) **General Rule** -- Deadly force is never justified. A person is justified in using non-deadly force if she reasonably believes that such force is necessary to prevent the imminent, unlawful dispossession of the property. In some jurisdictions defender must request the dispossessor to stop prior to using force.
- 2) **Recapture** -- If the defender has already been dispossessed of the property, force may not be used to recapture the property.
 - a) Exception -- Non-deadly force is permitted in fresh pursuit of dispossessor of property.

ii. Model Penal Code

- 1) **General Rule** -- A person is justified in using non-deadly force if she believes that such force is necessary to prevent the imminent, unlawful dispossession of the property.
- 2) **Recapture** -- Non-deadly force is authorized, even after fresh pursuit has ended, if the actor believes that the dispossessor has no claim of right to the property.
 - a) Exception, Land -- Actor may not use force to recapture unless he believes that it would constitute an "exceptional hardship" to delay re-entry until he can get a court order.
- 3) **Deadly Force (Defense of Habitation)** -- The use of deadly force is justified when:
 - a) The defender believes that a person intends to dispossess her of her dwelling other than under a claim of right to possession.
 - b) The defender believes that a person intends to commit arson, burglary, robbery or felonious theft inside the dwelling and
 - i) The person has employed or threatened deadly force against or in the presence of the defender; **OR**
 - ii) The use of non-deadly force to prevent commission of the crime would expose the defender or another to a substantial risk of serious bodily harm.

d. Defense of Habitation

i. Common Law

- 1) **Old and Broad Rule** -- Deadly force is justified if the actor reasonably believes that 1) the intruder intends unlawfully and immediately enter the dwelling, 2) intends to commit a felony inside or cause bodily (any) injury to any occupant, and 3) deadly force is necessary to prevent entry.
- 2) **Modern, Narrow Rule** -- Deadly force is limited to circumstances in which the defender believes that the intruder will commit an atrocious (violent) felony inside the dwelling if the intruder enters.

ii. Model Penal Code

- 1) **General Rule** -- The MPC uses defense of property principals to analyze defense of habitation issues.

e. Necessity

i. Common Law

- 1) **General Rule** -- Three Elements: 1) Actor --> clear and imminent danger. 2) act necessary to abate danger(above). 3) What he must do is less serious than the harm he wants to avoid.
 - a) Minority Limitation -- Limit this to the protection of personal property
 - b) Homicide -- typically inapplicable

ii. Model Penal Code

- 1) **General Rule** -- Three elements: 1) the actor believes conduct is necessary to avoid harm to himself or another.
- 2) the harm that the actor seeks to avoid is greater than that sought to be avoided by the law prohibiting his conduct.
- 3) there does not plainly exist any to exclude the justification claimed by the actor.
 - a) Homicide -- the defense is available for homicide
- 2) **Reckless/Negligent Exception** -- If the actor was reckless or negligent the defense is unavailable.

f. Duress

i. Common Law

- 1) **General Rule** -- Defendant must prove she committed the offense because 1) another person unlawfully threatened imminently to kill or grievously injure her or another person unless she committed the crime and 2) she is not at fault in exposing herself to the threat.
 - a) Coerced Homicide -- Defense not available for coerced homicides.

ii. Model Penal Code

- 1) **General Rule** -- Defendant must show that 1) he committed an offense because he was coerced to do so by another person's use, or threat to use, unlawful force against him or a third party, and 2) a person of reasonable firmness would have committed the offense.
 - a) Coerced Homicide -- There is no bar to use of the defense for coerced homicides.

