General Exam Information / Strategies / General Arguments

Exam: Spot issue, articulate issue, argue about it, and consider counter-arguments. Best arguments start with some principle that people living at the time of case would have subscribed to, then proceeding from those principles. *The limits of the criminal sanction*, by Herbert Packer

malum in se: the act is “wrong in itself,” very nature is illegal violates natural, moral, or public principles of civilized society.

General strategy
- Look to the statutory language – frame the issue with the MR terms, get into the grammar and argue what the words mean.
- Look at other statutes passed at the time that might reflect on our statute
- Look to the history of common law crimes, how this came to be → if no common law antecedent then might suggest no culpability requirement (public welfare, strict liability).
- Look at the penalties (i.e. draconian sanctions)
- Legislative history
- Parade of horribles

Theories of punishment
1. Incapacitation (Restraint) – while in prison a criminal has fewer opportunities to commit acts causing harm to society.
2. Special deterrence – punishment may deter the criminal from committing future acts.
3. General deterrence – punishment may deter persons other than the criminal from committing similar crimes for fear of incurring the same punishment.
4. Retribution – punishment is imposed to vent society’s sense of outrage and need for revenge.
5. Rehabilitation – imprisonment provides the opportunity to mold or reform the criminal into a person who, upon return to society, will conform her behavior to societal norms.
6. Education – the publicity attending the trial, conviction, and punishment of some criminals serves to educate the public to distinguish good and bad conduct and to develop a respect for the law.

Punishment under the criminal law is what distinguishes it from tort. Need different kind of punishment (imprisonment) to exceed the wealth of some who could afford to commit it as a deterrent. Also for people who are financially worthless – a cost punishment doesn’t threaten them.

Focus on the limits of the criminal sanctions. Looking for the optimal level of deterrence – too much is too costly on society, too little is also costly on society.

Void for Vagueness Doctrine / Principle of Legality
- No criminal penalty be imposed w/o fair notice that the conduct is forbidden
  - Fair warning – statute must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.
Individual needs knowledge of the punishment in assessing whether to commit a crime. Humans are rational and hedonistic. Criminal acts are deterred by criminal penalty, which requires crimes and punishments to be spelled out in advance.

Fictitious to believe that criminals base if they are going to commit a crime on whether it's statutorily illegal or not.

** Here think of the target population the statute is aimed towards (Sherman antitrust v. vagrancy example). Those who might be subject to Sherman antitrust suit probably have lawyers / money to know what they can and cannot do. This is different from those subject to vagrancy proceedings. Ask yourself – what do you have to do to stay out of trouble? (Think murder v. vagrancy example – murder is clear, you don’t kill people, versus vagrancy is unknown – not go to the grocery store?).

- Arbitrary and discriminatory enforcement must be avoided – A statute must not encourage arbitrary and erratic arrests and convictions.

Social compact between the people and the legislature – if people are going to give up rights and the legislature promises to protect them then need to spell out the rules and guidelines. Also need this to keep law enforcement in check, so that a police officer, prosecutor and judge all in co-hoots do not take the law into their own hands and make the criminal law.

The law has imperfect commitment to the goal of being non-discriminatory and arbitrary. This is inherent in the criminal law because discriminatory administration is (1) police decide who to arrest and who to let go; (2) prosecutors decide who to press charges; (3) the exercise of discretion is virtually uncontrolled.

**Interpretations of Criminal Statutes**

- Plain meaning rule – court must give effect when the language is plain and the meaning is clear. Exception if it leads to injustice, oppression, or an absurd consequence.
- Ambiguous statutes must be strictly construed in favor of the D
  - Ambiguity – one susceptible of two or more equally reasonable interpretations.
  - Vague – so unclear that it is susceptible to no reasonable interpretation.

Doctrine of strict construction has roots in common law history. Originally only punish felonies w/death penalty – so need to interpret very strictly. Think of case where punished against motor vehicles, so airplane stolen was an exception. Airplanes existed at the time and Congress chose not to include them in the list.

- The expression of one thing impliedly indicates an intention to exclude another (or else the legislature would have stated it).
- The specific controls the general, the more recent controls the earlier

Think of the memo and the statutory interpretation there:

- The language of the section itself.
- The section / language in the section compared to other parts of the statute.
- The purpose of the statute as a whole / legislature’s purpose.
Other statutes – If you have two statutes (ex: abortion and murder) it is clear that the legislature meant to differentiate between the two of them, and thus the offenses are not the same thing. If the legislature has criminalized something, it is the job of the courts to respect that.

**Essential Elements of a Crime = Actus Reus + Mens Rea + Concurrence (they existed at the same time) + harmful result caused by the D's act – justification / excuse.**

**Actus Reus**

The function of the criminal law is to shape people’s behavior and deter certain kinds of activities (actus reus = physical act by the defendant).

**Act**
- Bodily movement
- Thoughts are not acts, thus bad thoughts do not constitute a crime (but speech does.)

The purpose of the general conduct requirement in the criminal law is to inform members of society how they can and cannot act. On function of the general conduct requirement is that as long as you don’t act in particular prescribed ways, then you can go about your own business and nobody will bother you. Conduct is inferred from actions. If actions do not amount to those proscribed by law, then cannot be criminally liable.

Slippery slope argument – if people were punished for their thoughts then everyone would be criminals. Too expensive, not optimal level of deterrence.

**The act must be voluntary**
- Must be a conscious exercise of the will
- The function of having a voluntary act requirement is to identify cases where an individual’s responsibility for his own conduct is so sharply interrupted as to preclude altogether any imposition of penal sanctions. An involuntary act will not be deterred by punishment
- Conduct that is not the product of the actors’ determination (shoveling example), reflexive or convulsive acts, and unconscious / asleep are not voluntary.

**Omissions as an “act”**
- A legal duty to act: statute, contract, relationship, voluntary assumption of care, creation of peril by the D.
- Knowledge of facts giving rise to a duty (parent has to know child is drowning)
- Reasonably possible to perform (need to be able to swim)

**Mens Rea**

**Purpose:** Need MR to distinguish between inadvertent or accidental acts and acts performed by one with a “guilty mind.” The later type is more blameworthy, and arguably can be deterred. In some cases (strict liability), MR is not required.

**Statutory analysis:**
- When approaching a MR issue – look at the words of the statute to figure out what mental state is required
- Just because no culpability words doesn't mean there isn't a culpability requirement.

