I. Process and Purposes
    a. The Criminal Justice Process
    b. The Purposes of Criminal Law
        i. Three critical areas of substantive criminal law:
            1. What is a crime?
            2. What defenses are available to the defendant?
            3. What punishment should be imposed?
        ii. Most substantive criminal law can be divided into four major categories.
            1. General principles of criminal law: the basic rules on which all of criminal law builds.
            2. The definition of crimes: since the state must prove crimes beyond a reasonable doubt (95%), it is important that each element of a crime be clearly defined.
            3. Criminal defenses: the law recognizes that even when the state has established each element of the crime beyond a reasonable doubt, there are still some situations in which the defendant should be not guilty.
            4. Punishment considerations.
        iii. Due Process: Minimum standards of fairness in a free society.
        iv. When a defendant can demonstrate that by his criminal activity he prevented a greater harm, various jurisdictions have reacted differently.
            1. Defense of choice of evils/necessity: If defendant can establish that by engaging in that criminal behavior he cut down on a much greater harm to society, he will be found not guilty.
            2. Defense of the choice of evils excluded as a defense for murder.
            3. Defense of necessity is not recognized. Any relief that the defendant receives will be received at sentencing.
        v. Theories of punishment
            1. Deterrence
                a. Special deterrence: punishment to deter that particular individual from committing that crime again.

b. General deterrence: punishment to deter others from committing that crime.

2. Rehabilitation: attempts to transform a criminal into a better, different person.
3. Restraint: punish a person simply to keep that person from committing a crime while they are incarcerated.
4. Retribution: regardless of any other consideration people should be punished for their wrongdoing.

vi. We ultimately punish people for the purpose of cutting down on the amount of harm to society.

II. Sources and Limits of the Criminal Law

a. The Common Law

i. When England began to develop its criminal law in the 1500s, the job fell to the courts of England, as Parliament rarely met and was generally occupied with wars and monarchial conflicts when it did. The courts developed the law of crimes with each crime coming to have its own specific definition, which came to be known as the common law definitions. With the formation of the United States, otherwise occupied state legislatures simply adopted the common law of crimes.

ii. Though not in force today, there are a variety of reasons to learn the common law of crimes.

1. The statutory definition is almost identical with the common law definition.
2. If the legislature sets out a common law crime without setting out a definition, it is implied that the legislature mean what the common law meant.
3. A statute is never 100% clear. Common law helps supplement understanding.
4. Multi-state bar examination requires a knowledge of the common law definition of each one of the major crimes.

iii. *Commonwealth v. Poindexter* (Ky.1909)

iv. *Estes v. Carter* (Iowa 1860)

b. Criminal Statues and Their Judicial and Administrative Interpretation
    i. In the 1800s, the legislature began reforming the criminal code in order to update it, making criminal law 99% statutory. Today the states bear the primary responsibility of addressing criminal law. The state is free to do whatever it wishes, just so long as it doesn't violate an individual's Constitutional rights.
    ii. When interpreting legislation, courts will search for legislative intent by looking to
        1. The statute
        2. the common law definition
        3. dictionary or treatise definitions of statutory language
        4. other states interpretive stance
        5. common sense
        6. the interpretation that would promote the best policy of the state
    iii. *State v. Whitmarsh* (S.D.1910)
c. Statutory Interpretation and the Void-for-Vagueness Doctrine
    i. Principle of legality: Before there can be criminal condemnation and punishment, there should be laws that set out in reasonably clear fashion what behavior is prohibited and what punishments are possible if one engages in that behavior. This is not a law on the books, but rather a basic notion in the U.S. justice system. The legislature and only the legislature determines what is criminal and what punishments are appropriate for criminal behavior.
        1. The U.S. wants to encourage people to obey the criminal law, and people need to know what the law is in order to obey it.
        2. The police need to know in advance what behavior sufficiently merits arrest.
        3. Judges and juries need clear guidance in advance on what is and isn't criminal so that inconsistent results don't occur from making case by case decisions.

4. It is unfair to condemn someone without advance warning.
5. If a statute is so unclear that a person of reasonable intelligence would have to guess at the meaning of the statute, it is unconstitutional, void-for-vagueness.
6. Though it is not constitutionally required, when a court is attempting to determine the meaning of a statute, and there are two possible interpretations, the court will usually give the statute the narrower interpretation.

ii. Void for Vagueness doctrine: defendant claims that the statute he is charged under is so unclear that a reasonable person would have to guess at the meaning of the statute. A related argument is that the lower court has interpreted a statute in such a way that no one could have predicted it. Only in the former situation will the statute actually be overturned.

iii. *Locke v. State* (Tenn.1973): Defendant was convicted of crime against nature for forcibly performing cunnilingus. State court of appeals rejected defendant's argument that the statute was unconstitutionally vague.

iv. *Locke v. Rose* (Fed.1975): The U.S. Court of Appeals overturned the state court's ruling and ruled in favor of the defendant.

v. *Rose v. Locke* (U.S.1975): The Supreme Court overturned the Appellant Court ruling, holding that the defendant had fair warning.

d. Retroactive Application of Detrimental and Beneficial Law Regarding a Crime's Definition and Punishment

e. Other Constitutional Limitations on Defining Criminal Behavior

i. *Lawrence v. Texas* (U.S.2003): held that most state statutes forbidding sodomy or other sexual acts between consenting adults in private are unconstitutional.

f. Other Constitutional Limits on Punishment of Crime

g. State Authority Verses Federal and Local Authority

i. If a state refuses to enforce or honor a defendant's Constitutional rights:

1. An appeal can be made to the U.S. Supreme Court.

2. If the state disregards the Supreme Court, negotiations will ensue between the justice department and the state.
3. If negotiations get nowhere, the justice department will bring the state to court, and the state will be found in contempt and a sentence will be imposed.
4. If that doesn't work, the President will send troops to enforce the Supreme Court's ruling.

III. Mental State

a. General Considerations

i. Before a defendant can be found guilty of a crime, the state must establish an unlawful mental state. The mental state is an element of the crime, which the state must prove beyond a reasonable doubt.

ii. The most frequently asserted defense of a defendant is claiming that the act was a mistake, and so there was no required mental state.

iii. Why does the system require a mental state?

1. Most theories of punishment don't work if the defendant is mentally innocent.
2. It offends our basic sense of justice.
3. For 500 years, the mental state requirement has been a part of our criminal justice system.

iv. When the statute does not include the necessary mental state.

