Functions:

Criminal v. Civil:
- like civil, we want to shape folks' behavior and deter certain action
- can’t squeeze blood out of turnip: sometimes no damage about is high enough to deter
- what about folks with no assets, they can’t be deterred.
- In torts you won’t catch the bad guy with no one to sue them

Approach, assess:
Conduct
Culpability
Intent of legislature
Harshness of punishment
Consequences on the functions of criminal law
Parade of horribles if interpreted that way.
- consequences for this defendant
  o does this guy deserve to be in jail for 10 years
- consequences for others people down road.
  o Encourage shady behavior of part of defendants
  o Bring loads of folks into court
  o Interfere with ordinary law abiding behavior.
  o What is the effect of the ability of this law to be prosecuted in the future
  o Effect on other legislation (abortion law (if we say keeler killed a person), adoption law (if we say dad with no connection to son has duty))

THE CRIMINAL ACT

I. CONDUCT REQUIREMENT
A. We don’t punish folks for their thoughts, only conduct.
  1. Doe: creepy guy who is a pedophile and is banned from parks because he told his shrink he was having bad thoughts. Overturned – no conduct
B. Function: we want folks to go about their normal business without constant fear of criminal sanctions.
  1. All of us at some time have had criminal thoughts.
  2. conduct usually reflects something about the person (what kind of threat they pose), entering a park is harmless and something everybody does.
     Does not help you draw an inference about the person like when Lee steals a bag of dorritos.
C. Voluntary v. Involuntary
  1. How do you tag something as involuntary or voluntary conduct
     a. Martin: we know that is not because cops brought him out onto the street
     b. Decina: epileptic who kills kids in car accident (voluntary?)
2. Don’t simply label as voluntary or involuntary, analyze by look at the consequences of finding criminal liability, and do consequences comport with functions of criminal law. *(apply to Decina case)*

II. **PRINCIPLE OF LEGALITY**
   A. Forbids the retroactive definition of a crime matter, no how nasty a behavior is
      1. no concern of substance of specific offence, nor with which values we should enforce.
   B. **Purpose:** We want to keep law enforcement at some distance between them and ordinary law abiding people. It is a clear line, must be a statute.
      1. also, individuals have no time to comport their behavior to what is required
      2. don’t want law enforcement selling judge on what bad behavior is.
   C. **Con:** everyone should not what is right and wrong. Sometimes can find liability through common law precedent (but can’t be so broad to encompass other legislative acts)
   D. **Manley:** lady who makes false statements to police can not be held liable because not statute.

III. **VOID FOR VAGUENESS**
   A. About vagueness of whether a crime has been committed at all, don’t mind vagueness in determining grades, there you already know killing someone was bad (i.e. murder v. manslaughter). You have a lawyer then to help you
   B. **Argument:**
      1. Not enough notice for due process: A vague statute fails to provide notice of precisely what acts are forbidden and therefore violates due process. We don’t want to allow because vague statutes don’t put folks on notice for what is and is not criminal activity without assistant of lawyer.
         a. **Kolender:** Sherman Act is vague as well, but that is for business folks, and they have lawyers to provide notice.
      2. Vague standard fails to provide explicit standards for those who are enforcing them, thus allowing discrimination and arbitrary enforcement.
         a. **Papachristou:** two black men and two white women arrested for violating vagrancy law. Law is explicit in what is criminal conduct, but allows too much discretion in enforcement.
   C. **Anti-Argument:** (conscientious objector case) – you are given fair warning (read manuals telling him not to do x,y, and z), and you now your conduct is criminal, you should not be able to get off.
      1. can’t challenge a statute becomes someday it may be vague, has to be vague in your case (questionable)
      2. tolerable vagueness and demands of necessity: some statues are necessarily vague. *(something prohibits in excess of the number needed by a license)*
   D. **Test:** if statute and common law do not give fair warning of criminal liability, look at it closely. Might not matter if particular defendant thought act was criminal.

IV. **FAILURE TO ACT** *(distinguish moral duty and legal duty!!!)*
   A. **Rule:** A failure to act (an omission) can only be criminalized when the specific omission has been outlawed by statute or there is a legal duty.
1. **Billinglea:** Son wasn’t convicted of committing seriously body injury to an elderly person because the TX statute did not specify any statutory duty outlined to care for an elderly person; there was no positive duty outlined.

2. **Instan:** aunt dies of gangrene and neglect, find legal duty between niece and aunt. Lived with aunt and supported her.

