I. Criminal Law Generally
   A. Reason for criminal law (rather than civil punishment)
      1. Chances of getting caught are very low therefore must make
         punishment higher than actual damage caused to victim – needs to be high
         enough to deter (but not too high so as to encourage ppl not to commit murder
         when robbing b/c punishment is the same)
      2. Punishment is so high that people can’t pay, therefore incarceration is
         possible form of payment (can’t squeeze blood out of a turnip)
   B. Goals of punishment
      1. retribution
         a. Deontological – justification of punishment is the moral culpability of
            the defendant
            i. also acts to limit punishment in situations where might otherwise
               serve a societal function (where defendant has no culpability)
      2. incapacitation
         a. b/c it’s a losing economic situation, does not serve much good unless
            it causes a deterrent effect
      3. deterrence, rehabilitation
         a. Utilitarian – punishment imposed to achieve beneficial social
            consequences, i.e., get ppl to behave themselves
         b. but can’t be too high for a particular crime or else no incentive not to
            commit the greater crim. (ex. life imprisonment for both robbery and
            murder, no incentive for robber to also commit murder)
         c. other considerations – proximity/certainty of punishment, probability
            of conviction, imposition of criminal sanctions
   II. The Criminal Act
      A. Rules to limit use of criminal sanctions so it is only applied to conduct that:
         a) generates huge losses and b) involves low risk of getting caught
      B. Conduct – line b/t where things are not punishable and where they are (mere
         intention not enough)
         1. conduct can be an action, omission, or possession
            a. serves an evidentiary function
         2. Questions to ask.
            a. is the conduct being punished related to the crime?
            b. was the conduct voluntary (must be voluntary for culpability)?
               i. coercion ≠ involuntary ≠ preclusion of ALL crim. liability
               ii. was the involuntary state brought about by D’s fault (drunk)?
            c. argue whether functions of crim. law are being served when
               answering these questions.
      C. Previously defined offense
         1. Principle of legality – limiting situations in which state can bring charges to
            only previously defined statutory offenses
            a. limits law enforcement officers discretion
               i. acts as a check on law enforcement (every system needs checks)
               ii. nec. in crim. law b/c in torts, suit brought by indiv. so no need to
                   limit discretion.
b. compatible w/ democracy (due process of the laws)
   i. constitution delegates making of laws to legis. branch only
   c. not fair to prosecute ppl. for behavior they thought was legal (need to give notice)

D. Vagueness – same arguments as above apply
   1. Other Considerations
      a. does the defendant have access to legal counsel – effects their ability to be aware/understand the laws
      b. is it common sense that the act would be prohibited (speaks to notice requirement)

4. Arguments against vagueness doctrine
   a. criminals probably don’t have access to the statutes
   b. very difficult to make statutes precise yet encompassing
      i. no better language available
      ii. can’t meet impossible standards (ex. “heat of passion” has never been struck down for vague b/c still provides notice requirement and can’t be any more precise)
   c. ct.’s can limit law enforcement officer’s abuse of discretion

E. Omissions
   1. Strong argument that omission can’t be an offense unless a positive duty is prescribed first
   2. Debate whether duty must be statutorily proscribed or can be a common law duty
   3. Duty comes from:
      a. relationships
      b. circumstances

F. Statutory Construction
   1. Have to look at plain language first
   2. Then construe language in accordance with:
      a. legis. intent (arg. intent if favor of your side)
         i. ct’s can’t extend statute past legis. intent (rule of strict construction)
         ii. other language in the statute, amendments, language in other statutes
      b. precedent case interpretations
         i. other helpful court decisions
         ii. if not helpful, then have to limit the holding
      c. functions of criminal law
   3. Can’t apply laws retroactively (ex post facto)

II. The Criminal Mind – NEVER USE LABELS ON TEST
A. Acts as another limit to focus crim. sanctions to those ppl. who meet “profile characteristics” (high losses/can’t pay)
B. Rationale
   1. ppl. who do things purposefully are more likely to do harm and more likely to get away with it than ppl. who don’t mean to do the act.
2. protects those not blameworthy in the mind (speaks to deontological fuct.)
3. If punish ppl. w/out culp then won’t serve deterrence function
4. If ppl caught early (attempt) culpability nec. to show harm would have resulted if act wasn’t preempted.