1. Under traditional law, the court will have to try to determine legislative intent. What, if any, mental state is required? If the court determines that the legislature intended a mental state, the court will then usually determine that recklessness will satisfy the required mental state.
2. Under the Model Penal Code, unless the statute is clearly meant to be a strict liability statute, recklessness will satisfy the required mental state. 2.02(5)

v. When the statute does include a necessary mental state, under traditional law, there is ambiguity as to what the mental state laid out in the statute

means, there was confusion as to whether or not a more culpable mental state would satisfy the requirement of a less culpable mental state, and there was confusion as to which elements of the crime the mental state applied to.

vi. Under the model penal code, unless otherwise noted, a mental state is required for every element of the crime. If the statute ascribes a mental state, it applies to every element. 2.02(4)

vii. *Regina v. Cunningham* (Engl.1957): On appeal, the court overturned a lower court's ruling by ruling that the required mental state was required for both elements of the crime. Defendant's maliciously ripping out a gas meter did not meet the requirement of maliciously causing harm to a neighbor through the inhalation of poison gas. The most common contention of a defendant on appeal is that the judge did not properly instruct the jury.

viii. The Model Penal Code, now adopted by two-thirds of the states, sought to clear up the ambiguity of mental state by setting out definitions in 2.02 limiting itself to four culpable mental states.

1. Purposely: a person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct as a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
2. Knowingly: A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

3. Recklessly: A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor's situation.
4. Negligently: A person acts negligently with respect to a material element of the offense when he should be aware of substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

ix. Presumption: a rule of law that states if a litigant can prove fact X, the law will presume fact Y. (If the defendant had 1,000 pounds of marijuana, the law will presume that he intended to sell it.) They are rare, as most legislatures change the required mental state if they want to ease the prosecution's difficulty in proving a case. The Supreme Court has ruled that presumptions are not unconstitutional if they meet a two part test.
    1. In charging the jury, the judge must make it clear that if they find that fact X has been established, they may, but are not required to, conclude that fact Y has been established.
    2. There is a logical common sense relationship between fact X and Y.

b. Intent
    i. In traditional law.

1. General intent: when a court rules that the statutory requirement for intent doesn't mean the person has to actually intend, but to simply be reckless.
2. Specific intent: when the court rules that the statutory requirement for intent means that a person must have actual intent. If the word intent is in the statute, courts will generally find that a specific intent is required.

ii. *State v. Rocker* (Haw.1970): Court ruled that nude sunbathers need not intend to expose themselves so that others can see, only intend to expose themselves in a place where others could see, that is, only a general intent is required. Case demonstrates the ambiguity in determining the meaning of the word intent under traditional law. The court's interpretation of intent is ambiguous and self-contradicting.

iii. *Smallwood v. State* (Md.1996): Court ruled that an HIV-positive rapist cannot be found guilty of attempted murder, because attempted murder requires specific intent.

c. Knowledge

i. Under traditional law, the mental state of knowledge was established if the defendant knew, believed, or was substantially certain that a particular fact existed. Debate ensued, however, over whether or not the knowledge requirement could be met if the defendant should have known or if a reasonable person would have known or would have inquired about the situations. Some states under the traditional law applied the reasonable person doctrine, others did not.

ii. Under the model penal code, the defendant himself has to have knowledge.

iii. *State v. Beale* (Me.1973): The trial judge instructed the jury that finding that a reasonable person would have known satisfies the knowledge requirement. The appellant court overturned the lower court's decision, but said that proving to the jury that a reasonable person would have

known will go a long way in convincing the jury that the defendant himself knew.

iv. *United States v. Jewell* (Fed.1976): Willful blindness qualifies the mental state of knowingly. Under traditional law, there was a split of authority on this point.

v. *Barnes v. United States* (U.S.1973)

d. Recklessness and Negligence

i. There is always a debate over whether a defendant's behavior fits within the parameters of recklessness or negligence. While there is no disagreement over the meaning of recklessness under the model penal code, there is still debates over whether or not the defendant's behavior qualifies as reckless.

ii. Negligence: There are only a handful of crimes that are satisfied by a negligent state of mind. When negligence is a requirement, the overwhelming majority of courts hold that a great deviations from normal behavior is required before criminal negligence can be established, though not as great a deviation as recklessness. The model penal code adheres to the majority opinion, requiring a gross deviation.

iii. *State v. Hazelwood* (Alaska 1997): in the Exxon-Valdez incident, the court ruled that a simple lack of reasonable care is enough to satisfy criminal negligence. This finding represents the minority opinion.

iv. *State v. Larson* (S.D.1997)

e. Strict Liability

i. Only about 1% of crimes don't require a mental state, not to be confused with strict liability elements of a crime, which are common.

ii. Why we have strict liability crimes:

1. For this particular offense, a culpable mental state is almost impossible to prove.
2. This is an area where the legislature wants to make everyone very careful.

3. It is a behavior that could potentially cause harm to a lot of people.

iii. Disadvantages:
    1. Often result in the conviction of people who are morally and mentally blameless.
    2. People are sometimes convicted of unavoidable accidents.
    3. *Mens rea* is part of the criminal liability tradition.

iv. Under traditional, courts will look at a variety of things in order to determine if a statute without a required mental state is a strict liability crime.
    1. The wording of the statute
    2. The dictionary definition of those words
    3. Other statutes in that jurisdiction to determine legislative intent
    4. Other legislatures
    5. The potential punishment
    6. The statement of purpose found in the statute. Note that legislation designed to cover brand new crimes are more likely to be strict liability than those covering traditional crimes.

v. Under the model penal code, the only strict liability crimes are those that distinguish themselves as such.

vi. *State v. Stepniewski* (Wis.1982): Court affirmed conviction for trade violations, ruling that the mental state required by statute only applied to one element in the statute, though dissent looked at the same information and reached a different conclusion.

vii. The Supreme Court has implied that a new strict liability statute carrying a major penalty would probably violate due process.

viii. The combination of questionable constitutionality, the ability of the court to read in a required mental state, and the realization on the part of the elected legislature that mentally innocent people would be convicted, has resulted in a very small number of strict liability crimes, limited to mostly minor offenses.