**B. Argument against criminalizing:**
1. Citizens have the right to notice; they have the right to know what is illegal. Duties imposed by law must be clear.
2. We don’t want everyone responsible for everyone in their care or company, over criminalization
3. we don’t want the government dictating when I should help someone out

**C. How to:**
1. is there a legal duty? Statutory, implied by letting someone on your land, status relationship (mother and child), imposed by contract (lifeguard), voluntary assumption of care (if you take kid into your home)
2. if you have a legal duty and failed to act, omission must be direct cause of harm.

**V. INTERPRETATION OF CONDUCT ELEMENTS**

A. **Rule:** The constitutional guarantee of due process means that courts are bound to interpret statutes consistently over time.

B. **How to:**
1. identify prohibited act and see you your guy did it
2. if there is grey area, then argue for either a strict construction (notice, due process, etc) or a liberal construction (functions of criminal law) of legislative intent and statute. **Generally policy of court to construe statute as favorable to the defendant as the circumstances permit – i.e. strict construction (Sobiek)**
   a. Look to intent of the statute and common law history of statute
   b. Find a fair import of the words, with a view to effect its purpose and promote justice.
   ▪ **Keeler:** fucker who knees his wife in the stomach and aborts baby. Settled common law at the creation of the statute that “person” meant someone alive. (most likely decided on political bendings) Also, we are back to the issue of due process and fair notice than an act is criminal.
   ▪ But come on, this guy knew what he was doing was illegal.

C. **Purpose:** This ensures notice, i.e. that citizens know what to do (or not do) to stay on the right side of the law.
1. **Sobiek:** Common sense still comes in, people. guy held liable under grand theft statute even though he is a partner, because reasonable that he was given notice that this was bad conduct and partners were included

**VI. REVIEW of LIMITS (Mind your PVCs)**
A. **Principal of legality:** have a statute first
B. **Void for vagueness:** give us a clue as to what is okay or not
C. **Strict construction of penal statutes:** don’t trample legislative intent
D. Conduct requirement: some required
   1. Omissions: sticky situation need some limit
E. Mens rea/Culpability: apply to folks with a nasty mind and not accidental (see below)

THE CRIMINAL MIND

I. Foundations of Mens Rea
   A. Rule: Can’t be found guilty based on moral blameworthiness. Must show:
      1. he intended every crime, or
      2. it was an necessary consequence of some other felonious act; or
      3. was a probable result which the defendant should have foreseen.
         a. Faulkner: guy who burned ship down while stealing rum, no malicious intent to burn ship down.
         b. Cunningham: guy who asphyxiates neighbor when he steals gas meter, no requisite intent.
         c. Issue: should foreseeability of a crime be actual foreseeability or that of a reasonable man? (Holmes)
         d. Pro actual: Pay attention to the criminal thinking, that is what are are going after in criminal law. Not looking to punish stupidity. If goal is deterrence, then punishing folks for something they didn’t foresee will do no deterrence.
         e. Pro reasonable man: if you are worried about prevention of certain criminal conduct, then need reasonable man. Won’t everyone say I was too stupid? No deterrence if actual knowledge. What is used mostly
   B. Inferring Mens rea:
      1. Discuss why we don’t normally hold people criminally liable for negligence. Although some say read in recklessly that is not the law.
      2. look to see if any language in statute at all. If there is you can argue that it should apply to all of the material offense or some.
      3. If no language, make arguments for applying varying legs of mens rea to each element (conduct, circumstances and result)
         a. Look to placement (but grammar does not always matter)
         b. Look to legislative intent
         c. Look to harshness of sentence.
         d. look to functions of crim law and consequences of reading another way.
            ▪ Morissette: takes what he thought were abandoned casings, court said although no requirement in statute this was a common law crime where a general intent was required.
   C. Purpose: we want more than strict liability for all crimes, no longer want the vague sense of wickedness in general.
   D. Categories of Mens rea and Application to components of a statute
      1. Purpose: sense of conscious objective or desire, usually purpose about conduct, not usually the circumstances
2. **knowledge:** You act with knowledge if in regards to conduct and circumstance elements, you are aware the your conduct is of the nature described and you are aware that the circumstances exist, and if result element, you are aware that it is practically certain your conduct will lead to result.
   a. you can argue this many ways though, could be knowingly or “known or should have known”. So even words don’t tell you exactly. *Pereira*

3. **recklessness:** consciously disregard a substantial or unjustifiable risk. Gross deviation from the standard conduct of a law-abiding person in the actor’s situation
   a. **How to argue recklessness**
      - Was the guy aware of the risk?
      - Did he carry on his actions anyways, disregarding risk?
      - Would the reasonable person, in the actor’s situation have disregarded the risk and carried on with the conduct?
        o Best place for an argument. Quite vague, what is the actor’s situation?