2. Excuse Defenses

a. Intoxication

i. Voluntary Intoxication

- 1) **Common Law**
 - a) General Rule -- A person is never excused because of voluntarily intoxication.
 - b) Mens Rea Defense -- Failure of proof: specific-intent offense if, b/c of V/I, he lacked the capacity or did not form the specific intent required for the crime.
- 2) **Model Penal Code**
 - a) General Rule -- V/I is a defense if it negates an element of the offense.
 - i) Exception -- If the defendant is charged with recklessness offense, defendant may be convicted if the reason for her recklessness was a failure to perceive the risk because her self induced intoxication.

ii. Involuntary Intoxication

- 1) **Common Law**
 - a) Mens Rea Defense -- Involuntary intoxication is a defense if actor lacks the requisite mental state of the offense for which she was charged (specific or general-intent)
 - b) Temporary Insanity Defense -- Voluntary intoxication is a defense if, due to involuntary intoxication, the defendant satisfies the jurisdictions insanity test.
- 2) **Model Penal Code**
 - a) Mens Rea Defense -- Involuntary intoxication is a defense if actor lacks the requisite mental state of the offense for which she was charged (specific or general-intent)
 - b) Temporary Insanity Defense -- Voluntary intoxication is a defense if, due to involuntary intoxication, the defendant satisfies the jurisdictions insanity test.

b. Insanity

i. Common Law

- 1) **M'Naghten Test** -- A person is legally insane if, b/c of MD/D, 1) he did not know (cognition) the nature and quality of the act he or 2) did not know the difference between right and wrong.
- 2) **Irresistible Impulse Test** -- A person is legally insane if, b/c of MD/D, she acted with an irresistible and uncontrollable impulse, or if lost the power to choose between right and wrong.

ii. Model Penal Code

- 1) **General Rule** -- An actor is legally insane if at the time of the criminal conduct, as a result of a MD/D, the defendant lacked substantial capacity to 1) appreciate the criminality/wrongfulness of his conduct (cognitive) OR conform his conduct to the requirements of the law (volitional).
 - a) Wrongfulness/Criminality -- Left to the court to figure out. Wrongfulness is in some sense broader than criminality.
 - b) Appreciation -- MPC uses appreciation rather than knowing. Appreciation is broader than knowing. It is an understanding of conduct.

c. Diminished Capacity

i. Common Law

- 1) **General Rule** -- Diminished capacity is a partial defense (failure of proof) where the defendant asserts that he could not form the *mens rea* required for the crime due to a lower mental status. Usually used when mental problem isn't enough for insanity.

ii. Model Penal Code

- 1) **General Rule** -- See EMED homicide

3. Inchoate Conduct

a. Attempt

i. Common Law

- 1) **Actus Reus** -- The actus reus is an act of perpetration.
 - a) Last Act Test -- Performed all of the acts that she believed were necessary to commit the target offense.
 - b) Dangerous Proximity Test -- an attempt occurs when when an act "is so near to the result that the danger of success is very great."
 - c) Proximity to Success Test -- The attempt would have resulted in the actual commission of the crime if it was not frustrated by extraneous circumstances.
 - d) Indispensable Element Test -- An attempt occurs when the defendant has obtained control of an indispensable feature of the criminal plan.
 - e) Unequivocally/Res Ipsa Loquitur Test -- The actors conduct, standing alone, demonstrates criminal intent. (No words, only actions).
 - f) Probable Desistance Test -- The actor is guilty when she proceeds past the point which an ordinary person would have likely abandoned her criminal endeavor (the point of no return).
- 2) **Mens Rea**
 - a) Two Intents Required:
 - i) The actor must intentionally commit the *actus reus* of an attempt; and
 - ii) Must perform said acts with the specific intention of committing the target crime.
 - b) Attendant Circumstances -- At common law it is unclear what *mens rea*, if any, an actor must possess regarding an attendant circumstances to be guilty of attempt.
 - i) Reckless Approach -- Reckless regarding an attendant circumstance.
 - ii) Target Crime Approach -- Look to that element of the target crime.
- 3) **Impossibility** -- Legal impossibility was a defense to attempt while factual impossibility was not.
 - a) Factual Impossibility -- If the facts were as the defendant believed them to be the target crime would have occurred. Factual impossibility is never a defense.
 - b) Legal Impossibility -- Legal impossibility is generally a defense when the defendant tries to violate a law

but no law exists (pure legal impossibility).

c) **Hybrid Legal Impossibility** -- An actor's goal is illegal but commission of the offense is impossible b/k of mistake regarding the legal status of some factual circumstance relevant to her conduct. Result depends upon the danger and who we want to blame.