**Model Penal Code**
- Advocates the elimination of general/specific intent
- Proposes four categories into which the mental component can be characterized:
  1. Purposely – subjective standard, when it is the actors' conscious object to engage in certain conduct or cause a certain result, e.g. burglary.
  2. Knowingly – subjective standard, when he is aware that his conduct is of that nature or that certain circumstances exist. He acts knowingly with respect to the result of his conduct when he knows that his conduct will necessarily or very likely cause such a result. Also satisfies the mental state of a statute that requires willful conduct.
  3. Recklessly – subjective standard, when he consciously disregards a substantial or unjustifiable risk that circumstances exist or that a prohibited result will follow, and this disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation. Both subjective (“awareness” elements) and objective (“unjustifiable risk”).
  4. Negligence – objective standard, when he fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, such failure constitutes a substantial deviation from the standard of care that a reasonable person would exercise under the circumstances.
    - Distinguished from torts – must be very unreasonable risk
- If no culpability word then the MPC assumes “reckless”

**Ignorance of the law: Don’t know it’s a crime**
- Is traditionally not an excuse

If you let one person off from “not knowing the law” then where do you draw the line? Will have to let the guy off whom 6 months down the road says that he didn’t know it was the law, etc.

Most people have no idea what the statutory law is anyways – if you let it go as an excuse then the law will be whatever the clever defense lawyer makes it out to be.

If let the excuse “I didn’t know” then it would eradicate most laws.

Keep in mind the **principle of legality** – the people in the legislature have the authority to state what the law is. If the legislature has to do it before hand it protects ordinary people from intrusion in their lives from authoritative personnel and defense lawyers. This is why **ignorance of the law is never an excuse**.

- Sometimes is an excuse, approach this that ignorance of the law is not an excuse, but there are some exceptions.

What if you go and ask the state attorney? These people are responsible for making the law, responsible for charging people, and telling them what they can and cannot do. Can’t go shopping for a state attorney who will tell you what you want to hear. Law wants us to rely on these people because if we don’t then...
people won’t follow what they tell them to do, will break the law. Don’t want to generate more conduct that the criminal law is looking to decrease. This goes for all people in an official capacity.

Or, if they are acting how a model citizen should act to learn what the law is. Not fair to hold them liable.

MR and Intoxication

- One of the few cases where we actually know the answer – if you get drunk and drive then you are liable because you were reckless in getting drunk.

If we allow people the excuse of being drunk, then anyone who wants to commit a crime will go out and get trashed before committing it to have a fool proof excuse.

Disallowing the consideration of intoxication deters drunkenness or irresponsible behavior while drunk. Ensures that those that can’t contain themselves while drunk go to prison. There are also the moral considerations that if you impair you own faculties then should be responsible for the consequences. Also don’t want drunks behaving in accord with their learned belief that drunks are violent. Don’t want misleading evidence for the jury (by allowing them to consider intoxication).

Public welfare offenses = strict liability?

- No MR element is required
- Regulatory measures in the interest of public safety

Promotes the preventative goal at the expense of the culpability limitations on the criminal law, which is why usually accompanied by small penalties to make up for the deprivation of liberties. As long as the D knows he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be on notice / alerted to the probability of strict regulation.

Generally no common law antecedent here – no history of mental consideration.

Summary

Why we require culpability: maximize liberty from externally imposed restraints. In cases where need to show a specific intent to secure conviction what we are really doing is saying that what makes the conduct of the actor fit the profile of the kind we want to deter is what the actor thought he was doing.

Negligence – fits into scheme that we have criminal law to conjure up sanctions that are not optimally deterred by tort remedy.

Concurrence of Mental Fault with Physical Act is Required

The D must have had the intent necessary for the crime at the time he committed the act constituting the crime. In addition, the intent must have prompted the act.

Ex: A decides to kill B. While driving to get gun, hits B and kills him by accident. A is not liable for murder.

Causation
Some crimes (ex. homicide) require a harmful result and causation. ## P/u here later.

**ACCOMPlice LIABILITY**

See beginning of chapter for practice questions.

The common law, distinguished four parties to a felony: (Judges in England created complicity liability)

- Principals in the first degree (persons who actually engage in the act or omission that constitutes the criminal offense);
- Principals in the second degree (persons who aid, command, or encourage the principal and are present at the crime).
- Accessories before the fact (persons who aid, abet, or encourage the principal but are *not* present at the crime).
- Accessories after the fact (persons who assist the principal after the crime).

Significance of common law distinctions – an accessory could not be convicted unless the principal had already been convicted. * Most modern jurisdictions have abandoned this. Accessories after the fact are dealt with separately and punished differently (focus is on interference w/law enforcement).

Modern statutory vocabulary – “all parties to a crime” can be convicted of a criminal offense.

- Principle – the one who, with the requisite mental state, actually engages in the act or omission that causes the criminal result. Also, anyone who acts though an innocent, irresponsible, or unwilling agent is classified as a principle.
- Accomplice – One who, with the intent the crime be committed, aids, counsels, or encourages the principal before or during the commission of a crime.
- Accessory after the fact – one, who receives, relieves, comforts, or assists another, knowing that he has committed a felony, in order to *help* the felon escape arrest, trial, or conviction. (Usually not the same type of punishment).

Conduct required for complicity liability (when doing these scenarios assume maximum culpability).

- *Russel* – father stands by and watches wife and children drown themselves. Held liable.
  - Arguments in favor of holding all who watch (even beach goers) liable as accomplice if they don’t act:
  - Arguments against holding all who watch liable as accomplice for those that don’t act (Olympic swimmer v. dad):

If we held everyone liable, then everyone would *constantly be reporting things*. People would be paranoid and report things that weren’t even crimes, or *could have been crimes but weren’t*.

Note also – if the rule provided that all people who *did nothing* would be tried – then people would take *precautions* to make sure you don’t see suspicious activating and make sure you are not in situations where you don’t come across it – i.e. look down instead of up. *Strange precautions – we don’t want people to be impervious to life.*

Could argue that criminal *failure* to act should go to people who already have some pre-existing duty imposed by law.
If someone is verbally encouraging an offender – example if bystander yelling “kill the kids” are they an accomplice?

If crime would have happened regardless of the verbal encouragement, then no. Maybe if the crime wouldn’t have happened but for the encouragement.

Should in the case where accomplice has a duty to act, should they be held liable for 1st degree murder in stead of accomplice liability?

There is the interposition of a later criminal act (that of the mother).

MPC says the conduct we need to constitute attempt is “a substantial step” strongly corroborative of the actors purpose.

Need to be careful when accusing of accomplice liability – how far will it go – are we getting back to accusing people of making bad thoughts?

Mental State – Intent required (assumes here that our accomplice engaged in way too much conduct; now need to ask if their culpability is enough).

Under the common law rule, a person must have given aid, counsel, or encouragement with the intent to aid or encourage the principal in the commission of the crime charged. In the absence of a statute, most courts would hold that mere knowledge that a crime would result from the aid provided is insufficient for accomplice liability, at least where the aid involves the sale of ordinary goods at ordinary prices. However, procuring illegal items or selling at a high price, because of the buyer’s purpose may constitute a sufficient “stake in the venture” for a court to find intent to aid.