4. **negligence:** you act negligently if you should have been aware of substantial and unjustifiable risk.
   a. v. recklessness: recklessness you have to have been aware, negligence is failure to perceive the risk in a situation where a reasonable person would have.

E. **General intent:** usually recklessness or negligence, actor liable even when he didn’t necessarily intend to bring about the result

F. **Specific intent:** must have specific objective or purpose, usually knowingly or purposefully.

II. **MISTAKE OF FACT**

A. **Rule:**
   1. **Specific intent:** if you experience an **honest mistake** that negates **specific intent** of the crime, then you can argue that as a defense.
   2. **general intent:** if you experience an **honest and reasonable** (good faith and due care) **mistake of fact** when accused of a general intent crime you can argue that as a defense
      a. defendant response: don’t have a criminal mind, you are punishing me without culpability, we agreed this was not going to be done.

B. **Walker:** takes the wrong grandkid, court says this was an honest and reasonable mistake

C. **Approach**
   1. what kind of mistake: make sure it is fact
   2. what kind of crime: specific or general?

D. **Notes**
   1. strict liability when it comes to issue of grading. Can’t say I stole jewelry that I thought was $50, not $10,000
   2. remember issue is not did he know, but should it matter?

III. **MISTAKE OF THE LAW**
A. **Rule:** Generally mistake of the law is never an excuse. Everyone is presumed to know the law, no matter how silly that is. This is true even when mistake is reasonable.

B. **Exceptions**

1. If the actor diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is legit, he is not on the hook (??)

2. Good to go if statute invalidated after you relied on it.

3. Official misstatement: if you reasonably rely upon an official statement.
   a. Must be official, your attorney can’t say so. Generally only applies to legislative bodies or the person who made the law.
      - We don’t want to allow folks to rely on anyone as an expert, no regulation of who the expert is.

4. May have some leniency if your mistake was how the law was interpreted
   a. *Long:* guy unsure about how bigamy law interpreted, knew that it was a criminal act. He made a mistake about the conflict of law law
   b. Recognizing his mistake still keeps the bigamy law in tact.

5. If statute has not been made reasonably available, you may have the defense

6. **Bottom line:** look at the impact of recognizing mistake on the functions of criminal law
   a. *Fox:* guy who didn’t know buying 100,000 tablets of ephedrine was illegal. Recognizing mistake virtually negates the law, not much law left to enforce
   b. *Bray:* fellow and prosecutor didn’t know he was classified as a felon and was carrying a handgun. Hard one, not good answer. He knew the law, just didn’t know he fit into it.
   c. *Long:* If you recognize Long’s excuse, still lots of bigamy law to enforce

7. **Ante exceptions:** but some say, we can not allow any excuse and must sacrifice one man for the good of society.

8. **Pro exceptions:** we want to encourage folks to listen to authority and do research. To be productive at some point have to rely on official judgment.

IV. **APPLICATION OF MENS REA STRUCTURE**

A. **Negligence about death:** should negligence about death suffice for conviction?

1. how do you distinguish from civil negligence? Require a criminal mind.

2. **Reasonable man:** if someone argues they did not have the requisite culpability, do you take their version or what a reasonable person would have thought
   a. **Pro:** don’t have to look at what is in a person’s head, accounts for some individual’s differences (in the actor’s situation)
   b. **Con:** specific man test gets it right more often and really find the nasty minds.
   c. *Smith:* guy who sped away from officer because he said he was scared, “I didn’t mean to hurt him.” So do you instruct that if he was reckless he can be convicted, or that it was reckless for a reasonable man to do what he did?
3. **Note on intoxication:** not going to cut it for not having requisite culpability. If so, everyone would get wasted before they commit a crime. Point of crime law is to deter, this would encourage.
   a. Intoxication as excuse for conscious disregard: how can courts figure out if intoxication lowered person’s ability to perceive risk
   b. Intoxication as excuse for purposeful endangerment: easier for courts to determine this. Sometimes allow this.
      ▪ Remember intoxication never excuse for a crime, we are talking here about intoxication to determine culpability levels. (but isn’t that the same really?)

B. **Strict Liability and Regulatory offenses**
   1. responsible relation standard: *(Park)* Individual held responsible for the company’s acts if you had responsible relationship to the act or omission in question. No need to show mens rea, just relationship.
      a. *Parks:* CEO on the hook for rat poop
      b. *Dotterwich:* President responsible for misbranded drugs
      c. *Con:* overbroad, individuals who have no real connection to the conduct are held criminally liable. Where do you stop? Is a CEO really in the best position to prevent?