B. Generally

1. mens rea = culpability = attitude
   a. can’t rely on specific mens rea language (FUM) b/c means diff. things in diff. circumstances – need to interpret
2. for test – never use labels, speak in terms of whether D specifically knew X

3. Treatment
   a. courts tend to read in a culpability requirement even where one is not explicit in statute – to serve functions of crim. law
      i. strong argument for reading in culp. requirements – see rat. above.
   b. 1800’s – ct.’s began to turn focus away from D’s disposition (general intent) and focus on specific attitude towards the crime.
      i. but still need to argue whether statute requires specific or general intent (usually statute is unclear)
   c. Statute may proscribe a specific intent requirement to one element (knowingly) but be vague about other elements.
      i. specific intent language – knowingly, purposefully
      ii. gen’l intent language – neg’l, recklessly
   d. how to resolve? argue the functions of law served better by gen’l or specific intent, required by other elements
      i. ex. Grandfather Walker was mistaken that girl was his daughter, got off b/c if he had been correct about the circumstances (that girl wasn’t his daughter) he probably wouldn’t have committed the crime (deterrence function carried out).
      ii. ex. Thief stole jewelry he though was worth $50 but really worth $500. Shouldn’t get off b/c even if knew it was really worth $500, probably would have stolen anyway

D. Excuses

1. Mistake of Fact - circumstances that are required by that statue to exist but D is unaware of the circumstances existence
   a. only applies as excuse to specific intent requirement
      i. two standards of application
         a. objective – reasonable person wouldn’t have been aware of circumstances (majority rule)
         b. subjective – D could not foresee harm being caused by act
      ii. lesson – if arguing mistake of fact need to also argue specific intent required (opposed to gen’l intent)
   b. mistake is not an excuse for public welfare laws or grading offenses

3. Mistake of law – rarely an excuse
   a. Rationale/arguments for mistake as no excuse
i. if D had been aware of law, probably would have broken it anyway
ii. if mistake of law is an excuse, then the law becomes whatever a reasonable person believes law is – destroys the law, destroys legis. constitutional authority
   i. same rationale applies to relying on attny’s interp.
iii. if mistake of law is an excuse, provides incentive to not be aware of the law.
b. might be an excuse if relied on state’s attny interp. of law
   i. can’t shop around for a state attny like can a private attny
   ii. state attny in effect makes the law on the street anyway
       a. same rat. could apply to relying on ct. interp. of the law
   c. lesson – need to find a way to argue D made a mistake of fact, not law

E. Analysis
   1. D charged w/ crime, then offers excuse
   2. Frame issue:
      i. Does D’s lack of knowledge that X circumstance existed, relieve him of criminal liability OR
      ii. Did D “intent” to do X or bring about “Y result? OR
      iii. Does X statute require D to know Y?
   2. Look at language of statute to see if excuse is addressed/what culp. required
      a. if language is addressed need to argue why ct. should/shouldn’t look beyond plain language meaning.
      b. if excuse not addressed, move on to arguments
   3. Arguments
      a. precise language of the statute
         i. grammar
         ii. what could the words mean
      b. statute in context of rest of the bill
         i. especially the penalty provisions
      c. legislative history
      d. consequences of accepting opposing side’s interpretation
         i. less consistent w/ functions served by stat.
            a. often consistent w/ functions of crim. law
         ii. slippery slope/parade of horribles
         iii. reduction ad absurdum
         iv. leads to consequences legis. couldn’t have intended
      e. how your position coincides w/ goals of crim. law
         i. consequences opposing side claims will happen are unlikely or remote

III. Attempt and other inchoate (anticipatory) offenses
   A. Purpose – to allow law enforcement to intervene b/f actual crime is committed
      1. it natural follows then that “but I didn’t commit a crime” is never an excuse but also can’t prosecute just for thinking about a crime
B. Conduct limits—b/c attempt expands the use of criminal sanctions, need to put some limits on it (crim. sanctions are harsh and don’t want to get carried away)
   1. Main issue – how much conduct is enough to suffice for criminal sanctions
      a. needs to be unambiguous, no other end possible from D’s conduct other than the commission of a crime.
      b. tests
         i. D’s conduct demonstrates D converted thinking about committing a crime into resolution to committee a crime
            a. harder to convict
         ii. Whether D took substantial steps strongly corroborative of the accusation of a crime.
            a. easier to convict
            b. good defense when solicited by an undercover officers b/c the officer never would have carried out the act
         iii. The proximity of time or space b/t D’s conduct and when the crime could have been committed.
            a. ex. case of kids waiting outside ATM w/ bad stuff in car got off b/c ATM techs may not have showed up.
            c. outcome is highly dependant on which test you use.
C. Culpability Limits
   1. Need to draw limits or else every time actor engages in conduct that endangers somebody, they would be guilty of a crime (ex. speeding = attempted reckless murder)
   2. Where to draw the line?
      a. look at legis. intent for the crime D is being charged w/ attempt for
         i. if he was convicted, would it serve the legis. intent?
      b. prosecution must show more culp. about the result than the statute requires if the offense had been completed/show a specific intent
         i. arg. for:
            a. attempt is a conscious intent to do something but reckless means conscious disregard for the risks (incompatible standards)
               i. use this rat. when act actually completed but result doesn’t come about (shooting = attempted neg’l murder)
            b. since no completion, need to be more sure that person would have completed crime than somebody who actually did complete it to protect the innocent from unwarranted conviction
            c. b/c there is less conduct in an attempt than there is in a completion, prosecutor needs to show MORE culpability to make up for lack of conduct.
               i. conduct serves an evidentiary function for blameworthiness, when there is less conduct there is a greater risk of punishing the innocent so need to be extra sure they are blameworthy
ii. arg. against:
   a. it is possible to consciously intend to engage in conduct that is reckless (driving onto a sidewalk full of ppl.)
   b. serves deterrence functions by punishing those that come dangerously close to the commission of a crime or who manifest a propensity to engage in crim. behavior
   d. look at the potential for future danger