Moral consideration – every citizen is under the moral obligation to prevent the commission of a felony.

Seller of goods used for the commission of a crime.

Consider the consequences on seller of goods if we held them liable for the ultimate crime. They would be burdened to either interrogate every shopper (hurt business, long lines) or play dumb and purposefully try and avoid finding out if anything fishy was going on. This is not what the criminal law or complicity liability is supposed to accomplish.

Should be able to argue about knowledge (see seller of good discussion about):
  o Yes, knowledge is enough – Maybe knowledge is enough if there is an expressly stated statutory duty (gun clerk, but not store clerk).
  o No, knowledge is not enough – See clerk argument above.

Other approaches to analysis (## check in Crim book). When arguing about culpability requirements should take into account what the results of all of the following methods might be.
  o Culpability required for conduct – i.e. mental attitude
  o Culpability required for results (e.g. you give a drunk keys, are you liable for the results of that?)
Culpability required for circumstances (e.g. you lend apartment to friend who has sex with a minor).

**Scope of Liability**
- An accomplice is responsible for the crimes he did or counseled and for any other crimes committed in the course of committing the crime contemplated, as long as the other crimes were probable or foreseeable.

Case of the guy who was in the stolen car w/buddy who had gun – buddy kills. Arguments why the non-killer should not be held liable for homicide when buddy kills police officer:

- Didn’t engage in sufficient conduct to suffice for complicity liability.
- Usually culpability with homicide is especially important and really matters, charge here is complicity w/first degree murder.
- If getting accomplice for the crime of the primary (now we are talking about the perpetrators results) – what level of culpability do we need to show for the accomplice?
  - Greater culpability

Because we have much less conduct on the part of the accomplice than on the part of the perpetrator. When we have much less conduct, the risk of using the criminal sanction in areas where no legislature would want it applied becomes higher and higher. Once way to address this problem is to up the ante on culpability (not lower it).

- Same culpability

What about liability when the accomplice (wife) orders a crime (beating up husband) and that crime doesn’t go down (only gets scratches). Should she be liable for the crime she intended? Does liability of the accomplice not depend in part on the conduct of the principle?

- Yes

If we hold the accomplice (master mind) liable then is deterrent, others won’t be complicit in like crimes.

- No

If we hold accomplice liable, then will go to extremes to make sure that the acts they order are done right, might be forcing higher crime rates.

To the extreme, if nothing happens, than anyone can blame anyone else for attempt and/or conspiracy all based on he said v. she said. Make up that people are accomplices.

**Exclusions / Limits on Liability** (otherwise liable is not because of legislative intent to exempt him or because he has a special defense). *Can use all same arguments w/ complicity and conspiracy.*

- Members of a protected class – i.e. if the statute is intended for a certain class then only for those it intends to target. (Ex. Sex statutes)
If can’t commit a crime against yourself, then can’t by reasoning of analogy be an * aider and abbetter* of that crime either.

Legislative intent – to protect the person in the statute (young girls from having sex). Not to protect young girls from themselves.

- Necessary parties not provided for – I.e. if a crime involves more than one participant but the statute only criminalizes / states liability for *one of them*, then it is presumed that the legislative intent was to immunize the other participant from liability as an accomplice. (Ex. Statutes making the sale of a particular good illegal; “shall not bribe a legislator” targeted for briber, not legislator).
- Withdrawal

**INCHOATE OFFENSES**

[Solicitation, attempt, and conspiracy]

Inchoate = offense committed prior to and in preparation for what may be a more serious offense. It is a complete offense in itself, even though the act to be done may not have been completed.

Inchoate offenses fit into the scheme of deterrence and the purpose of the criminal law by preventing horrible stuff before it happens and deterring people from helping perpetrators. This expands the scope of conduct that could be an offense and culpable. In order to make sure not abusing power there are limits such as minimum conduct requirements and culpability requirements and (some third requirement?).

Sources of argument to follow:

1. For complicity, should the State have to show that the accomplice was trying to *promote* the conduct of the perp, or is it enough that he had *knowledge*?
2. For attempt ####

**Conspiracy**

*When analyzing conspiracy think of danger to society.* Also look to see how many conspiracies were committed – different arguments for each conspiracy. Think about attempt when doing this too, same issue.

**Definition** = (Common law) A combination or agreement between two or more persons to accomplish some criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means.

- Every time you agree to do something it’s a different conspiracy

**Functions of the law of conspiracy:**

- Punish agreement in advance of action

By focusing on agreement, the law of conspiracy allows intervention and punishment at very early stage of misconduct, catch it before harm occurs.

- Ground for aggravating penalties
- Way to hold one person liable for the completed conduct of another
- Alternative to complicity
Conduct requirement: Agreement (however most states now require than an act in furtherance of the conspiracy be performed, any act will suffice even if just mere preparation, may be performed by any one of the conspirators).

- Low conduct requirement.
- Under common law no conduct was required
- Should agreement alone be basis for criminal punishment?
  - Yes

The act of agreeing is concrete and unambiguous. Purpose must be relatively firm before the commitment involved in agreement is assumed.

  - No

Conspiracy is overly broad criminal liability – the use of the independent crime of conspiracy to punish inchoate crimes turns out to be unnecessary in the face of attempt. The act of agreeing is a substantial step = attempt.

- Agreement is not always easy to show, some add on “any act in furtherance” of the agreement, is this a good thing?

Yes: distinguishes between locker room talk and serious intentions.

No: ordinary law abiding people don’t go around with other people agreeing to do bad things, if you do this you have identified yourself as a menace.

Mental requirement: (many issues here also relate to attempt) Actor must have at least the level of culpability required for the underlying crime. Just because inchoate offense of conspiracy, no reason to dilute MR. Only issue now is do you need higher culpability?

- Think of following intents (look for intent to enter agreement, and intent to achieve the objective).
  - Conduct – requirement of intent to agreement. Intent to agree can be inferred from conduct.

If you can show that you agreed to commit a crime, then it shows you had the intent to commit a crime.

  - Results – conspiracy requires an actual purpose to cause a proscribed result (thus if accidentally murder someone, not conspiracy to commit murder)
  - Circumstances – this is the only real issue, does conspiracy impose special MR requirements w/respect to the attendant circumstances? (ex. Steel a watch that you think is $100, really $200).

What is agreement, or rather the intent to agree?

A person who acts with the intent to facilitate a conspiracy may thereby become a member of the conspiracy. However, intent cannot be inferred from mere knowledge. Therefore, a merchant who sells a good in the ordinary course of business that he knows will be used to further a conspiracy does not thereby
join the conspiracy. On the other hand, a merchant may be held to have joined the conspiracy if the good sold is a specialty item that cannot easily be obtained elsewhere or if the merchant otherwise has a stake in the criminal venture (i.e. raising the price of goods).