4) **Renunciation (Abandonment)** -- Generally not a defense. In jurisdictions where it is defendant must voluntarily and completely renounces his criminal purpose.

ii. Model Penal Code

1) **General** -- A person is guilty of attempt if he 1) purposely engages in conduct that would constitute the crime, 2) acts with the purpose of causing or with the belief that it will cause the criminal result, or 3) purposely does an act constituting a substantial step in furtherance of the offense.

2) **Actus Reus** -- There will only be an *actus reus* issue with an incomplete attempt.

a) **Substantial Step Standard** -- Substantial step is not defined but it must be corroborative of the actor's criminal purpose. Corroborative must be considered by the fact finder:

i) Lying in wait

ii) Enticing the victim to the place of the contemplated crime

iii) Reconnoitering the place contemplated from the commission of the crime

iv) Unlawful entry into the place of the crime

v) Possession of materials to be employed in the commission of the crime

vi) Possession, collection or fabrication of materials to be employed in the commission of the crime at or near the place of the crime

vii) Soliciting an innocent agent to engage in conduct constituting an element of the crime.

3) **Mens Rea**

a) **Complete or Incomplete?**

i) **Complete Attempt** -- A defendant has done every act necessary on his part to commit the target offense.

ii) **Incomplete Attempt** -- A defendant has not completed the last act

b) **Criminal Result or Conduct (Complete Attempt)?**

i) **Criminal Conduct (Rape)** -- Must purposely engage in conduct that would constitute the crime.

ii) **Criminal Result (Murder)** -- Must act with the purpose of causing or with the belief that the act will cause the criminal result.

c) **Incomplete Attempt, General Rule** -- Must purposely engage in a substantial step.

d) **Attendant Circumstances** -- MPC provides that an actor is guilty of an attempt if she acts with the kind of culpability otherwise required for commission of the target crime.

4) **Impossibility** -- The MPC stipulates that a person is guilty of attempt if his conduct would constitute the crime if the attendant circumstances were as he believed them to be. Thus, factual impossibility and hybrid impossibility are not a defense. Pure legal impossibility, however, remains a defense.

5) **Renunciation (Abandonment)** -- A person is not guilty of MPC attempt if 1) she abandons her effort to commit the crime or prevents it from being committed, and 2) her conduct manifests a complete and voluntary renunciation of her criminal purpose.

b. Conspiracy

i. Common Law

1) **General Rule** -- Common law conspiracy is an agreement between two or more persons to commit an unlawful act or series of unlawful acts. Common law conspiracy does not merge.

2) **Actus Reus** -- The actus reus of conspiracy is an agreement (actual or implied) by the parties to commit an unlawful act or series of unlawful acts.

a) **Overt Act** -- some jurisdictions (via MPC influence) require an overt act.

3) **Mens rea** -- The mens rea of conspiracy is 1) specific intent to form an agreement, and 2) specific intent to commit the illegal act.

a) **Knowledge** -- Note: Under the common law it is possible to infer intent from knowledge.

b) **Plurality Requirement (Bilateral Theory)** -- Two or more persons must possess (but need not be guilty) the requisite mens rea or no party is guilty of conspiracy.

4) **Co-Conspirators** -- Generally, to be a co-conspirator a person must have a general awareness of the scope and the objective of the criminal enterprise. Knowledge of the identity of everyone involved is not necessary.

5) **Defenses**

a) **Wharton's Rule** -- No conspiracy if the only parties in the offense are those who are necessary to commit the offense (i.e. adultery)

i) **Exception** -- Wharton's rule not applicable if 1) two conspirators are not the parties necessary to commission of the offense, and 2) more persons than necessary to commit the crime are involved in the agreement to commit the crime.

b) **Legislative - Exemption Rule** -- A person may not be prosecuted for conspiracy to commit a crime that is intended to protect that person (i.e. statutory rape). Look for issues about who the statute was intended to protect.

c) **Abandonment** -- Common law conspiracy is complete at the moment the agreement is made. If an actor freely and voluntarily abandons the conspiracy by announcing his intent to his co-conspirators he is only liable for the crimes committed prior to his abandonment.

ii. Model Penal Code

1) **Actus Reus** -- The actus reus of conspiracy is the formation (or attempted formation) of an agreement (actual or implied) by the parties to commit a crime or series of crimes.

a) **Overt Act** -- An overt act of at least one party is required (except for felonies of first and second degree)

2) **Mens Rea** -- A person is not guilty of conspiracy unless she acts with the purpose of promoting or facilitating the commission of the conduct that constitutes a crime. One who furnishes a service or instrument with knowledge of another's criminal activities is not guilty of conspiracy.