f. Ignorance or Mistake of Fact or Law
    i. When defendant makes a mistake as to a fact found in the definition of the crime, he may be found not to possess the required mental state for a conviction.
    ii. Traditional approach developed rules for mistake of fact defense:
        1. If the crime required specific intent, a mistake as to a critical element of the crime was a defense, and it didn't matter if the mistake was reasonable or not.
        2. If the crime required malice or recklessness, a mistake to a critical fact was a defense only if it were reasonable.
        3. Mistake of fact is no defense in a strict liability crime.
    iii. Under the model penal code, mistake of fact becomes an issue when considering whether or not the defendant had the required mental state for conviction.
    iv. *State v. Sexton* (N.J.1999): Defendant's conviction for reckless manslaughter was overturned by an appeals court, a ruling that was affirmed by the state's Supreme Court. While a mistake of fact does not stand alone as a defense under the model penal code, it is allowed to go into the mix when determining whether the defendant had the proper state of mind, whether the mistake was reasonable or not. This is true even in a recklessness case.
    v. Mistake of law is no defense to a crime for a variety of reasons.
        1. If mistake of law was a defense, it would encourage people to stay uninformed about the legal rules and their legal obligations.
        2. It would place great difficulty upon the prosecutor in proving that the defendant knew the law.
    vi. In the context of a criminal case, ignorance of the law being no excuse means two things.
        1. If the defendant is ignorant of the law, it does not affect the mental state requirement. If a person knowingly engages in a

behavior that requires knowingly as a mental state, he is guilty of a crime. It doesn't matter if he knowingly broke the law.

2. There is no other defense provided by the law, because the defendant was ignorant of the law.

vii. There are two exceptions to the doctrine that ignorance of the law is no excuse under traditional law, and three under the model penal code.

1. Where the criminal statue requires by its very terms knowledge of the law. MPC 2.04(1)
2. The defendant makes a mistake as to the law which results in the defendant's making a mistake of fact as to a critical element of a crime. For example, if a home seller is ignorant of the fact that the $5,000 chandelier passed by law to the home owner by law, and then he takes it from the house. He thought he owned the chandelier, and so it's a mistake of fact. In such situations, the mistake of fact rules apply.
3. Under the model penal code only, when a person *reasonably* relies on an official interpretation with respect to the law made by a public official charged with the responsibility for interpreting or enforcing the law. MPC 2.04(3).

viii. *People v. Marrero* (N.Y.1987)

IV. The Act Requirement

a. Voluntary Act

i. Voluntary: requires a volitional act; some willed movement on the part of the defendant. Supreme Court says that it would be unconstitutional to start punishing people for their nonvolitional behavior.

ii. Result crimes: any act that causes that particular result will be established as an unlawful act.

iii. *State v. Caddell* (N.C.1975): The majority held that the defendant has the burden of proof by the preponderance of the evidence in demonstrating that he was unconscious when he committed the crime. The dissent argued that the defendant must only raise a reasonable

doubt. The holding in this case is, however, the minority opinion, as almost every court that has faced this issue has held that the defendant is claiming no voluntary act, which is an element of the crime, and so the defendant must only raise a reasonable doubt.

iv. The Supreme Court has held that for most defenses the state can either require a defendant to prove a defense by the preponderance of the evidence or require the defendant only to raise a reasonable doubt as to that issue. It's up to the state, with one exception: if the state labels a defense that is essentially the claim that one of the elements of the crime is missing, then the defendant must only raise a reasonable doubt. For example, if the state labeled a lack of mental state as a defense, the state could not place the burden of proof on the defendant.

v. Under traditional law, there wasn't a lot of clear rules of defenses beside the major three, whereas the MPC sets out a specific list of acts that are not considered to be voluntary in 2.01.

vi. Most courts would say that an involuntary element negates the necessity of an act, although in theory it could negate the mental state as well.

b. The "Act" of Possession

c. Omissions

i. Acts of omission are generally not criminal, except in two circumstances:

1. When the statute particularly prohibits not acting. Accounts for only about 1% of statutes. For example, failure to file an income tax return by April 15.
2. Where the criminal statute prohibits bringing about a particular result, but does not indicate any particular behavior which the actor must engage in, and the defendant's failure to act substantially contributes to that result and the court finds that the defendant had a legal duty to act.

ii. There is no affirmative duty to prevent harm to or to help someone who is in distress, with four exceptions:

1. There's a close personal relationship between the parties: parent-child, husband-wife, etc.
2. There's a contract between the parties that requires assistance.
3. There is a non-criminal statute in the jurisdiction that provides that the party has a legal duty to the other party. For example, the non-criminal statute says that all railroad employees have the duty to get people off the tracks at all times.
4. If the actor begins to give aid, he is under a legal duty to reasonably try to complete the task.

iii. *State v. Williquette*: Court held that a woman failing to act upon the knowledge that her husband was abusing her children could be found guilty of bringing about said abuse.

V. Homicide: Using Mental State and Other Factors to Classify Crimes

a. Most states have not enacted the MPC recommendations on murder.

b. Common law definitions

i. Murder: the killing of a human being with malice aforethought. Murder is a result crime.

ii. Elements of murder

1. Death of a human being
2. Necessary mental state
3. Act

iii. Malice aforethought can be established with any one of the following four mental states:

1. Intent to kill.
2. Intent to cause serious bodily harm.
3. The depraved indifference to human life (depraved or wicked heart killing).
4. Felony murder situation: if defendant is attempting to commit, is committing, or fleeing from a felony and causes a death, that is, murder.

iv. Manslaughter: the unlawful killing of a human being without malice aforethought. Three situations made up 90% of common law manslaughter.
    1. An intentional killing that takes place during the heat of passion right after legal provocation. Often referred to as voluntary manslaughter. Provoking event in the heat of passion eliminates malice aforethought. Examples of such events include:
        a. Finding your spouse in a sex act with another.
        b. Being physically assaulted by another person and in a rage taking their life.
    2. The reckless killing of a human being. Sometimes referred to as involuntary manslaughter.
    3. The misdemeanor manslaughter rule: causing a death during the commission of a misdemeanor.

c. Statutory regulations
    i. Practically every state divided common law murder into first and second degree.
    ii. First degree murder is committed by (1) the premeditated and deliberate killing of a human being and (2) the killing of a person during a commission of a dangerous felony.
        1. Different states interpreted premeditation and deliberate differently. Some said it only required an intent to kill, others required intent to kill and forethought.
        2. Some states said that a dangerous felony was a felony that was dangerous by definition. Other states said that it was a felony committed in a dangerous way.
    iii. Second degree murder: the intent to cause serious bodily harm and the depraved indifference to the value of human life. Some jurisdictions said that second degree murder is all common law murder not covered by first degree murder.