- Is knowledge agreement?
  - Yes - knowledge is intent when (1) direct evidence that he intends to participate; (2) through inference that he intends to participate based on (a) special interest in the activity, or (b) aggravated nature of the crime itself.

If distributor of dangerous products then should exercise greater discrimination in conduct of business. Higher susceptibility of harmful and illegal use. Here can establish elements because (1) seller knows the intended use is illegal, (2) by sale he intends to further promote and cooperate in the act.

If inflated price then intent for seller to participate in the criminal enterprise may be inferred.

Also depends on if it’s a felony or a misdemeanor – different obligations and duties owed to society. If it is a felony the must be stamped out of society (then knowledge would establish intent), if just a misdemeanor the it would be outweighed by the disruption to everyday life brought about by amateur law enforcement (knowledge does not establish intent).

  - No

**Compared to attempt**

- In attempt cases the law requires there be a *substantial step* toward the commission of the crime. In conspiracy cases, at least at common law, the agreement itself is normally sufficient to constitute the crime. Hence, in common law conspiracy cases the law intervenes at an earlier stage than the planning of the crime. The reason for this is that the *secret activity is potentially more dangerous to society, and since a group is involved, it is more difficult for one person to stop the activity once the agreement has been made.*

While some conduct won’t suffice for attempt liability it will suffice for conspiracy liability because group work is more dangerous than if someone acted alone.

- Should the minimum conduct for conspiracy and attempt be the same?
- With impossibility, usually no defense for conspiracy even though it can at times be a defense for attempt.

**MPC (unilateral) v. Common law (bilateral – need two guilty minds)**

- Arguments for unilateral approach – D agreed w/another to commit the crime (regardless of whether the other shared in the commitment); it is not necessary to show an actual agreement between two or more persons. (ex. undercover agent).

Could be more dangerous to society, if other party isn’t acting because undercover agent then the dangerous party will be taking more substantial steps to get the job done.

- Arguments against unilateral approach
No true agreement or planning between two persons, no true meeting of the minds.

Not as dangerous to society – relying on another party who won’t do anything means the crime won’t come into being.

Reason why we have a conspiracy offense that is punishable apart from other crimes is that when conspirators act together it is especially dangerous. Groups activities are especially dangerous because lead to anti-social acts. Rationale for the crime being separate is destroyed.

- Special arguments should they arise:
  - Husband and wife when viewed at common law are one person.
  - Corporation and agent can be viewed as one person.
  - When need two or more people to commit crime (ex. Adultery) can argue either way here too.
  - Persons in the protected class can’t be guilty for conspiracy – see arguments for this above – legislative intent.

Defenses
- Withdrawal = No such thing in conspiracy, once agree then conspiracy is complete. MPC says maybe if go to police and thwart the occurrence of the crime.
- Impossibility = No defense

Pinkerton Rule

As long as the partnership continues, the partners act for each other in carrying it forward. An overt act of one is the overt act of all.

The Relation of Conspiracy to Complicity

Conspiracy functions as an alternative to complicity (complicity holds one person criminally responsible for the conduct of another; conspiracy imposes liability for the preliminary step of agreeing, may be responsible even though don’t commit the AR of the crime).

Attempt

Always ask if there has been enough conduct to justify criminal punishment in attempt cases. Can’t have attempt on its own, need attempt to commit… x, y, or z. Need to distinguish between punishable attempt and unpunishable preparation.

A criminal attempt is an act that, although done with the intention of committing a crime, falls short of completing the crime.

Minimum Conduct Requirements (assume perp already had the state of mind, not interested in whether it corroborates with the actors intention) – OVERT ACT
- D must have committed an act beyond mere preparation for the offense – converted “resolution into action.”
If there is *no other reason for the D’s action other than to go through with his attempt*, then can consider that an *overt act*.

- Traditional rule: proximity test (attempt only if come dangerously close to success)
- MPC: “substantial step”

**Culpability Requirements:** (Assume the D did the act) The defendant must have the intent to perform an act and obtain a result that, if achieved, would constitute a crime. (Requires *specific intent*).

Useful tool here might be comparing to someone who is *driving recklessly* and kills someone, or doesn’t kill someone. When forming attempt liability the legislature did not have the intent to turn all reckless endangerment into attempted homicide. **This is why courts have traditionally taken the position that when someone is interrupted in the course of conduct that seems to result in horrific outcomes (death), the prosecution will be burdened with showing more culpability than the statute really requires.**

- Issue: For an attempt should you have to show *any more culpability* about death than you would if you had a murderer?

Yes: Equally as threatening as if the actor had chosen death. Little difference in potential for future danger inherent in the two culpable mental states. If he was going to do something bad in the end then should be convicted, if not then don’t convict.

- Support for specific intent:

Attempt necessarily involves the notion of intended consequences – common language definition. The way attempt is always described is for an intended consequence.

Reason to punish an act is to prevent harm that is foreseen as likely to follow that act under the circumstances. Needs to be grounds for expecting that the act done will be followed by other acts that will effect harm. The importance of intent is not to show that the act was wicked, but to show it was likely to be followed by hurtful consequences. Those that are lucky (reckless guy shooting at light) are no less culpable and no less dangerous had a death actually occurred.

Need this to *prove* that the D was likely to engage in additional conduct that would complete the crime.

- Against specific intent

Actor is no more or less culpable. The law of attempts proceeds on premise that deterrent or social control functions of the criminal law require punishment of those who come close to the commission of a crim or who manifest the propensity to engage in criminal behavior.

Attempt to commit negligent crimes is logically impossible – a crime defined as the negligent production of a result cannot be attempted, because if there were an intent to cause such a result, the appropriate offense would be attempt to intentionally commit the crime rather than attempt to negligently cause the harm.
Same with recklessness, can’t *purposefully do something recklessly*.

Attempt to commit strict liability crimes requires intent

**Defenses to Liability for Attempt: Impossibility**
- Traditional classifications
  - Factual impossibility is *no defense* (includes impossibility due to attendant circumstances)
  - Legal impossibility is *a defense*.

The D does not threaten the interests that the law is designed to protect. In this case we are just extending the law to innocent behavior.

When think about this section think about what is *normal every day activity* (grabbing umbrella v. putting hand in peoples pockets).

**Subjective versus Objective approach to criminal attempts**
- Subjective
  - The D only deserves punishment if he actually intended the crime.
- Objective
  - The end of the criminal law is to protect public and social interests. Criminality should depend primarily on whether social or public interests are endangered. Should be based on the *degree of actual danger to society*.

Must punish attempts because if go unpunished then they will endanger societal interests by encouraging repetition on the part of the D and others. Danger lays in the future of similar acts.