D. Impossibility – where D thinks they are committing a crime but b/c of circumstances not known to them, their conduct is not criminal
   1. Arg. for impossibility as an excuse
      a. not a crime to do that which is legal
      b. if the conduct is legal, then to convict would be a conviction on intent alone → slippery slope of not requiring conduct for conviction (loose protection against convicting innocent ppl.)
      c. no harm is threatened, actors conduct unlikely to result in commission of a crime
   2. Arg. against impossibility as an excuse
      a. D still manifest propensity to engage in crim. behavior and will probably do it again
      b. shouldn’t be relieved of liability b/c of fortuitous circumstances
      c. serves deterrence function
      d. poses a danger to society

E. Abandonment – affirmative defense when evid. suff. to prove conduct of attempt
   1. Argue whether D voluntary abandoned on his own accord, or did it for ulterior motives
      a. plays a role in whether D is likely to commit again
      b. degrees of abandonment
         i. D freely chooses to stop – easiest case to make for the def b/c shouldn’t be blamed for voluntary cessation and want to encourage abandonment, but could argue once attempt committed (substantial steps) then can’t take it back
         ii. vic. verbally persuades D to stop – tougher but could still argue free will or could argue likelihood of committing again
         iii. D stops b/c vic. fought him off or sounded an alarm – toughest case to make

IV. Complicity – liability for act of another b/c D encouraged it
   A. Reason for “accomplice” classification rather than holding liable as principle
      a. too tough to say that actor “caused” the result when chain of events involves help of another responsible person
      b. exception where accomplice acts through an “innocent agent” that didn’t know what they were doing
   B. Required conduct
      1. Arguments for conduct not enough
         a. when discussing an inaction on part of D:
i. D did not have a legal duty b/c no relationship (don’t want to impose duty on everybody, infringes on freedoms)
b. difficult to say D was the cause of the crime (crime would have happened whether D was present or not – doesn’t serve deterrent function

2. Arguments for conduct enough
   a. when discussing inaction on part of D:
      i. D had a duty to act OR
      i. D’s presence w/out acting to stop = assent to the commission
   b. D’s conduct made it easier for the commission of a crime/increased probability of crime occurring or encouraged crime (society doesn’t want to make it easier to commit crimes)
c. w/out D’s conduct crime wouldn’t have happened (causation)

C. Required culpability
   1. Arguments for requiring a higher culp.
      a. Look at culp. for principal crime – argue more culp. needs to be shown for accomplice than principle b/c less conduct (want to limit crim. sanctions to only those who meet the criteria)
         i. this argument can be made for all inchoate offenses
      b. language of statute (“aiding, abetting, ect.”) implies a purpose on part of D to desire the result occur
      c. if allow complicity on knowledge alone, a lot of ppl will be held accountable for crimes
   2. Arguments for allowing a lower culp.
      a. moral obligation to prevent a crime if you know about it (don’t need to desire the results of the crime)
      b. D had stake in the venture/benefited from it
      c. D aware of probably consequences of action

NOTE: always pay attn. to the conduct and culp. req. of the principle or crime being accused and argue for inchoate offenses that req. should be higher

D. Guilt of the principal – if the principal is not found guilty can accessory still be convicted?
   1. Arguments for no conviction
      a. look to language of statute → does D’s conduct and mens rea fit the requirements? probably not
   2. Arguments for conviction
      a. that principal was not found guilty doesn’t change fact crime was still committed → everything else applies as it normally would
      b. legis. intent
      c. conspirator’s mens rea assessed separately from principal

NOTE: watch out for situations where D charged as accomplice for a crime in which she was the victim (against legis. intent)

V. Conspiracy – punishes agreement in advance of action
   A. carries sanctions larger than that of an indiv. acting alone b/c two ppl. acting together more dangerous and more likely to get away with it.
      1. functions as alternative to complicity OR attempt
2. lesser included offense rule - Can’t tack on charges for two offenses for same conduct (ex. conspiracy and attempt) just to increase penalties for same conduct. Only legis. can increase crim. sanctions
   a. must be either conspiracy OR attempt when talking about same conduct but never both
   b. opposing view – b/c of special danger from two ppl. acting in concert, there should be indep. punishment