iv. Most states began allowing the jury to determine what a legal provoking event was. Many states began replacing provocation heat of passion language with killing that takes place during an extreme emotional disturbance for which there is a reasonable excuse.

v. Most states today have negligent homicide instead of the misdemeanor manslaughter rule.

d. "Human Being" as the Protected Interest

i. *Hughes v. State*: Court held that a fetus was a human being and the reckless killing of a fetus was manslaughter. Court made its holding prospective only, meaning that its ruling would apply to future cases but not the current one.

e. Intentional Killing: The "Heat of Passion" Test

i. *Mullaney v. Wilbur*: Supreme Court held that the defendant only has to raise a reasonable doubt as to his assertion that his killing was a heat of passion killing. Two interpretations:

1. Supreme Court held that in this type of case a critical issue in the case is whether there was heat of passion provocation, and when that becomes a critical issue of the case which will result in different levels of criminal liability, basic fairness requires the state to prove it beyond a reasonable doubt. The Constitutional requires the prosecution to prove every critical issue of the case beyond a reasonable doubt.

2. Court was saying nothing more than that the state must prove each element of the crime beyond a reasonable doubt, and when a defendant is charged for murder which requires malice aforethought and the defendant is claiming heat of passion provocation, the defendant is really saying no malice aforethought, and therefore one of the elements of the crime is missing, and so the defendant must only raise a reasonable doubt.

ii. *Patterson v. New York*: Defendant does not argue that there was no intent to kill, but rather that he intended to kill but was under extreme

emotional distress. This is an affirmative defense, and so the state can require the defendant to prove that point by the preponderance of the evidence. Defendant is not claiming that an element of the crime is missing, but rather that he has a defense for one of the elements of the crime being presented. Clarified *Mullaney*, and said that the Constitution does not require the state to prove each critical issue beyond a reasonable doubt.

iii. From these two cases come the current Constitutional rules regarding burden of proof in a criminal case.
    1. The state must prove each element of the crime beyond a reasonable doubt.
    2. As far as defenses to the criminal charge are concerned or other critical issues in the case that may lower the level of liability, the state can put the burden of proof wherever it wants.
    3. If what the state is trying to call a defense is nothing more than saying one of the elements of the crime is missing, then the defendant only has to raise a reasonable doubt.

iv. *People v. Washington*: Did not allow the jury to take into consideration the unique factors of the individual when considering the heat of passion provocation defense. Traditional law was not very consistent when dealing with this issue. Most allowed the jury to take into consideration the unique physical characteristics of the defendants, but not to allow them to take into consideration the unique mental characteristics of the defendant, on the belief that the jury would be able to empathize with the unique physical shortcomings of the defendant, but not the mental uniqueness. See MPC 210.3 on this point. The law is currently evolving, however, and more considerations are being allowed to be taken into consideration by the trier of fact.

v. MPC 210.3: Uses extreme emotional disturbance for which there is a reasonable excuse. Makes it clear that both issues (whether there was an extreme emotional disturbance and whether there was a reasonable

excuse) must be decided by the jury. The provision makes it clear that the jury can take into account the unique characteristics of the defendant in deciding these issues.

f. Intentional Killing: The "Deliberate"—"Premeditated" Test
    i. Two appeals made by convicted defendants.
        1. Judge charges the jury that deliberation and premeditation can be formed in an instant. Defendant is found guilty and appeals.
        2. Judge charges the jury that deliberation and premeditation requires consideration ahead of time. Defendant is found guilty and appeals on the ground that there is not enough evidence to find him guilty. Defendant will usually lose this appeal. If there is a correct instruction given to the jury, the appellate court will rarely second guess the jury's decision. However, courts are a little more receptive to the claim that there wasn't enough evidence to prove that premeditations existed, because juries have been known to disregard their instructions when a particularly violent killing has taken place, but defendant still usually loses.
    ii. *State v. Guthrie*: Court held that premeditation and deliberation requires reflection. This begs the question, if premeditation and deliberation requires reflection ahead of time, how much ahead of time must it be.

g. Reckless and Negligent Killing
    i. *Hyam v. Director of Public Prosecutions*
    ii. *United States v. Escamilla*: In deciding whether there was a gross deviation from reasonable behavior, the jury should be instructed to consider all the factors and circumstances surrounding the event.

h. Killing by Unlawful Act
    i. Malice aforethought at common law required an intent to kill, an intent to cause bodily harm, a depraved indifference to human life, and felony murder theory.

ii. If the legislature wasn't clear about what constituted a dangerous felony, the court must determine the legislative intent.
iii. There is a debate over whether a felony should be dangerous only by definition, or whether the circumstances surrounding the felony should be taken into consideration when determining whether or not the felony is dangerous.
iv. *State v. Goodseal*: Defendant's owning a gun as a felon constitutes a dangerous felony, and so even if accidentally killed the victim, he's still guilty of first degree murder. Court held that a dangerous felony is determined by taking into consideration the circumstances surrounding that felony, rather than its being just a matter of definition. The Court determined that the circumstances surrounding the felony should be considered when determining whether it was a dangerous felony.
v. The clash over the legitimacy of this rule has led to three major limitations on the felony murder rule:
    1. It is only applied to dangerous felonies.
    2. There must be an independent felony. A felony that is another degree of homicide (murder two, manslaughter), and another felony that is an integral part of one of those other homicides cannot be used (assault with an intent to kill).
    3. The modern trend holds that if a third person takes a life attempting to stop a felony being committed, the rule cannot be applied.
vi. As a general matter, a defendant can only be found guilty of a crime that he has been charged with. Supreme Court says due process requires this. The prosecutor can charge the defendant in the alternative. The exception is, if a crime is considered a less included offense to the crime the defendant has been charged with, sometimes the judge can allow the jury to find the defendant guilty of the lesser included offense even though the defendant has not been charged with that offense. A trial judge will allow this when he determines that based on the defense and

evidence presented in the case, a reasonable jury might find the defendant not guilty of the crime charged but guilty of the lesser offense.