## See Abbreviated Exam Question II at end of Attempts section

**Defenses to Liability for Attempt: Abandonment**

If the defendant has, with the required intent, gone beyond preparation, may she escape liability by abandoning her plans? The general rule is that abandonment is *never* a defense. The MPC approach is that *withdrawal will be a defense but only if*:
1. It is *fully voluntary* and not made because of difficulty completing the crim or because of an increased risk or apprehension.
2. It is *complete abandonment* of the plan made under circumstances manifesting a renunciation of criminal purpose, not just a decision to postpone committing it or to find another victim.

**HOMICIDE**

Common law murder came to encompass 4 different kinds of killings:
- Intended to kill or knew that death would result
- Intended to inflict GBH or knew that such harm would result
Actor manifested reckless indifference to death

Death occurred while the actor engaged in the commission of a felony.

These all became known as **malice aforethought**

Manslaughter was defined as homicide that was committed w/o malice aforethought, came to include 3 distinct types of killing:

- (Voluntary) Actor intended to kill but committed the offense in a sudden heat of passion.
- (Involuntary) The Actor engaged in reckless or negligent behavior.
- (Involuntary) Death occurred while the actor was engaged in the commission of an unlawful act not amounting to a felony.

* Most important aspect of early English Law was the development of separate offenses of murder and manslaughter. These grades are important for thinking about homicide now and which killings are most culpable.

Also in all these cases want to argue difference between **objective and subjective** when looking to calculation of the risk.

**Murder**

§ 10 MURDER

Causing the death of another human being (I) purposely, (ii) knowingly, or (iii) recklessly, under circumstances manifesting extreme indifference to the value of human life. When done with **premeditation and deliberation** or while perpetrating arson, kidnapping, rape, or robbery, murder is if of the first degree for which the maximum punishment is **death or life imprisonment** and a fine of $250,000. Otherwise murder is of the second degree, a Class A Felony.

**Distinguishing between 1st Degree and 2nd Degree murder**

- Premeditation and deliberation
  - How do you define these words?
    - Deliberate – the defendant made the decision to kill in a *cool and dispassionate manner*.
    - Premeditated – the defendant actually reflected on the idea of killing, if only for a very brief period.

Could look to common law to help define these words – “**malice aforethought.”** To determine if the killer is actually thinking about the kill before it occurs.

**Example with child abuse** – if have history of child abuse then maybe not **premeditated and deliberate** (thought of beforehand) because if have history of it then expect the child to live so you can beat again. If wanted to kill child before, then you could.

**Should they be defined together or separate?**
Good reason to try and give separate meanings, wouldn’t have them both in there if they weren’t significant. Legislature originally intended for the words to be read literally.

Reasons why the legislature would give them there dictionary meanings – so that the common man would know what they mean and would follow it.

- Should these words matter at all?

  - Generally differentiate between 1st and 2nd as purposeful killing

No – just as much cruelty is shown by sudden as well as premeditated murders. Furthermore, it does not reflect an intelligible policy for the grading of criminal behaviors because spontaneous killers could be more culpable than the actor who broods over his crime.

- 2nd would be “depraved indifference to human life” – that being the case need to argue about objective v. subjective – and what the level of risk is. ## Statute we have doesn’t tell us explicitly what 2nd is…

The difference between 2nd murder and Manslaughter:

**Manslaughter**

§ 11 MANSLAUGHTER(Class B felony)

A homicide which would otherwise be murder is manslaughter if it is committed in the heat of passion.

Where heat of passion has been commonly accepted:

1. Subjected to serious battery or a threat of deadly force
2. Discovering one’s spouse in bed w/another person

Where heat of passion has not been accepted: mere words.

**Negligent Homicide**

§ 12 NEGLIGENT HOMICIDE(Class C felony)

Causing another person’s death when the actor should have been aware of a substantial and unjustifiable risk that his conduct might result in death. This 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 circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

Distinguished from tort: Need more than just absence of due care. If take positive steps to reduce the risk then sign that you don’t have a disregard for human life. Requires greater deviation from the “reasonable person” standard than is required for civil liability.
Felony Murder

Definition: A killing – even an accidental one – committed during the course of a felony is murder. Malice is implied from the intent to commit the underlying felony.

What felonies are included? Statutes limit them, usually only to those that are inherently dangerous.

Limitations on Liability:
- Must be guilty for the underlying felony.
- Can be applied only where the underlying felony is independent from the killing.
- Foreseeability
  - Majority – death must be foreseeable result of the commission of the felony.
  - Courts have been willing to find most deaths foreseeable.
- During the termination of a felony – death must have been caused during the commission or attempted commission of the felony. Once reach “temporary place of safety” then subsequent death is not felony murder.
- Killing co-felon
  - Majority rule – not liable for felony murder
  - Redline view – liability for murder cannot be based upon the death of a co-felon from resistance by the victim or police pursuit.

Related Limits on Misdemeanor Manslaughter – usually limit to malum in se.

When reading for exam – distinguish those that the legislature says are inherently dangerous (in the first degree murder statute). Say that the others aren’t inherently dangerous. More likely death will follow from those enumerated, then other felonies.

Point of inherently dangerous for felonies – if it never dawned on an ordinary person that in addition to the felony someone might die, then the point of deterring people is pointless. This would be a fruitless effort by the legislature.

Problem: giving a warning to felon’s when committing their felonies. If you’re going to do it then be more cautious.

Causation

Model Penal Code § 2.03(a) (Causation)

(1) Conduct is the cause of a result when:

(a) it is an antecedent but for which the result in question would not have occurred; and

(b) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.
When purposefully or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the intent or the contemplation of the actor unless:

(a) the actual result differs from that designed or contemplated as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.

When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or

(b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the liability of the actor or on the gravity of his offense.

General requirements: When a crime is defined to require not merely conduct but also specified result of that conduct, the defendant’s conduct must be both cause in fact and the proximate cause.

- Cause in fact – “but for”
  - Common law requirement was “a year and a day” – the death of the victim must have occurred w/in one year and one day from the infliction of the injury or wound. If not in that time prosecuted, then can’t get for homicide.
  - Proximate cause – problems arise here only when the victims’ death occurs because of the defendants’ acts, but in a manner not intended or anticipated by the defendant.

Rules of causation
- Hastening an inevitable result = legal cause
- Simultaneous acts
- Preexisting conditions

Intervening acts – general rule will shield the D from liability if the act is a mere coincidence or is outside the foreseeable sphere of risk created by the D’s act.

- Act of nature
- Act by 3rd party
- Acts by the victim

Should these intervening acts relieve the perpetrator of liability?
- Yes
**Suggested method of Homicide Analysis for test**

1. Did the D have any of the states of mind sufficient to constitute malice aforethought?
2. If yes, is there proof of anything that will, under any applicable statute, raise the homicide to first degree murder?
3. If yes, is there evidence to reduce the killing to voluntary manslaughter (namely, heat of passion?)
4. If no, is there a sufficient basis for holding the crime to be involuntary manslaughter, criminal negligence or misdemeanor manslaughter?
5. Is there adequate causation between the defendant’s acts and the victim’s death? Did the victim die within a year and one day? Was the defendant the factual cause of the death? Is there anything to break the chain of proximate causation between the defendant’s act and the victims’ death?