B. Conduct – must be agreement to commit a crime
   1. allow a lesser conduct requirement than attempt or complicity b/c conspiracy much more dangerous/likely to result in harm b/c involves two ppl
   2. problem – what conducts suffices to prove agreement?
      a. must argue that D understood there to be an agreement
      b. show agreement plus act in furtherance of agreement
         i. differentiates bullshit talk from serious talk
      c. agreement show future is no longer governed by actor’s will alone
   2. What if co-conspirator is not guilty/unilateral agreement (undercover cop)
      a. arg. for requiring guilt of co-conspirator
         i. purpose of law is two ppl. more dangerous than one, but here two ppl not acting in concert
         ii. no actual danger of completion (nobody endangered)
         iii. no actual agreement b/t the ppl. – no step taken towards commission
      b. arg. for not requiring guilt of co-conspirator
         i. conduct still dangerous, shows desire to complete crime
         ii. same arguments for why not to accept impossibility as an excuse for attempt

C. Culpability
   1. Felony – knowledge of criminal activity is enough
   2. Misdemeanor – intent (purpose) to aide in principal’s conduct is necessary or knowledge + stake in the venture or profit from venture
   3. Rationale for culpability division
      a. there is a cost to society of requiring/encouraging (through crim. sanction) citizens to take affirmative steps to stop crimes when they know about them
         i. ppl. see crimes (speeding) everyday, can’t force ppl. to intervene
      b. but benefits to society outweigh the costs when:
         i. the crime is a felony
         ii. citizens knows the other person engaged in a crime and can prove it through:
            a. citizen has a stake in the venture
            b. increased volume of sales
            c. citizen couldn’t be involved for a legit purpose
         c. arg. for lower culp. level – if require purpose then there’s going to be less deterrent factor

D. Underlying substantive offense – another limit on conspiracy
   1. Argument for liability limited only to what D agreed to
a. to hold somebody liable for acts which they weren’t aware of would be to impose vicarious liability → dangerous in crim. law b/c of harsh penalties and in civil context no vicarious liability for most serious offenses
b. strictly speaking, D only agreed to acts which aware of
c. requires ct. to predict consequences a criminal should have foreseen
d. punishes the same conduct many times (not what legis. intended)

2. Argument liability extends to all acts done in furtherance of agreement
   a. once agreement occurs, act of one is an act for all
   b. w/out the agreement, the other acts wouldn’t have happened (cause)
   c. D should have foreseen the results of the act

E. Impossibility/Abandonment
   1. same arguments as attempt apply
   2. Abandonment - Could also argue to keep sanctions in play even if withdraw agreement b/c likelihood of other person following through has still increased than if had never agreed at all
   3. Impossibility – Could argue not an excuse b/c elements met, there was an agreement to commit a crime and culp. present → that crime later became impossible to commit doesn’t take away from elements of crime still met

VI. Homicide
A. Murder – give each word a meaning, make 1) literal and 2) functional distinctions
   1. First Degree – requires deliberation and premeditation and willfulness
      a. literal distinctions
         i. premeditation = decision happens b/f killing
         ii. deliberation = calm/cool decision
      b. argument for narrow reading (defense)
         i. legis. wouldn’t have included words they didn’t want to have their own distinct meaning, ct. shouldn’t read words out of a statute
         ii. words meant to limit ct.s discretion in applying the statute
         iii. the premeditation needs to happen way b/f the killing takes place if it is truly a deliberated decision
      c. argument for broad reading (prosecution)
         i. legis. included words w/ similar meanings so ct. would apply the statute in more situations, not be the language police
         ii. the premeditation can happen just a moment b/f the killing and sill be deliberate
      d. functional distinctions for prosecution (broaden the scope)
         i. requiring delib./premed. legis intended to punish those w/ the worst kind of conduct → brutal killings also fall into this category
         ii. people who premeditate are more likely to get away
         iii. ppl who make cool decisions are more likely to do it again
      e. functional distinctions for defense (narrow the scope)
   2. Second Degree – acting w/ depraved indifference to human life (without deliberation/premeditation) recklessly engages in conduct which results in death
      a. literal distinction
i. depraved indifference = elevated or grave risk
   a. look to the circumstances
ii. reckless = conduct required for both 2\textsuperscript{nd} degree murder and manslaughter
   a. mens rea element
b. functional arguments
   i. objective standard (pros.) – whether a reasonable person would have been aware of the circumstances creating an elevated risk
      a. circumstances have nothing to do with D’s mens rea state
   ii. subjective standards (def.) – whether D was aware of the circumstances creating an elevated risk
      a. consistent with legislative intent of statute because need to show much more than recklessness (manslaughter) circumstances such D knew death would result
         i. emotional state (upset, crying, remorseful) after the fact evid. D’s subjective lack of knowledge that circumstances could lead to death
      b. if don’t use subjective standard, any intentional situation where D not aware of circumstances elevates manslaughter to murder \textrightarrow contrary to legislative intent (slippery slope)