1. Crime number 1 requires proof of elements A, B, and C, and crime 2 requires proof of elements A and B, then crime 2 is considered a lesser included offense than crime 2.
2. When the two crimes have the exact same set of elements with the exception of mental state and the mental state of the second crime is a lesser mental state.

i. Causation
    i. To meet the act requirement of a result crime, the prosecution must only show that any act had that particular result, that is, the prosecution must show causation.
    ii. Result crimes for the purposes of this course:
        1. All homicide offenses
        2. Battery
        3. Any crime that contains the word "causes" or the phrase "results in" in the definition of the crime.
    iii. Even in result crimes, causation is usually not an issue debated in court.
    iv. To establish causation in a criminal case the state must establish two things:
        1. That the defendant's act was the cause in fact of the prohibited result. This is actual cause.
            a. The defendant's action caused the harm when the same result would not have occurred in the same way but for the defendant's action. If the exact same result would have occurred in the exact same way without the input of the defendant, then the defendant did not cause that result.
            b. Both the traditional approach and the MPC adhere to this.
            c. Is usually an extremely easy inquiry.

2. That the defendant's act was the criminal proximate cause of the result. This is legal cause.
    a. Some results are so far removed from the defendant's action in time, place, circumstances, or chain of events that even though the defendant's act was the cause in fact of the result, the defendant should not be held criminally responsible for that result.
    b. At common law, an act is the proximate cause of all of the natural and probable consequences of the act. Doesn't provide a lot of guidance.
    c. Attempts to explain how the rule is applied has not yielded clear rules, only clues:
        i. Did the defendant intent the result that took place?
        ii. Was the result foreseeable?
        iii. How substantial a bearing did the defendant's action have on that result?
        iv. Distance in time, space, and chain of events are considered.
    d. The drafters of the MPC rejected this result.

v. *Model Penal Code §2.03*
    1. (1)(a): Cause in fact must still be established.
    2. (2) and (3): proximate cause is still going to have to be established, but its name and definition are different. The basic idea is still the same.
    3. (2): Applied when the act is committed purposely or knowingly
    4. (3) Applied when act is committed recklessly or negligently.
    5. MPC charges the jury to do justice. Criticized by some for its potential to yield inconsistent results, resulting in a lack of fair warning. Others say it's still superior to the traditional approach.

vi. *State v. Rose*: If causation is established, it doesn't mean that the defendant is guilty. The other elements of the crime must still be met.

vii. *Kibbe v. Henderson*: Demonstrates the confusion surrounding the issue of causation under the traditional approach, the confusion over who decides causation, and the confusion as to how this notion should be articulated to the jury. There are no Constitutional requirements in regards to causation. Causation is a matter of state law.

j. The Death Penalty
    i. Prior to the Supreme Court decisions of the 1960s and 70s, 2/3 of states administered the death penalty through the single verdict method, and the jury was given no guidelines when determining whether to give the defendant life or death.
    ii. *Ferman v. Georgia*: the single verdict procedure violated equal protection and due process provisions of the Constitution.
    iii. Supreme Court struck down the required death penalty, but upheld the bifurcated trial method.

VI. Mental Disease and Defect
    a. MPC 4.04: No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.
    b. Competency to Stand Trial
        i. To be competent to stand trial, a defendant must be able to understand the proceedings against him and assist in his own defense. There is some debate as to what will satisfy these requirements.
        ii. *Jackson v. Indiana*: Court held that an indefinite commitment to a mental hospital because a person was found incompetent to stand trial is unconstitutional. If the state wants to keep defendant longer, civil proceedings must be administered.
    c. Test for the Insanity "Defense"
        i. *Daniel M'Naghten's Case*: Sets out the right-wrong test. If the defendant can't tell the difference between right or wrong or can't appreciate the criminality of his conduct, he can be found not guilty by

reason of insanity. There must be a mental illness underpinning for this to apply. Debate ensued whether the right-wrong test applied to moral or legal right or wrong. Other jurisdictions added an irresistible impulse defense. Jury makes the decision based on the evidence presented at trial. Supreme Court says that mental illness sits by itself, and the state can put the burden on whomever it wishes. Most states put the burden on the defendant.

ii. MPC: (1) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social behavior.

iii. The difference between the two usually manifests itself in the form of expert testimony at trial. There will generally be more expert testimony under the MPC.

d. Various results if defendant wins his mental illness defense:
    i. Automatic commitment: not guilty by reason of insanity results in automatic commitment into the state mental hospital. State mental hospital determines when defendant is ready for release.
    ii. Trial judge has discretion to either allow the defendant to go free or to commit the defendant to the state mental hospital.
    iii. After being found not guilty by reasons of insanity, a date for a hearing will be set for to determine if defendant is currently mentally ill and in need of hospitalization.
    iv. If not guilty of the criminal charge for any reasons, including insanity, the state can no longer hold the person in the state's criminal justice system. In those jurisdictions, civil commitment proceedings are generally initiated.
e. Diminished capacity (partial insanity)

i. This is the defense that says, while the defendant might not qualify for the full defense of mental illness, he was so mentally ill that he couldn't form the necessary mental state at the time of the crime. When successful in raising this defense, defendant will usually be found guilty of a lesser offense requiring a lesser mental state.

ii. Approaches to dealing with this defense:

1. Some courts have said that since mental state is an element of the crime, a defendant could show for any reason that he didn't have the necessary mental state.
2. Other courts took a practical approach and refused to allow the defense at all.
3. Some states have said that if the crime charged was a specific intent crime requiring proof of a particularly high mental state, then the defendant could use partial insanity as a defense, but otherwise defendant couldn't use it.

iii. *State v. McVey*: Diminished capacity applies only to specific intent crime. Court came to the debatable conclusion that a crime requiring a mental state of knowingly is a general intent crime.

iv. MPC allows for this defense.