When given a statute need to look at the words themselves and in the alternative to literal interpretation functionally see those words in the fact of what we are trying to accomplish and why we are making distinctions.

**Summary**

1. Provoked v. 1st. Murder = chances of getting caught are greater if just provoked, if think about it before larger chance you’ll get away with it.
2. Not all provocation suffices however – this would be enormous harm to law abiding people if all provoked people got lenient treatment. -- argue which should and should not get treatment.
3. Differentiating between negligent homicide, involuntary manslaughter, and negligent tort: inquire into culpability of the accused, look at what reasonable people would do (too big threat for tort system?), utility of the conduct (driving v. Russian roulette).
4. Causation [really still talking about negligence here] – really tough here, sometimes not using it for negligence at all. Lee thinks: Sometimes courts are implicitly asking the question that if people avoided conduct exhibited by the accused, would that have any impact on the odds that this terrible outcome would actually occur. If the court concludes that it would be undetectable, the courts would be more inclined to say we don’t have causation. On the other side, if the courts said yes – if people don’t act like the accused then we would have a lot dead people.
5. Felony murder works to relieve the prosecution that they had to show any culpability about death. Just need to show engaged in a felony.
6. Felony murder: Literally taken the felony murder doctrine would obliterate all distinctions of murder, manslaughter, etc (totally undermining the legislature’s distinct scheme about death). Not the way it works. What does “inherently dangerous” mean? Purpose is to make felons be careful when committing crimes. Lots of felonies where won’t impact (tax evasion) – if just make you more careful then nobody dies AND get more money – so we need to qualify our felonies. * Think about if you have accused in felon position, need to argue both sides.

**JUSTIFICATION AND EXCUSE**

**Justification**
Under certain circumstances, the commission of a proscribed act is viewed by society as justified and hence not appropriate for criminal punishments. It’s an exception to the prohibitions laid down by specific offenses.

Consider this as a balancing of the harms. Question of which harm is greater is a law question (running red light v. hitting and killing someone). Always catalogue the harms when looking at a justification question. Also look to see if the defendant could have done anything else.

Arguments against justification defense:

To allow the defense of justification to those who willingly and intentionally break the law would encourage criminality cloaked in the guise of conscience.

Asking that the court countenance civil disobedience: a form of law breaking employed to demonstrate injustice or unfairness of a particular law. But not in the tradition because the true conscientious objector refuses to obey the very law which he claims is unjust.

Don’t want people to take the law into their own hands and / or play GOD. This about the aggregation principle – namely even if seems like small harm in one situation (punch someone to get blood v. die w/o blood transfusion) need to see there is a lot more at stake. Set precedent that if you have something and someone else wants it, then it’s theirs unless you can fend them off.

Arguments for justification:

Obviously if you were to let the arguments run wild then it would be the end of the criminal law as we know it, but what we want to do is provide an incentive to do the right thing. If what you were doing is likely to accomplish the greater good then what you are doing is “ok.”

Arguments in favor of subjective approach of what is reasonable:

The Model Penal Code has language favorable to the subjective interpretation.

Would be unjust to penalize if don’t have requisite culpability.

Arguments against subjective approach and for objective approach:

If you exonerate individuals, no matter how bizarre their actions are, we will be allowing citizens to take the law into their own hands and set their own standards for the permissible use of force. We will be letting defendants kill with impunity.

Arguments for – people have different reactions to stress and susceptibility to panic, defeats the point of deterrence because don’t have community standard to which actors should conform. Reasonableness is meant to compel compliance with the law, however if you are attacked and have to react instant and instinctively, punishment does not provide utilitarian purpose. Can’t check validity of belief against standards.
NECESSITY

Conduct otherwise criminal is justifiable if, as a result of pressure from natural forces, the defendant reasonably believed that the conduct was necessary to avoid some harm to society that would exceed the harm caused by society. This is an *objective* test; a good faith belief in the *necessity* of one’s conduct is insufficient. Causing death of another is never justified to protect property, not available if the D is at fault in creating a situation which requires that she choose between two evils.

Could do the weighing of dead bodies analysis.

- Dudley and Stevens dilemma – even if you assume that 4 dead bodies is greater good than 1 dead body, it makes a difference because they are *deciding among themselves who is sacrificed.*
- Distinguished from *duress* – this involves natural forces, duress involves human forces

SELF DEFENSE – force perceived needs to appear reasonable (so people don’t take the law into their own hands)

- Nondeadly force

*Defense of killing to prevent rape, robbery, kidnapping:* To some people those events occurring are worse than death itself; comparable to a threat of the victims life. *Against killing to prevent other felonies* – not proportional.

- Deadly force – use if w/o fault, confronted by unlawful force, and threatened with *reasonable* imminent death or great bodily harm.

Think of the weighing of harms, although it is 1 dead body v. 1 dead body, there is a difference because society values non-killers above killers. So saving yourself is doing the greater good. [law abiding v. law breaking].

If recognize self defense in these situations then killers or offenders will be deterred from acting because know that people will not be inhibited from retaliating against them.

People are going to use self defense regardless of whether the law says it’s ok or no okay, so what is the point of using up expensive criminal sanctions on this?

- Retreat – preponderant rule is that the “failure to retreat is a circumstance to be considered with all the others in order to determine whether the D went farther than he was justified going.”

For retreat rule: Can’t articulate that you must retreat because nobody can foresee all the possible circumstances in which self defense must be raised. Could be anything – gets into a slippery slope – what about this persons characteristics that make retreat less likely, etc. Unfair and unequal standard of application.

** If argue about characteristics that should be taken into account then frame them in terms of the goal of justification to argue about them.
*** Use to help define the D’s perception of the risk.
Against retreat rule: People will kill when they could otherwise save a life – inadequate protection of human life. Life should trump all.

Preponderant rule: Leaves too much room for inconsistent legislation.

Castle exception – don’t have to retreat from your own home that is where you retreat to.

- Right of Aggressor to use Self Defense

DEFENSE OF OTHERS

**Common law argument**: Under the common law, every citizen was entitled to prevent any felony from being committed, regardless of whether he or she was the intended victim. Remnants of this are forcible sexual assault, kidnapping, or robbery.

**Against common law argument**: Things are different today: (1) many situations covered by the common law defense are not covered by separate privileges concerning defense of person, habitation, and property against unprovoked attack. (2) Penal law punishes as felonies a range of conduct far wider than the predatory conduct classified at common law. (3) At common law all felonies were punishable by death.

**Yes defense of others**: The defense of justification (pursuing the greater good) applies regardless of what culpability requirement the court chooses to require.