3) **Parties to Agreement** -- Two aspects of the code must be considered:

a) **Conspiracy is a Unilateral Offense** -- The first step is to identify each conspiracy with this fact in mind.

b) **Co-Conspirators** -- If a person is guilty of conspiracy knows that the person with whom he has conspired has, in turn, conspired with still another person or persons to commit the same crime, the first person is also guilty of conspiring with the other persons or person, whether or not he knows their identity.

4) **Objectives of a Conspiracy** -- Under the MPC the conspiracy is attached to the agreement. If two parties have multiple criminal objectives derived a single agreement there is one conspiracy.

5) **Defenses**

a) **Wharton's Rule** -- not recognized by the MPC

b) **Legislative Exemption Rule** -- Is a defense if enforcement of the conspiracy law would frustrate a legislative intention to exempt a party from prosecution.

c) **Renunciation of Criminal Purpose** -- No conspiracy if the person renounces (manifesting complete and voluntary renunciation) his criminal purpose and then thwarts the success of the conspiracy. <-- completely free from liability. Can withdraw if C/L requirements.

c. Solicitation

i. Common Law

1) **General Rule** -- Common law solicitation is when an actor intentionally invites, requests, commands, or

encourages another person to engage in conduct constituting a unlawful act.

a) **Merger** -- The crime of solicitation merges with the target crime.

2) **Actus Reus** -- The actus reus of solicitation is completed when the actor communicates the words or performs the physical act that constitutes the invitation, request, command, or encouragement of the other person to commit the offense.

a) **Unsuccessful Communications** -- Communication must be successful.

3) **Mens Rea** -- Common law solicitation is a specific intent offense. The person must commit the actus reus with the specific intent that the person solicited commit the target offense.

4) **Defense, Renunciation** -- Not available at the common law.

ii. Model Penal Code

1) **General Rule** -- MPC solicitation is when an actor invites, requests, commands, or encourages another person to engage in conduct constituting a crime.

2) **Actus Reus** -- The actus reus of solicitation is completed when the actor communicates the words or performs the physical act that constitutes the invitation, request, command, or encouragement of the other person to commit the offense.

a) **Unsuccessful Communications** -- Under the MPC a person who unsuccessfully communicates a solicitation is still guilty. <--- can attempt to solicit!

3) **Mens rea** -- Must act with the purpose of promoting or facilitating the commission of the solicited offense.

4) **Defense, Renunciation** -- The solicitor must: 1) completely and voluntarily renounce her criminal intent; and 2) persuade the solicited party not to commit the offense or otherwise prevent her from committing the offense.

4. Accomplice Liability (Complicity)

a. Common Law

i. General

1) **General Rule** -- A person is an accomplice if she intentionally assists another person to engage in the conduct that constitutes the target offense.

2) Common Law Terminology

a) **Principal in the First Degree** -- A person who, with the requisite *mens rea*, personally commits the offense, or uses an innocent human instrumentality to commit it.

i) **Innocent Instrumentality Doctrine** -- The innocent-instrumentality rule provides that a person is the principal in the first degree if, with the mens rea required for the commission of the offense, he uses a non-human agent (e.g., a trained dog) or a non-culpable human agent to commit the crime.

b) **Principal in the Second Degree** -- Intentionally assists the principal in the first degree to commit the offense. Is actually or constructively present during its commission.

i) **Constructive Presence** -- close enough to assist the principal in the first degree.

c) **Accessory Before the Fact** -- A person who intentionally assists in the commission of the offense, but who is not actually or constructively present during its commission.

d) **Accessory After the Fact** -- knowingly assists a felon to avoid arrest, trial, or conviction.