VII. Alcoholism and Addiction; Intoxication; Immaturity

a. Voluntary and Involuntary Intoxication

i. Traditional approach to voluntary intoxication by alcohol:

1. Voluntary intoxication is not a defense to crimes that have a mental state of malice, recklessness, or any strict liability crime.
2. It is a defense to a specific intent crime.
3. To win with this defense, defendant must show that he was so drunk that he did not know what he was doing.

ii. MPC approach: If a defendant is charged with a crime that requires a purposeful or knowing mental state under the code, the voluntary intoxication is a defense, and if the defendant was so intoxicated that he couldn't form that mental sate, then the defendant should be found not

guilty. If the defendant is charged with a crime requiring recklessness or a crime requiring negligence, then voluntary intoxication is not a defense.

iii. In Arkansas, voluntary intoxication is not a defense to any criminal charge.

iv. *Montana v. Egelhoff*: Supreme Court held that disallowing the use of voluntary intoxication to raise a reasonable doubt to an element of the crime was not unconstitutional.

v. Involuntary intoxication through drugs or alcohol is a defense to any criminal charge, but in order to prevail with the defense the defendant has to show that he was so intoxicated that he couldn't appreciate the criminality of his conduct or control the activity of his crime.

vi. Voluntary intoxication through drugs

1. Common law courts were split.
2. MPC treats it exactly the same as voluntary intoxication through alcohol.

vii. *City of Minneapolis v. Altimus*

b. Immaturity (Defense of Age)

i. At common law:

1. If the defendant was less than 7 at the time of the alleged crime, it was conclusively presumed that he could not form the mental state for the crime and would therefore be found not guilty of that charge.
2. If the child was between 7 and 14 at the time of the alleged crime, there was a rebuttable presumption that defendant could not form the required mental state.
3. If over 14, defendant was tried as an adult.

ii. Today, every jurisdiction has a juvenile court system, but state laws differ as to when that system will apply.

iii. *State v. Q.D.*

VIII. Justification and Excuse

a. Defense of Self and Others
    i. Majority rule: If the defendant reasonably believed he was under an unlawful attack, he could use a reasonable amount of force to defend himself. There are two sub-rules.
        1. If the defendant was charged with murder and the defendant took the position of self-defense, and the jury reached the conclusion that he believed he was under the attack but that belief wasn't reasonable, or he believed the amount of force used was necessary but it wasn't reasonable.
            a. Under traditional law, there was a split of authority. Some said that if the defendant was unreasonable in his belief, he didn't qualify for the defense of self-defense. Others said that defendant would be guilty of manslaughter.
            b. MPC: If the actor believes that he was under an unlawful attack, and the amount of force used was necessary to protect himself, he is justified, unless he was reckless or negligent in forming that belief.
        2. To what extent should the jury take into consideration the unique characteristics of the defendant in deciding whether he reasonably believed he was under attack and in deciding if he used a reasonable amount of force in defending himself? Should it be decided whether it was reasonable for the individual or should the reasonable man test be used?
    ii. Two major limitations on the use of the defense of self-defense
        1. The original aggressor rule: if the defendant was the original aggressor in the encounter that led to his taking someone else's life he could not use the defense of self-defense. Applied in two different ways: (1) When the defendant was the initial aggressor with the intent to cause death or bodily harm. (2) When the

defendant was the original aggressor with the intent to commit any felony.

a. Defendant regained his right to self-defense when he withdrew from the encounter.

i. Under traditional law, this involved (1) giving up the attack and (2) communicating directly or indirectly to the other party that you were giving up the attack.

ii. MPC: When the encounter comes to an end, the right to self-defense is recovered.

2. The retreat rule: a person cannot use deadly force in self-defense if he could have retreated safely in from the unlawful attack. This is a limitation on the use of deadly force only. Does not apply if the person would be at risk during the retreat or if the person was in his home. A law enforcement officer is never required to retreat. About half the states follow this rule. MPC does.

iii. Imperfect self-defense: under traditional law, defendant believed he was under threat and used reasonable force, but he was not reasonable in that belief, and so is guilty of manslaughter.

iv. MPC 3.09: If defendant was unreasonable in his belief, he cannot be found guilty of murder but he can be found guilty of manslaughter if that unreasonableness meets the level of reckless.

v. State can place the burden of proof on whomever it wants. Most states only require that the defendant raise a reasonable doubt.

vi. *United States v. Peterson*

vii. *Bechtel v. State*

b. Defense of Property

i. Reasonable non-lethal force can always be used to defend property. Deadly force can never be used to defend property alone, although some states and the MPC allow for the defense of the home as an exception.

ii. *Law v. State*: The defendant must act reasonably.

iii. *Bishop v. State*: Use of trap gun does not constitute self-defense or valid defense or property.

c. Law Enforcement and Response Thereto

i. At the common law, the officer could use all force necessary, including deadly force if reasonably necessary, to prevent a felony or to effectuate the arrest of a fleeing felon. The same applies to misdemeanors, except deadly force is not allowed.

ii. MPC 3.07 limits the officer's use of deadly force to those situations in which the officer believes the felony to be dangerous.

iii. *Tennessee v. Garner*: Statutes allowing the police to use deadly force on any fleeing felony are unconstitutional. Deadly force is permissible only when the officer believes the fleeing felon poses a serious risk to others.

iv. An arrest is illegal when (1) there is no probable cause for the arrest, and (2) when the police officer uses excessive force in making an otherwise valid arrest.

v. At common law, a citizen had the right to resist an unlawful arrest. Most states today no longer allow it, though some allow it if the arrest is illegal because of use of excessive force.

vi. *State v. Hobson*: no right to resist an unlawful arrest, so long as the police are utilizing reasonable force.

d. Domestic Authority

i. *State v. Wilder*

e. Duress, Necessity and Choice of Evils

i. A common law, it was a defense to a crime that the actor was in reasonable fear from another of immediate death or serious bodily harm to himself or a close family member unless he committed murder.

ii. MPC 2.09: Defense of duress. If the threat to the defendant was a threat that a person of reasonable firmness would be unable to resist, then the defendant has a defense to the criminal charge. Unlike the common law rule, the defense does not require that the threat be immediate or that the

threat be one of death or physical injury, and allows the defense in homicide cases.

iii. On the choice of evils/defense of necessity, MPC 3.02 allows for it, but the traditional law varied.

iv. *State v. Warshow*

v. *United States v. LaFleur*

IX. Common law crimes

a. Rape

i. Common law: force sexual intercourse, by a man on a woman not his spouse.

ii. The majority of jurisdictions have concluded that the mental state of rape is recklessness.

iii. Modern statutory changes:

1. Sexual intercourse or deviant sexual activity will constitute a crime, though in some jurisdictions the crime of rape still requires sexual intercourse.
2. No gender requirements.
3. Mental state is recklessness.
4. Half of jurisdictions allow for spousal rape.
5. Model Penal Code does not allow for spousal rape. (Would be nearly impossible to prove.)

b. Battery

i. Common law: the intentional or reckless application of force to the person of another that results in physical harm or an offensive touching. Assault and battery were two separate crimes.

ii. Modern statutory changes:

1. Most jurisdictions have divided battery into degrees determined by the status of the victim, the result, the mental state, and whether or not a weapon was used.

c. Assault

i. Common law had two different definitions:

1. An attempted battery.
2. An intentionally placing another in reasonable apprehension of bodily harm.

ii. Merger: a defendant cannot be convicted of both assault and battery.

iii. Modern statutory changes:

1. Most statutes define assault in such a way that it covers both the attempted battery and the intent to cause apprehension.
2. Most jurisdictions have degrees of assault determined by the same criteria as for battery.
3. MPC combines assault and battery as one offense.
4. Under the MPC, a person is guilty of a simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury. Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.
5. Under the MPC, a person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon. Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

d. Larceny

i. Common law: the taking and carrying away of the personal property in the possession of another without consent with the intent to permanently deprive.