**No defense of others**: Don’t know anything about the attendant circumstances.

**It’s a trade off – what is better encouraging people to save others who are in danger OR discouraging people from meddling in affairs when they don’t know all the facts (and run the risk of harming a plain clothes police officer?)**

DEFENSE OF DWELLING

Allowed to defend w/deadly force to prevent entry into his home based on reasonable belief that such force was necessary to prevent robbery, burglary, arson, or felonious assault even if don’t fear death.

**Argument for defense of habitation**: Circumstances that arouse such fears usually arouse the same fears as death or serious injury. Citizens have a right to absolute safety w/in their homes.

Arguments related to the **objective approach of someone in the defendants position**, i.e. what characteristics of the accused should the just allow the jury to consider in a self defense claim? [See also ‘battered women’s below’):

- Whether experts are offering testable scientific hypothesis
- Problems that arise in letting jury take battered women’s syndrome into account:
  - Cutting off alternatives to women killing their husbands such as:
    - Leaving the relationship
    - Fight back during the battering
  - Leads women to conclusion that best time to defend themselves is when husband is most vulnerable (sleeping)
BATTERED WOMEN’S SYNDROME and SELF DEFENSE

Yes, evidence on battered women’s syndrome is relevant to the defendant’s self defense claim: Knows the beating pattern, could better enable her to predict when she was in serious threat / fear of death.

No, evidence on battered women’s syndrome is not relevant to the defendant’s self defense claim: Expands the scope of self defense beyond the bounds of lawful justification – classic strategy of “blaming the victim for his own demise.” Thus making the killing “justified” in the jurors minds, not because it was necessary that she respond with force, but rather because it was a fit of retribution for a bad guy, who got what he deserved.

On the imminence of harm:

Harm has to be imminent: If not, would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives testimony concerning their subjective speculation as to the probability of future assault. Homicidal self help.

Harm does not have to be imminent (kill him in his sleep).
  o Could be threat of attack in the future; lots of women don’t have the strength to fight back against the man at the time of the imminent harm. Know the pattern of violence.
  o Hostages / captors analogy – cultural knowledge will beat until they kill you.
  o Think of the principle of self defense – to protect against harm – doesn’t have to be imminent if know (through cycle) that it’s going to happen.

USE OF FORCE TO EFFECTUATE ARREST

If it’s a police officer
  ▪ Yes help

Citizens have a duty to help police officers in need of assistance. Good public policy.

If it were a citizen calling out – don’t want a societal policy where you go around assaulting people at will just because you think they are in trouble. But if it involves a police officer, then takes off the table who the person in the right is versus the person in the wrong is.

If you punish someone for helping a police officer (who says they are a cop, regardless of whether they actually are) then you are punishing people for relying on the police officers word.

  ▪ No don’t help

What if the person is lying, don’t have a duty to help if they are not really a police officer.

PUBLIC AUTHORITY

In favor of defense of criminal acts performed as public authority
Roots in common law – recognized that otherwise criminal acts were justifiable if performed in execution of the law and furtherance of justice.

For the president to specifically chart out the methods of employing the power each and every time he delegates power is absurd.

Against defense of criminal acts performed as public authority

Only if specifically invoked by the President – not any executive officer – otherwise intrusive surveillance and zealous officials would misuse the presidential prerogative.

In favor of reasonable belief that had authority

Need reasonable belief to take into account the uncertain scope of many official duties and obligations. Public officials that act w/ reasonable belief should not be treated as criminals if we expect our laws to be enforced w/vigor.

- Response to this: Public servant should be treated with even higher standard then would be expected from ordinary citizen, not lower standard.

Against reasonable belief that have authority

Encourages official abuses of power. Dilutes the power of the law to deal with criminal conduct on the part of federal officers. Use position of public trust as defense, violate that trust. Switches the focus from whether it was part of public duty to what the official reasonably believed.

Doesn’t serve the purpose of deterrence: If public official thinks that can take border line illegal activity and persuade jury he was reasonable about it then will not be deterred, can get away with anything.

What about if just foot soldier and just given orders?

Yes, reasonable reliance and thus NOT liable

(Public policy): Although this is a mistake of law, there are over-riding societal interests in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected for the furtherance of public order. If second guess then could be a nightmare.

No, liable still – reasonable reliance not good enough

ALI – who wrote model penal code – difference between police officer telling citizen to make an arrest or rather a case where society has no alternative means available to protect its interest short of imposing a duty to act w/o a correlative duty to inquire about the legality of the act. If no alternative means then would frustrate the effective functioning of the duly constituted police.

No compelling societal interest to be served in allowing private citizens to undertake extra-legal activities, acting simply on the word of a government official. Should have been a red flag.

Citizens take upon them the risk that their trust was misplaced.

Excuses
Some individuals can’t be fairly blamed for admittedly wrongful conduct. Also situational excuses – makes allowances for abnormal situations. Different from justification because here we have people pursuing the greater harm.

**PROVOCATION** – “sufficient to excite the passions of a reasonable man”

- Mitigating defense
- Can words provoke?

**For defendant: provocation stands**
  - Common law: assault + language is enough.
  - Provocation is a “concession to the frailty of human nature”

**Against defendant: provocation is not enough**
  - Common law: mere epithet or language is not sufficient provocation for the taking of a life. 
    But assault + language might be enough.

- Should the reasonable man standard apply?

**Provocation v. reasonable man standard**
  - Provocation written out
    - Reasonable man would not commit a felony
  - Reasonable man / objective standard
    - Need it to determine the mental state of the killer

- Should characteristics of the accused be taken into account?
  - Yes: Think of the purposes served by criminal punishment – must focus on whether person who kills in the heat of passion and if they are less deterrable than those that murder – less morally blameworthy, less deserving of the punishment imposed upon the murderer.
  - No: Substantial policy reasons → no social interaction is so placid as to be utterly devoid of interpersonal stress and friction. Would limit homicide to manslaughter upon any fancied slight so long as the perpetrator was sufficiently sensitive. Society has a strong interest in not allowing individuals to justify their acts by their own standard of conduct.

**FOR EXAM –**

1. Ask why the legislature would make a difference between provoked and unprovoked killings? (Deterrence, functions the legislature is supposed to serve). Why would you have a penalty if it won’t deter people to whom the penalty is aimed?

When arguing always try to justify the use of draconian sanctions. Since we don’t have a list of the appropriate provocations that are mitigating need to distinguish amongst the situations.

- Model Penal Code = “extreme emotional disturbance”

**OTHER crimes than provocation, pursuing the greater harm**, Duress as a Defense to Murder

One general argument – levy example – might be able to argue for the social welfare, asking individuals to do what the judges themselves won’t even do. Not a fair legal system, not legitimate.