3. Negligent Murder can also be a type of homicide when there’s “malice”
   a. need to assign a meaning to “malice”
      i. negligent so bad almost certain that death would result
         a. ex. Russian roulette
   b. functional diff.
      i. compare Russian roulette to speeding which also causes a death
         a. both negligent death but driving has a utility (don’t want to deter ppl. from driving for fear they might cause a death) whereas no utility served by playing Russian Roulette (always deter)
         b. culpability – playing Russian Roulette causes greater risk of death (big time negligent) than speeding

B. Voluntary Manslaughter – murder with provocation
   1. provocation is mitigating defense because if killer responds to something and kills rather than takes time and plans out a killing chances are a lot higher they’ll get caught so makes sense to punish less.
      a. problem – can’t mitigate all provoked killings because allows for a lot of killing, so where to draw line? Functions!
      b. what is sufficient is question for judge, was D actually provoked is question for jury
   2. Sufficiency arguments (note: typically mere words alone are never enough)
      a. deterrence (if not deterrence \textrightarrow everybody looses, D punished, state has to pay, future crime not prevented)
         i. likelihood of D being in that situation again
         ii. would same behavior have happened under other circumstances
         iii. what kind of message will it send to others
b. if provocation is slight then argue slippery slope
   i. allow provocation just for getting angry → mitigation of all murders b/c every killing usually in response to some kind of provocation

   c. would it be morally right to punish D the same as somebody who acted w/ an intention to kill?
      i. look to grading elements

   d. cooling period
      i. if D had time to cool down or argues cumulative effects, it is contrary to the notion of acting in “heat of passion”
         a. provide an incentive to seek other means than killing if have time to cool off
      ii. could also argue for cumulative effects → that it was the last incident that sparked the “heat of passion”

3. Standard
   a. arg. for objective
      i. judging by reasonable person assess deterrence factor
         a. if reasonable person provoked punishing would not deter
         b. if use subjective, lets D set their own standard and anybody could get away w/ anything
         c. promotes uniformity
      ii. assess causal connection
         a. objective shows provocation was the cause of loss of control
         b. objective only shows D’s weaknesses caused the loss of control
      iii. slippery slope if start looking at some peculiarities
      iv. allows mistakes (but not peculiarities) to be integrated into the test if they are reasonable
      v. subjective approach forces innocent ppl. to be bound to the whims of others w/ peculiar sensitivities
   b. arg. for quasi subjective
      i. take sensitivities into account if there is a reasonable explanation (two parts – was D acting due to sensitivities, and were they reasonable)
         a. don’t punish those not morally blameworthy same you do those who deliberately or reckless kill
      ii. still allows ct. to reject idiosyncratic moral values (like assassin who kills political leader b/c believes right thing to do)
      iii. if D was provoked than in a sense action not voluntary → crim. sanctions based on assumption of voluntary conduct
         a. punishing involuntary behavior doesn’t deter
      iv. focus on whether provocation would arose sympathy in ordinary citizen
      v. legis. intent not to punish those that acted due to a reasonable weakness
4. Analysis
   a. look at statute involved
   b. attribute meaning to the words
   c. distinguish/analogize your facts to other cases
   d. argue functions

C. Involuntary Manslaughter – criminally neg’l or reckless about death
   1. less reckless than neg’l murder but more than neg’l tort
      a. diff. b/t this and 2nd degree murder is the circumstances are not such
         that neg’l raised to a degree of almost certain death
      b. could be a battery that winds up in death

2. Arguments:
   a. whether there was a GREAT departure from ordinary care
      i. frame the duty owed in your favor (especially when talking about
         caring for elderly, children, husband/wife, ect.)
      ii. if not a GREAT departure then it is civil neg’l
   b. did D take steps to reduce risk?