1. Taking: There is a taking as soon as the actor gains control over the property.
2. Carrying away: the slightest movement of that property once the actor has gained possession was considered carrying away.
3. In the possession of another: possession in a very general sense; not physical possession.
    a. Should a man give his servant an object for performing a task, the master maintains possession while the servant has custody, unless the servant has completed control of the property. The statutory crime of embezzlement came into being to punish servants unable to be convicted of larceny.
4. Intent to permanently deprive:
5. Modern statutory changes
    a. There were three crimes at common law that were theft offenses: obtaining property by false pretences, embezzlement, and larceny. Today, all three offenses are included under the crime of theft.

e. Burglary
    i. Common law: the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony or larceny inside.
    ii. Breaking: opening anything that's closed.
    iii. Entering: any crossing of the plane of that home.
    iv. Dwelling: any place customarily used for sleeping.
    v. Nighttime: when the villain's features couldn't be made out through natural light.
    vi. Intent to commit a felony or larceny: if that intent is formed after breaking and entering, there is no burglary; if the target crime is not committed, however, he is guilty of burglary; no merger between the burglary and the target crime.

vii. Modern statutory changes:
    1. Most jurisdictions extend burglary to business.
    2. Some have created degrees, the highest of which deals with a dwelling.
    3. Most jurisdictions have done away with the nighttime requirements.
    4. There is a split of authority over whether there has to be intent at the time of entry.
    5. MPC: A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

f. Arson
    i. Common law: the malicious burning of the dwelling house of another.
    ii. Recklessness satisfies the malicious requirement.
    iii. Burning: if any part of the structure is burnt or charred.
    iv. Dwelling of another
    v. Modern statutory changes:
        1. Includes businesses.
        2. Burning of one's own property if done for insurance fraud.

g. Robbery
    i. Common law: the taking and carrying away the personal property in the possession of another from the other's person or presence, by force or intimidation with the intent to permanently deprive.
    ii. Robbery is larceny plus:
        1. Person or presence
        2. By force or intimidation
    iii. Larceny and robbery merge and assault and robbery merge.

iv. Not much modern statutory changes. Some jurisdictions have divided it into degrees, usually dependent upon whether the actor is using a weapon.

X. Attempts

a. The attempt merges with the completed target crime.

b. Mental State

i. Two competing schools:

1. Specific intent: A specific intent to commit the target offense regardless of the mental state of the target offense, and if the target offense is a result crime, a specific intent to bring about that result.
2. Whatever mental state is required by the target crime.

ii. *People v. Harris*

iii. *Model Penal Code §5.01*:

1. 5.01(c): Most attempt charges are brought under 5.01(c). "planned to culminate the commission of the crime." Requires something resembling specific intent.
2. Introduction: "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he…" This seems to require only the mental state required by the target crime.
3. If the state charges the defendant under 5.01(c), the state must demonstrate specific intent.

c. Acts

i. Under traditional law, close proximity was required. It was a jury question whether the defendant came within close proximity.

ii. MPC 5.01(c): a substantial step in the direction of the completed crime. Subsection two helps define what constitutes a substantial step.

iii. *Regina v. Eagleton*

d. Impossibility

i. When an actor is attempting to commit a crime, and it is impossible for the actor to commit that crime by the method chosen by the actor. At common law, factual impossibility was no defense to a charge of attempt, but legal impossibility was.
ii. Factual impossibility: If it was impossible to complete the crime because of some facts of which the defendant was not aware.
iii. Legal impossibility: If it was impossible to complete the crime, because there was no crime on the books.
iv. At traditional law, the application of this rule was inconsistent and convoluted. Criminal theorists started to observe that courts were deciding whether the defendant was the type of person that should be held for attempt and then using the appropriate label of factual or legal impossibility to legitimize the result.
v. Under MPC 5.01(a): In practically every situation in which it was impossible to complete the crime, the defendant can be found guilty of attempt. The exception is when there was no crime on the books.
vi. MPC 5.05(2): the code gives the court the discretion to dismiss the charge of attempt if the court finds both the impossibility of the result and the defendant presents no danger to the public.
vii. *United States v. Thomas*

e. Abandonment
i. Common law did not recognize the defense that after completing the attempt but before committing completing the target crime, the defendant voluntary abandoned his efforts. MPC does.
ii. *People v. Staples*

f. Prosecution and Punishment
i. Two approaches:
1. To punish attempt the exact same way you would punish the completed crime.
2. The punishment is scaled back from the punishment for the target crime.

ii. Most jurisdictions follow the second approach.

XI. Conspiracy and Solicitation

a. Conspiracy: Introduction

i. Under traditional American law: an agreement between two or more people to commit an unlawful act plus some overt act in furtherance of the agreement. It took very little to meet the overt act requirement.

ii. The government must prove

1. The agreement to commit the unlawful act
2. The mental state for this crime
3. Some overt act in furtherance of the agreement

iii. Ramifications of a conspiracy charge:

1. Coconspirators are liable not only for the conspiracy for all foreseeable crimes in furtherance of the conspiracy. Conspiracy does not merge with the subsequent offense.
2. If the defendants were accused of conspiracy, a lot of evidence of out of court statements made could be admitted to the trial that would not be admissible if the conspiracy charge was not brought.
3. In a conspiracy case, the government can bring the charges in any location in which any act done by any one of the coconspirators took place.

b. The Agreement

i. While direct proof of the agreement is sometimes obtained, usually the government makes its case through circumstantial evidence

ii. Traditional law allows for the crime of conspiracy only when there are two or more guilty parties. So, for example, if one party never actually intended to agree, then the other party is not guilty of conspiracy. Under the MPC, however, a defendant can be convicted of conspiracy without two guilty parties.