**Argument No**
Common law rejected such a claim.

Line between murderer and accomplice is vague, sometimes accomplice is more culpable

Law has supreme importance of life – repugnant that the law should recognize in any individual circumstance, however extreme, the right to choose that one innocent person should be killed rather than another.

**Argument Yes**

Can’t hold people to standard the judges/lawmakers themselves wouldn’t be able to uphold

**Summary**: These defenses, if interpreted broadly, would erase all of the criminal law, thus they have severe limits.

- **Justification** – shares same idea behind whole of the criminal law, encourages people to do the greater good as opposed to the greater harm.
  - Look at clues legislature gives us about “greater good” versus “greater harm” – the right value choice is the legislatures value choice.
    - Some are tangible (# dead bodies), others intangible (liberty to conduct yourself the way you choose)
  - Harm to be avoided must be *imminent* – pursue other avenues before start committing crimes.
  - Inquire what the impact is down the road if hold one way or the other (see duty to retreat) – not mistake of values but a mistake about the situation, if threat to society then not work.
  - Defense of others – keeping with purpose of justification rationale, don’t want to deter people from helping others.
  - Power of the state we have a justification problem: if recognize excuse of aiding power of the state then makes easier for low level officials to carry out dirty deeds, but if don’t recognize the defense then more difficult for law enforcement officials to do what they are asked to do.

- Situational excuses – what characteristics of the accused should we take into account? Think of guy killing his own brother scenario (won’t do it again, but what about others that want to get rid of terminally ill relatives).

**INSANITY**

**Part B -- Insanity**

To establish a defense of insanity, the defendant must persuade the finder of fact by a preponderance of the evidence that, at the time that the defendant committed the offense, the defendant labored under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or if did know it, that he did not know that what he was doing was wrong.

Defense that exempts certain defendants because of the existence of an abnormal mental condition at the time of the crime. The various formulations differ significantly on what effects a mental illness must have had to entitle the defendant to an acquittal.

**Formulations of Insanity Defense**
1. **M’Naughten Rules** (cognitive = knowing)– a defendant is entitled to acquittal if the proof establishes that (a) a disease of the mind, (b) caused a defect of reason, (c) such that the defendant *lacked the ability at the time of his actions either to* (i) know the wrongfulness of his actions, or (ii) understand the nature and quality of his actions.

If the D suffered from delusions (false beliefs) – necessary to determine whether his actions would have been criminal if the facts had been as he believed them to be.

Example: A, because mentally ill, believes B wanted to kill him, so A kills B. Not entitled to acquittal, even if A’s delusion was true, he would not have been legally entitled to kill B.

A defendant is not entitled to an acquittal merely because he believes his acts are morally right, unless he has lost the capacity to recognize that they are regarded by society as wrong.

Under the traditional interpretation of the M’N rules, it is irrelevant that the defendant may have been unable to control himself and avoid committing the crime. Loss of control because of mental illness is no defense.

2. **Irresistible Impulse Test** (volitional = power of choosing)– a defendant is entitled to acquittal if the proof establishes that because of mental illness he was unable to control his actions or to conform his conduct to the law. This need not come upon the defendant suddenly, many jurisdictions apply this coupled with the M’N test above (thus entitled to acquittal if meet either test).

3. **Model Penal Code Test** (combination of the two above) – a defendant is entitled to acquittal if the proof shows that he suffered from a *mental disease or defect* and as a result *lacked substantial capacity* to either: (i) Appreciate the criminality (wrongfulness of his act), or (ii) conform his conduct to the requirements of law.

4. **Product test** (New Hampshire) – a defendant is entitled to an acquittal if the proof establishes that his crime was the “product of mental disease or defect.” A crime is a “product of” the disease if it would not have been committed *but for* the disease. *Broader than either the M’N or irresistible impulse tests – intended primarily to give psychiatrists greater liberty to testify on defendant’s mental condition.*

In looking at insanity, ask:

1. Do we believe account of feelings and thoughts at time of killing? Why or why not?
2. If accurately describing account above, then what should be the outcome of the insanity plea under each insanity test?
   1. M’N test (interpretation of *knowledge*).
      1. Need to prove she has a *mental disease*.
      2. Does it matter that a scientist labeled it? Creates a class of people and the psychiatrists know who to put in each class. We label people because it’s useful to use, not to those that are crazy. Need accredited scientist testify that it is documented disease.
Assume she has a mental disease (not end of story, if manifests itself in some ways then she is responsible, if manifest in other ways then not responsible), did she know or not know the nature of what she did?

- This of this in terms of the product test – distinguish it from this formula.
- Knowledge we are talking about – not just that killing is against the law, but what makes it possible for a civil human to resist murderous impulse, the unconscious identification w/the potential victim.
- Look at knowledge as defined by the Model Penal Code – uses the word “appreciate” instead of “know” – maybe indication of what kind of knowledge we are talking about. Not knowledge in the intellectual sense.

Even if you know what you’re doing, did you know it was wrong?

- Legal wrong v. moral wrong
  - Control test (not about knowledge, ask if you can stop yourself, more cerebral focus)

Function of the criminal law is to achieve optimal deterrence, conform behavior to that deemed correct by the legislature. Premise that there is a fundamental assumption on how humans operate – namely that they choose what they want to do. [Have to assume this, if don’t then every time legislature says something is “bad” the state is intervening in people’s lives, totalitarian societies]. The argument makes sense – that if we build criminal law on the assumption that people choose to do whatever they do, if we can identify some people w/ a tolerable error rate then they should not be held responsible like the rest of us. Big problem though is how do we do this? One way is through medical specialists – can identify those who choose and those that don’t. Those that have some expertise can step forward and help. If we use the medical model at all – we need to identify which forms of sanity ought to qualify for the law, and which shouldn’t.

Still need to show more than just crazy, this corresponds with the argument of having insanity defense in the first place. Are they crazy enough to know what they are doing is wrong? Goes with the rationale for the insanity defense:

- Wrong = for the criminal law it means stuff that the legislature says ahead of time you shouldn’t be doing. But that gets us into a bit of a problem implying M’N test because ordinarily not knowing that the legislature decided what you did is a crime is the fact that you know it. Truth in whole cliché that ignorance of the law is no excuse. If you’re nutty and that’s why you don’t know, then that might be different.
- Knowledge of nature and quality of act = One problem of reading it as an affective of knowledge is that it becomes a lot like the irresistible impulse test. All it means is that you had an impulse that was irresistible – so then you’re off on the other defense. Hard to distinguish these two. Volition and operation – not obvious what the difference is.

The irresistible impulse test brings us full circle back to where we started. When we read about the II test (pyro maniac, ect). The professionals focus on psychodynamics (problem w/childhood, etc). We are talking about a rather deterministic view of human conduct. What this person did was not a choice – but product of forces operating inside his person described by the mental professional. This could be the correct explanation. The assumption turns on its head because all psycho analysis turn on some kind of explanation.