ii. Actus Reus

1) **Assistance** -- A person assists in an offense if she solicits or encourages another person to commit the crime, or if she aids in its commission.

a) **Trivial Assistance** -- Actual assistance, no matter how trivial, makes a person liable. Can be mere psychological encouragement to the perpetrator.

iii. Mens Rea

1) **General Rule** -- A person must have: 1) intent to assist; and 2) act with the mental state required in the definition of the offense in which she assisted.

a) **Knowledge** -- Knowledge is not enough but certain conditions can be used to infer intent from knowledge.

b) **Natural-And-Probable-Consequences Doctrine** -- A person, once proven to be an accomplice of an offense, is liable for any reasonably foreseeable offense committed (or resulting consequence -- reckless) by the person she aided.

iv. Defenses

1) **Perpetrator is Acquitted** -- If the perpetrator is acquitted of the offense from which the accomplice liability is derived, the accomplice should also be acquitted.

a) **Exception** -- If a perpetrator is acquitted on the grounds of an excuse (insanity) then the accomplice is not acquitted because the offense has still occurred.

2) **Legislative-Exemption Rule** -- A person may not be convicted as an accomplice in her own victimization.

b. Conspiracy Liability

i. C/L Pinkerton Doctrine

At common law, a person may be held responsible for any crime committed by any other member of the conspiracy, whether or not he assisted. The offense must have been an object of the conspiracy or a reasonably foreseeable consequence thereof.

ii. MPC Pinkerton Doctrine

The MPC rejects the Pinkerton Doctrine.

c. Model Penal Code

i. Forms of Complicity Liability

1) **Innocent-Instrumentality Doctrine** -- A person is guilty of an offense that she did not personally commit if, acting with the requisite culpability (*mens rea*), she causes an innocent or irresponsible person to commit the crime.

2) **Accomplice Liability** -- A person is guilty of an offense that she did not personally commit if she is an accomplice of another person in the commission of the offense.

3) **Criminal Attempt** -- When the principal didn't complete or attempt defendant is dealt with under direct liability for attempt.

ii. Actus Reus -- Assistance

1) **General Rule** -- To be an accomplice in the commission of an offense, a person must: 1) solicit the offense; 2) aid, agree to aid, or attempt to aid in its commission; or 3) fail to make a proper effort to prevent commission of the offense (assuming legal duty to act).

iii. Mens Rea

1) **General Rule** -- A person must act with the purpose of promoting or facilitating the commission of the offense.

a) **Knowledge** -- Knowledge is never enough. Must have purpose.

2) **Exception: Crimes of Recklessness or Negligence** -- A person who is an accomplice in the commission of conduct that causes a criminal result, is also an accomplice in the result thereof, if she has the level of culpability regarding the result required in the definition of the offense.

3) **Natural and Probably Consequences Doctrine** -- MPC rejects the doctrine.

iv. Defenses

1) **Perpetrator is Acquitted** -- Not a defense b/c A/R includes attempt to aid.

2) **Legislative-Exemption Rule** -- A person may not be convicted as an accomplice in her own victimization.

3) **Abandonment** -- A person is not an accomplice in the commission of a crime if she terminates her participation before the crime is committed, and if she either neutralizes her assistance, gives timely warning to the police, or in some other manner prevents commission of the crime.