D. Defenses
   1. Causation – this comes up a lot in felony murder rule b/c prosecutor doesn’t have
      to prove culp., only has to show D’s commission of the felony caused the death (but
      def. wants to show felony wasn’t the cause, ex. sale of drugs that wound up in death
      – sale is not what caused death, ingestion is what caused death)
      a. “but for” cause – ct. implicity asking “if ppl avoided the conduct D did,
         would it result in decreased deaths?” → if no, then no causation
      b. foreseeability – need to show both
         i. arg. for pros. if vic. does volitional intervening act (arg. as a matter of
            law- shouldn’t go to jury)
            i. not an intervening act - allows injury to take its natural course
            ii. vic has right to refuse treatment → foreseeable indiv. exercise
               their rights
            iii. slippery slope if allow these questions to go to jury → diff.
               juries may come out diff. (want to avoid varied outcomes)
            iv. purpose is to inform jury what law requires and law requires vic
               have a right to refuse med. treatment
         i. arg. for def. if vic does a volitional intervening act (arg. question of
            fact for jury)
            i. D could not foresee vic would remove life support, refuse med.
               treatment, ect. → reasonable person would believe vic would
               accept med. treatment
            ii. slippery slope if start holding D accountable for vic.’s volitional
               acts
            iii. argue remoteness (time b/t injury and death) → legis. intent to
               have jury decide questions of remoteness or difference is character
               and manner of death
iv. all quest. of fact should go to jury \(\rightarrow\) slippery slope if start
taking quest. of fact from juries (varied outcomes okay in our legal
system)
v. various factors in code meant to be considered as a whole (ex.
can’t separate one quest. for jury and det. other quest. by judge)
NOTE: main pt. – arguing that something else caused injury rather than
d’s conduct (ex. where chiropractor offers to cure cancer – arg.
foreseeable patient would die or arg. chiropractor is not the one that
causedit, cancer is)
c. problem w/ actors act in conc ert b/c don’t know which “caused” injury
   i. argue conspiracy or lack thereof – all liable for actions of the other
   ii. if no agreement – argue death caused by all actors independently
   “death from two mortal wounds” each act alone is “but for” cause
NOTE: THESE OTHER DEFENSES ARE THE “TRADITIONAL DEFENSES”
   -if interpreted broadly they would erase all crim. law so very limited
2. Justification – following greater good (complete defense)
   a. since encouraging greater good is purpose of crim. law, to punish for
   following greater good would be a perversion of the law
   b. how to determine harm seeking to avoid is greater than harm from
   breaking the law?
      i. must argue whether pursuing greater good under the statute (look to
         legis. intent for passing the law)
         a. arg. for prosecution
            i. if the legis. legalized conduct \(\rightarrow\) can’t argue it is right to
               stop ppl from engaging in that conduct b/c what is legal can’t
               be evil
            ii. D’s conduct violated legis. intent for the statute
            iii. up to legis. to change law, not ppl. through their conduct
                 or ct. through their interpretation
         b. arg. for defense
            i. legis can legalize conduct that is still evil (prostitution)
               \(\rightarrow\) evilness should be evaluated according to ordinary
               standards of morality
               a. morals change over time, so need to allow def. to
                  show legis. that laws no longer in line w/ morals
               ii. legis. did not foresee this type of situation arising
               iii. D’s conduct not proscribed by purpose of the statut
            ii. try to put the more impt. harms being prevented on your side of the
               scale (ex. driving baby to hospital preventing a more impt. harm that
               traffic accident that could result from speeding)
               a. protecting indiv. rights is more impt. than policy
               iii. balance interests of indiv. against interest of state in passing the law
               that is being broken (good for use in med. necessity cases – marijuana)
        iv. murder:
           a. gen’l rule – choose the outcome that results in less dead
              bodies (mountaineering hypo, dam hypo)
b. Dudley (killing boy on boat) sit. – danger in allowing those who benefit to make the choice about who dies
   i. can’t attach diff. values to diff. lives to determine whose life should be sacrificed
   ii. better if decision about who dies made at random
v. self-defense:
   a. for pros.
      i. D was putting hirer value on her own life than the life of the victim
      ii. D’s action resulted in more dead bodies
   b. for def.
      i. provides incentive for criminals to know potential victims could justifiably retaliate (PROMOTES DETERRENCE)
      ii. if no justifiable self defense → encourages crime b/c perp. knows vic. can’t retaliate
      iii. if stick to weight dead bodies → encourages criminals to just make sure they have more ppl. than D (subverts deterrence)
      iv. D is going to react in self defense regardless of punishment imposed → punishing doesn’t serve deterrence
vi. defense of others
   a. for pros.
      i. not an excuse unless duty to defend (close relationship)
         a. if mettle in affairs w/out a close relationship greater chance of jumping in on the wrong side/causing harm
      ii. if person has time to evaluate the situation → shouldn’t blindly follow orders
         a. want to promote independent inquiry into authority/reasonableness of situation
      iii. helpers right to defend another shouldn’t be greater than that person’s right to defend themselves
   v. mistake of auth. may be okay in military settings but in bus. settings want to encourage ppl. not to follow blindly
   b. for def.
      i. want to encourage ppl. to come to the aid of others
      ii. if come to aide b/c lied to → should punish the person lying, not the one trying to come to aid (if punish helper, discourages helping but if punisher liar, discourages lying)
      iii. want to encourage following orders of person in auth.
      iv. uncertainty of the situation made inquiry into reasonableness diff. → if sit. arose again D wouldn’t be deterred
   c. what if hindsight it turns out there was no actual harm to avoid?
      i. if allow strictly subjective → allow ppl. to set their own standards for when force is necessary or allow crazy ppl to commit murder→ danger to society
ii. solution – argue D had “reasonable belief”
   a. physical circumstances and characteristics of D
      i. can look at b/c provable and consistent w/ functions of
         justification
      ii. argue likelihood (either way) of D being in that situation
         again and acting in similar manner
   b. mental characteristics and past experiences
      i. arg. for prosecution
         a. subjective standard allows ppl to set their own
            standards (no uniformity extends just. def. too far)
         b. if look at subjectively – impossible to est. a
            community standard of conduct (purpose of laws)
         c. must be provable (scientifically testable hypothesis)
            or else could come up w/ mental excuse or “reasonable
            belief” for everything
            i. needed for uniform application
      ii. arg. for defense
         a. bears on reasonableness/credibility of D’s perception  
         b. punishment serves no utilitarian purpose to punish a
            person who believes they are in danger
         c. person acts on their beliefs whether objectively
            reasonable or not – objective standard doesn’t serve
            deterrent function
         d. just b/c a belief not scientifically testable doesn’t
            mean no reasonable belief (religious beliefs)
   iii. if turns out it belief was unreasonable
      a. prosecution – mistake is no excuse
      b. defense – mistake should be judged as same culp. standards as
         rest of crime (neg’l mistake doesn’t mean purpose to kill)
   d. requiring escape
      i. for prosecution - human life always trumps → if D could have gotten
         away rather than fighting back, killing is not the greater good (response
         should be in proportion to the danger)
      ii. for defense – bad policy to impose a duty to submit to harm or run
         away (cowardice) & D had a right to defend his autonomy (indiv. rights
         is the greater good)
         a. if in own home – rat. for retreat is D could find safe harbor, but
            no place more safe than home, so have right to defend it
   e. should the justification argument proffered be a question for judge or jury?
      i. question of weight of harm is a legal question – if allow to go to jury
         → inconsistent standards, risk of overextending justification and eroding
         criminal law
      ii. argue expert testimony re: reasonable belief
         a. arg. for prosecution (reasonable belief question for judge)
            i. not scientifically testable → leads to inconsistent
               standards
ii. if allow some types of testimony slippery slope of allowing experts to testify about all kinds of subjective things
iii. state of mind irrelevant b/c D was the attacked when husband helpless (no just. as a matter of law)