iii. *United States v. James*

iv. *State v. St. Christopher*

c. Mental State
    i. At common law, conspiracy was viewed to be a specific intent crime requiring the government to prove two intents: the intent to enter into an agreement and the intent to have an unlawful act take place as a result of that agreement. The intent to have the target crime committed was required even if the target crime had a less culpable mental state. If the target crime required a mental state greater than intent, such as premeditation and deliberation, the state had to prove the greater mental state. If the defendant entered into an agreement knowing that a crime would take place as a result of that agreement, there is not specific intent and so no conspiracy. If, however, the government could establish that the defendant knew that a crime would take place and he had a state in the criminal venture, that is, he would receive some benefit from the crime, then that was enough to establish specific intent. If the target offense contained many elements, and only one of the elements of the target offense required a specific intent, traditional law was split over whether the government had to prove a specific intent required to commit the target offense or the specific intent to commit every element of the target offense.
    ii. MPC 5.03(1) requires there be a purpose to promote or facilitate the crime, which is essentially the same as the traditional approach. On the issue of the target offense containing many elements, the drafters of the MPC purposely left if vague and dodged the issue.
    iii. *Mitchell v. State*
    iv. *People v. Lauria*
    v. *United States v. Feloa*
d. The Objective
    i. At common law, it was only necessary for the object of the conspiracy to be an unlawful act, not necessarily a crime. Practically every jurisdiction now requires that the object of the conspiracy be a crime, and some require it to be a felony. MPC requires a crime.

ii. *Shaw v. Director of Public Prosecutions*

e. Impossibility
    i. *Ventimiglia v. United States*
f. The Overt Act Requirement
g. Scope: The Object Dimension
    i. Under traditional law, a defendant guilty of conspiracy is also guilt of all substantive crimes committed as a result of the conspiracy.
    ii. Under the MPC, defendant is not necessarily guilty of all substantive crimes committed as a result of the conspiracy.
    iii. Under both traditional law and the MPC, if there is an agreement between the coconspirators to commit five crimes instead of one, there is only one conspiracy.
h. Scope: The Party Dimension
    i. If X has separate conspiracies with separate people concerning the same criminal conduct, the number of conspiracies is determined by the circumstances. When the acts are related, even if the coconspirators have no contact with one another though they are aware of one another, there will usually be just one conspiracy. When each participant in the chain knows that others are necessary to commit the objective, then one conspiracy exists. If the defendant does not know the necessity of other participants, then there usually isn't one conspiracy. Under the Model Penal Code, this is rarely an issue, because coconspirators are liable for all substantive crimes springing out of the conspiracy.
    ii. MPC § 5.03
i. Duration of the Conspiracy
j. Merger:
    i. Under traditional law, conspiracy did not merge with the substantive offense. Under the MPC, it does.
k. Withdrawal
    i. Under traditional law, once the requirements for a conspiracy occurred, defendant could not withdraw and avoid liability for the conspiracy.

They could, however, withdraw and avoid liability for future crimes springing forth from the conspiracy. To have a successful withdrawal, the defendant must give up the conspiracy and communicate his withdrawal with enough time for the coconspirators to give up their plans.

ii. Under the MPC, withdrawal will result in escaping liability for the conspiracy, if the defendant thwarts the success of the conspiracy under circumstances that show a complete renunciation of criminal purpose. Withdrawal requires more under the MPC than under traditional law.

l. Punishment
    i. Three theoretical possibilities
        1. Every conspiracy gets punished the same way
        2. A relationship between the conspiracy and the target offense
        3. The same punishment as the target offense.
        4. MPC follows the third option, unless it is a capital offense or a felony in the first degree, in which case it is a felony in the second degree. The court still has discretion if the defendant does not pose a danger to society.
m. The Plurality Requirement
n. Conspiracy: Final Look
o. Solicitation
    i. Asking another person to commit a crime with an intent to have the crime committed. The other person's response doesn't matter.
    ii. If the crime takes place, there is merger.
    iii. Solicitation prosecutions are rare, because they are difficult to prove if the target crime isn't committed, and if it is, the defendant is usually charged under accomplice liability, with the exception of solicitation for murder or when the solicitation is made to a police officer under circumstances that suggest the police officer is telling the truth.
    iv. Punishment
        1. Have a separate crime for solicitation

2. To relate the punishment to the target offense
3. To have the same punishment as the target offense
4. Most jurisdictions apply one of the first two.
5. The MPC follows the third approach, unless the crime solicited is a capital offense or a felony of the first degree in which case it is a felony of the second degree.

v. Merger: solicitation merges with everything else: attempt, conspiracy, and the target crime.

XII. Parties; Liability for Conduct of Another

a. The Common Law Classification:

i. The prosecution must prove that the defendant helped another person commit a crime with the necessary mental state.

ii. In virtually every jurisdiction, those who help another before or during the crime are principals in that crime and, if found guilty, will be subject to the exact same range of punishment.

iii. Element of the crime

1. The behavior element
2. The mental state element

b. Acts or Omissions

i. Defendant must aid, abet, assist, encourage, or entice another to commit a crime. That is, he must help. It is not necessary that the defendant give physical help, as help often comes through words of encouragement.

1. In most situations, mere presence at the scene will not be enough to establish help.
2. There is no threshold as to the amount of help necessary. Nor is it required that the crime occurred as a result of this help. Practically speaking, however, without a significant amount of assistance, juries will not convict and it will be difficult to prove the necessary mental state.

c. Mental State

i. There was a great deal of confusion under traditional law. One line of cases held that it must be established that the defendant intended to help and intended for that crime to take place, even if the crime required a lesser mental state. A second line of cases held that a person could be held as an accomplice if they had the mental state required by the target crime. Courts often jumped between the two.

ii. MPC 2.06(1) and (2): when the defendant is charged with a crime that is not a result crime, the state must prove a purpose for that crime to occur. If the defendant is charged with a result crime, then the defendant can be found guilty if he has the mental state required for that particular crime.

d. The Conspiracy-Complicity Relationship

e. Foreseeable or Related Crimes

f. Must the Principal be Guilty?

g. Withdrawal

h. Exceptions to Accomplice Liability

i. Vicarious Liability

j. Liability of Organizations, their officers and agents

k. Post-Crime Aid