5. Homicide

a. Murder

i. Common Law

- 1) **General Rule** -- Common law murder is a killing of a human being by another human being with malice aforethought.
 - a) Malice -- A person acts with malice if she unjustifiably, inexcusably, and in the absence of any mitigating circumstance, kills a person with 1) intent to kill, 2) grievous bodily injury, 3) depraved heart, **OR** 4) Felony Murder.
- 2) **Intent to Kill Murder** -- Intent to kill murder is an intentional killing that is unjustifiable, inexcusable, and unmitigated.
 - a) Intent -- Intent requires the prosecutor to prove beyond a reasonable doubt that the killer purposefully or knowingly took the life of another.
 - i) Natural and Probable Consequences -- The jury may infer that a person intends the natural and probable consequences of his actions.
 - ii) Deadly Weapon Rule -- Intent may be inferred if the defendant used a deadly weapon directed at a vital part of the human anatomy.
 - b) Degrees (Pennsylvania Model) -- For a murder to be in the first degree it must have been a willful, deliberate and premeditated killing. Everything else is second degree.
- 3) **Intent to Inflict GBH Murder** -- is when the defendant attempts to inflict an injury that is close to but less than deadly and death results.
 - a) Intent -- The intent of the defendant may be inferred from the circumstances.
 - i) Natural and Probable Consequences Doctrine
 - ii) Deadly Weapon Rule
 - b) Degree -- Second degree murder where a degreed system is used.
- 4) **Depraved Heart Murder** -- Depraved heart murder is when an actors conduct manifests extreme indifference to the value of human life and such conduct results in death.
 - a) Extreme Indifference -- Extreme indifference is established if the actor consciously takes a substantial and unjustifiable foreseeable risk of causing death.
 - b) Degree -- Second degree murder where a degreed system is used.
- 5) **Felony Murder** -- Malice aforethought is inferred by the felony when death occurs during the commission of a felony. A felony must be proven in lieu of a murder *mens rea*.
 - a) Limitations -- Felonies aren't necessarily dangerous anymore, so the following limitations are applied to the felony murder doctrine:
 - i) Inherently-Dangerous Felony --Permitting its use for only certain types of felonies. Two ways to establish if a felony is inherently dangerous:
 - (1) By the facts of the case
 - (2) The crime in the abstract -- violent act required for the felony
 - ii) Independent-Felony (Merger Doctrine) -- the felony murder rule is inapplicable to felonies that are an integral part of the homicide. The felony "merges" with the homicide and homicide must be established with one of the other *mens rea* requirements.
 - iii) Causal Connect -- look to the facts, if there is not causal connection btw the felony and the murder, a court could decline the use of FM
 - iv) In Furtherance -- Unpredictable actions by a co-felon are not in the furtherance of the felony, thus no felony murder.
 - (1) Agency Theory -- Only liable for deaths caused by co-felons.

ii. Model Penal Code

- 1) **General Rule** -- MPC murder is the killing of a human being 1) purposely, 2) knowingly, or 3) recklessly under the circumstances manifesting an extreme indifference to the value of human life. There are no degrees of murder.
- 2) **MPC Felony Murder** -- Reckless indifference to the value of human life may be presumed (inferred) if the person causes a death during the commission of a MPC felony (robbery, arson, burglary, kidnapping, felonious escape, or rape or deviate sexual intercourse by force or threat of force).

b. Manslaughter

i. Common Law

- 1) **Voluntary Manslaughter** -- Voluntary manslaughter is an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.
 - a) Provocation Doctrine -- Provocation must inflame the passion of a reasonable person and tend to cause him to act for the moment from passion rather than reason.
 - i) Words Alone -- Cannot constitute adequate provocation
 - ii) Hot Blooded -- The killing must have been in the heat of passion
 - iii) Opportunity to Cool -- The killing must have immediately followed the provocation.
 - b) Categorical Approach to Provocation -- Traditional categories that result in provocation:
 - i) Cheating Spouse
 - ii) Mutual Combat
 - iii) Assault and Battery
 - iv) Injury to Relatives or Third Party
 - v) Illegal Arrest -- Death resulting from an illegal arrest.
 - c) Reasonable Person Approach to Provocation -- The modern trend of provocation is ask if the provocation would have rendered a reasonable person to act rashly. The standard is not completely objective. Ultimately the amount of subjectivity is a policy judgment.
- 2) **Involuntary Manslaughter** -- Involuntary manslaughter is established when a person kills another person while taking a substantial and unjustifiable risk of death that the actor should have been aware of.
- 3) **Misdemeanor-Manslaughter Rule** -- Any unlawful act that is not a felony resulting in death is automatically involuntary manslaughter. Must prove that defendant committed a misdemeanor. Often limited to non-regulatory offences.

ii. Model Penal Code

- 1) **Recklessness Homicide** -- A homicide committed recklessly, where the actor does not manifest an extreme indifference to human life, constitutes manslaughter.
- 2) **Extreme Mental or Emotional Disturbance** --Murder constitutes manslaughter if committed under the influence of an extreme mental or emotional disturbance (EMED) for which there is a reasonable explanation or excuse
 - a) The Standard -- Similar to common law provocation doctrine except much broader. Can be words alone and a cooling off period is not needed. The actors EMED is established subjectively, while the reasonableness of the excuse is determined objectively (subjectiveized by the actors individual characteristics).
- 3) **Negligent Homicide** -- MPC negligent homicide is a homicide committed negligently, where the actor should have been aware of a substantial and unjustifiable risk.