b. arg. for defense (reasonable belief question for jury)
i. bears on credibility of perceived threat (need to understand syndrome to understand mental state)
ii. bears on lack of alternatives (immense of danger) other than killing (ex. battered women can’t leave the relationship or fight back)

3. Situational Excuse
   a. purpose of excuse – pursuing greater harm but excused b/c that is what most ppl. in similar situation would do
   b. serves deterrent function b/c if most ppl. would do the act, regardless of criminal sanctions then makes no sense to punish
   c. standard – need to argue that most ppl would/ wouldn’t act the same way D acted under same circumstances
      i. duress
         a. arg. against
            i. reasonable person wouldn’t have acted that way
            ii. D had a choice
            iii. D recklessly put himself in the dangerous situation
            iv. slippery slope – opens door to collusion w/ bad ppl. b/c can claim you were under duress
            v. arg. against brainwashing – no diff. that being raised in a family w/ distorted morals
         b. arg. for
            i. reasonable person would have acted this way
            ii. D’s capacity to comply w/ law was limited due to circumstances not in his control
            iii. rare situation like this would happen again
            iv. if D is reckless in placing himself in that situation, can’t substitute reckless culp. for hiring culp. of crime being accused
            v. D not as morally blameworthy as somebody who voluntarily committed the act
               a. can’t require a duty to be a hero
         c. gen’ standards
            i. imminent threat – shows a lack of other alternatives
            ii. threat against self or person close relationship
               a. arg. extend to 3d ptys
                  i. provides incentive to protect 3d ptys where incentive might not otherwise exist
                  ii. legis. intent
                  iii. hard to define what is a close or familial relation
         d. arg. for whether duress should be allowed as def. to murder
i. arg. for prosecution
   a. human life too impt. to allow an indiv. to choose one life over another
   b. if D really that innocent then wouldn’t be prosecuted
ii. arg. for defense
   a. same arg. as above
ii. other situations of excuse – anytime do something bad but want excuse b/c reasonable person in your sit. would have done same thing
   a. arg. for pros. – slippery slope if let ppl. start getting away w/ crimes
   b. arg. for pros. – deterrence won’t be served by punishing for action which would have done regardless of sanctions