6. Rape

a. Common Law

i. Forcible Rape

- 1) **Traditional Rule** -- Forcible rape is vaginal intercourse by a male, with a female not his wife, by means of force or threat of force, against her will, and without her consent.
- 2) **Actus Reus**
 - a) Force -- Force is a separate element of rape. Therefore it must be shown that the male acted forcibly or by threat of physical force.
 - i) *Degree of Force* -- Common law required a substantial force upon the female above and beyond that required for penetration. Even though force and nonconsent are separate elements, force often plays an evidentiary role in finding nonconsent.
 - ii) *Threat of Force* -- The requirement of force does not necessarily imply the positive exertion of actual physical force.
 - (1) Threat Required -- Bodily harm to the female
 - (2) Reasonable Fear -- Mere fear is not enough, it must be reasonable fear.
 - iii) *Resistance* -- Common law rule created to provide evidence of force.
 - b) Nonconsent -- Nonconsent must be proved beyond a reasonable doubt.
 - i) *Resistance* -- Early courts demanded that the victim manifest nonconsent. Highly demanding two part test:
 - (1) Intensity of Struggle -- The intensity of the struggle must have reflected the victim's physical capacity to oppose sexual aggression.
 - (2) Sustained Struggle -- The victim's efforts must have been sustained throughout the struggle.
 - ii) *Unconsciousness* -- The victim's unconsciousness manifests nonconsent at common law.
- 3) **Mens Rea** -- Forcible rape is a general intent crime (any blame worthy state of mind) at common law. The *mens rea* is generally implied by the element of force.

ii. Rape by Non-Forcible Means

- 1) **Statutory Rape** -- Statutory rape is intercourse by a male with an underage female to whom he is not married. No mens rea is required.
 - a) Underage -- Varies by jurisdiction.
- 2) **Rape by Fraud**
 - a) Fraud in the Inducement -- A male is not guilty of rape even if he fraudulently induces the female to consent to intercourse with him.
 - b) Fraud in Factum -- If, as a result of fraud, the victim is unaware that she has consented to an act of sexual intercourse, her consent is invalid.

b. Model Penal Code

i. Rape

- 1) **General Rule** -- A male who has sexual intercourse (anal and oral included) with a female not his wife is guilty if he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted by anyone.
 - a) Grading -- Rape is a felony in the second degree except for two circumstances when it is elevated to first degree:
 - i) The male actually inflicts serious bodily injury upon anyone during the course of the rape; **OR**
 - ii) The female was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties
 - b) Mens Rea -- No culpability terms in the definition. Read in purposely, knowingly, recklessly for each material element.
- 2) **Other Forms of Rape** -- Three situations where nonforcible sexual intercourse by a male with a female not his wife is prohibited:
 - a) Substantially impaired her power to appraise or control her conduct by using (without her knowledge) drugs, intoxicants, or other means for the purpose of preventing resistance.
 - b) If she was unconscious at the time of the intercourse; **OR**
 - c) If she is under 10 years of age. Mistake of fact as to the age is not allowed.

ii. Gross Sexual Imposition

- 1) **General Rule** -- Gross sexual imposition is a less serious offence than rape (felony, third degree). Three circumstances constitute gross sexual imposition when a male secures sexual intercourse with a female not his wife:
 - a) If he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution.
 - b) If he knows that she suffers from mental disease which renders her incapable of appraising the nature of her conduct; **OR**
 - c) He knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposed that he is her husband.

iii. Deviate Sexual Intercourse by Force or Imposition

- 1) No person required. Imposition offence. Force or imposition required.