4. Insanity
   a. purpose – if D not acting voluntarily, then can’t comply with law even if sanctions are applied (punishing wouldn’t serve deterrence)
   b. how to apply
      i. identify class of ppl. who can’t make their choices voluntarily
         a. arg. for using shrinks – insanity is their expertise
            i. may not be perfect but it’s the best solution
         b. arg. against – not all insane ppl. are incapable of making choices
            i. med. testimony focuses on internal dynamics which aren’t provable or disprovable
            ii. med. experts explain why choices are not made but are determined by outside influences → if everything predetermined, the turns whole notion of crim. law to change behavior on its head b/c by that rat. there can be no deterrence
      ii. so which forms of insanity qualify – that’s the question to argue!
   c. Standards for determining
      a. labors under mental defect of mind that CAUSED D to…(see b,c)
         a. shrink test. helps separate those really crazy from just weird thoughts (independent corroboration to est. credibility of test.)
      b. did not know nature/quality of act
         a. demensia, ect.
      c. if did know nature, didn’t know it was wrong
         a. legis. decides what’s wrong, so ignorance of law is no excuse
         b. arg. for if know the law but don’t know what they’re doing is wrong:
            i. prosecution
               a. D knew the law and knew what conduct is illegal
               b. if ct. adopts “affective knowledge” excuse then basically adopting volitional test (D had an impulse that was irresistible) which has nothing to do w/ knowledge
                  i. don’t want to use control test b/c then get away w/ anything had an impulse to do → expands excuse too far
c. evidence to prove “affective knowledge” is the criminal act → contradictory to use act as proof to relieve liability for act

ii. defense
a. D was not able to make connection b/t her act and the illegality of the conduct (lacked affective knowledge)
b. craziness causes person to think what they’re doing is okay even though unrelated from the circumstances may know that its illegal

E. Felony Murder- death which occurs in the commission of a felony is automatically 2nd degree murder (no culp. needed)

1. Purpose
   a. criminalize behavior that, absent the rule, wouldn’t be a homicide
   b. upgrade homicides that might otherwise be a lesser offense

2. Rationale
   a. create an added deterrent to felonies that by their nature increase risk of death
   b. reflects societal judgment that robberies that result in murder worse than robberies that do not
      i. re-enforces societal norms
   c. conserves judicial and prosecutorial resources (if person doing something really bad (armed robbery) already shows the requisite culpability so lets not waste time figuring it out)

2. Main question – what type of felonies should the rule apply to?
   a. arg. for prosecution
      i. plain language – applies to ALL felonies
      ii. slippery slope if start qualifying which penalties it applies to
      iii. should look at the felony concretely → if ended up in harm, then felony was inherently dangerous
         a. promotes legis. intent of punishing felonies committed w/ added carelessness
         iv. if purpose to punish those extra careless → need to look into specifics of case (concrete) to determine carelessness
         v. jury can infer malice from the manner in which the death occurred during the commission of the felony (D’s conduct was so bad death was bad wicked intent or certainty of death can be is obvious)
   b. arg. for def.
      i. only applies to inherently dangerous felonies (not non-violent felonies) → consistent w/ legis. intent for the rule
         a. requiring only applies to violent felonies consistent w/ deterrent function (ppl. committing non-violent crimes won’t be deterred by the rule anyway b/c won’t foresee risk of death)
         ii. requiring abstract inquiry into dangerousness of offense allows rule to be applied consistently across the board (for deterrence to work, ppl.
need to be able to determine in advance (if there is a risk of death resulting from the felony)
   a. specifics of case shouldn’t matter
   iii. disfavor strict liability in criminal law
   iv. need culp. for all crimes (rule shouldn’t apply at all) reason culp. req. in our society is b/c norms recognize not all murders shouldn’t be punished alike → depends on D’s moral blameworthiness

3. Merger rule – can’t charge somebody w/ an assault than winds up in death b/c otherwise almost every death would fall under the felony murder doctrine
   a. this all turns on what the pros. calls the assault (can call it an assault or call it something other than assault)
   b. solution – look at the case and argue whether functions of felony murder rule are or are not being served
   c. arguments
      i. arg. for pros.
         a. can call the assault something other than assault to get around the merger rule
         b. D’s culpability for murder (reckless disregard for human life under circumstances that evid. a great risk of death) can be inferred from the felony
         c. most homicides don’t result from the type of felony involved → to infer malice will not subvert legis. intent of separate inquire into culp. of murder
      ii. arg. for def.
         a. apply functions of felony murder rule → same arguments as above
         b. to allow an inference of culp. for murder subverts legis. intent to require make a separate inquiry into the higher culp. requirement for murder (eliminates inquire into whether there was a design for murder)
         c. when the felony is a willful act to do something → doctrine shouldn’t apply b/c won’t deter somebody from doing something they have willfully decided to do
            i. should only apply when their willful felony created an unknown risk that death would result

4. Approach
   a. very precisely frame the issue
   b. articulate argument showing understanding of policies underlying the rule
   c. show rationale why if adopted by ct. in this situation, the polices will be served

IX. Criminal Responsibility