C. **Strict liability and other crimes**
   1. Public safety: When public safety at risk, you may wave mens rea.
      a. *Freed:* was I supposed to register my hand grenades? Ummm, yes, you are buying a dangerous, strict liability because this is a public welfare issue
      b. *Morissette:* freed extends this too much, strict liability is reserved to the narrow issues discussed above of health concerns and regulatory offenses.

**INCHOATE OFFENSES**

Back to purpose, we put folks in jail for certain conduct that has two characteristics (1) probability of large losses and probability of apprehending the evil doers.

Inchoate offense fit into the picture by intervening before the nasty stuff happens. Easy to justify why we want it, but hard to justify this huge expansion. We need serious limits on use of criminal sanctions here.

**Limits:**
- minimum conduct requirements
- culpability requirements
- limits on substantive offenses that we are concerned with (con. and com)

Minimum conduct: We attach labels of preparation and attempt.

I. **ATTEMPT:** Must show conduct and mens rea
   A. *Defo:* encompasses conduct preliminary to completion of the crime committed.
1. Obviously when a bad result is about to take place and a good guy shows up in time to stop, that should satisfy the requirements. But not that eas.
2. *rationale:* about finding the goldilocks place of punishment and deterrence, too much everyone on the hook, too little criminal individuals go free.

**B. Minimum conduct:** On test looking for ambiguous conduct, is it definite enough? May have completed conduct, but it ambiguous in nature, can argue if it is enough.

1. this is one way to limit criminal sanctions, culpability and intent are not enough, need an overt act.
2. 6 tests to determine if conduct is enough: mainly argue first three.
   a. *Physical proximity test:* Do acts come so near the commission of the crime that there was a reasonable likelihood of its accomplishment but for the interference of the police. focuses on what remains to be done, and the actors separation (time, distance necessary steps) from the crime.
      ▪ Example: *Rizzo* case of guys who plan to rob victim, don’t find the victim but grab attention of police
      ▪ Rationale: you can’t convict a guy of attempted robbery if he is driving around with a crow bar (too wide a net), nor can you get someone for attempted murder if he has a gun but no body.
   b. *Converted resolution into action?*
   c. *MPC:* substantial step strongly corroborative of the actor’s purpose
      ▪ Broadens liability from proximity test.
      ▪ Focuses on what has been done
      ▪ How long does a police officer have to wait to watch a crime happen? If purpose of attempt is to prevent crimes, earlier you get them less likely the crime will occur.
   d. *Dangerous proximity test:* gravity of harm threatened, degree of apprehension arouse, probability that conduct would result in intended offense.
   e. Rationale: punish dangerous conduct *Last proximate act doctrine:* only acts immediately connected to the commission are attempts.
      ▪ very strict test, most jurisdiction use easier test.
      ▪ Example: you shoot a victim and miss
      ▪ Pro defendant: unequivocal, ambiguous acts are what folks do every day, i.e. enter a building too look around v. enter a building to steal something.
   f. *Res Ipsa Loquitur:* criminal attempt is an act that shows criminal intent on the face of it.
      ▪ Rationale: someone who posses a resolute commitment to commit a crime poses a threat to the social order and may be properly subject to punishment.
         ▪ Pro: objective of crim law served by focusing on propensity to criminal behavior rather than solely on the dangerousness of the conduct.
Con: over prediction of dangerousness, how do you separate those who are truly intent and those who will not complete. Does any conduct truly speak for itself?

C. Culpability: does the prosecution have to show more culpability about the result than conviction under the crime. Discuss three standards below.

1. If defense: must show some culpability beyond that required for the completed offense
   a. Or MPC: must show purpose for conduct and result, and what ever is required in statute for circumstance element (same as that for a completed offense)
   b. Rationale: extra required because we don’t want to over convict. We endanger folks every day, do not want to criminalize this. Only want to convict those with extra culpability.
      ▪ In interruption cases, easy why we require extra culpability. We are concerned with what happens next.
      ▪ Cases where crime has already been committed, but result did not happen. So get them on attempt. Harder to rationalize, look to legislative intent and public policy
      ▪ In completed homicide there is a body, so intent is clear. No dead body in attempt so intent not clear and need to up the ante on culpability requirements.

2. if prosecution: if state does not have to show specific intent for completed crime, then don’t have to for attempt crime
   a. Rationale: we are not going to reward the criminal for bad conduct that was interrupted or did not come to fruition.
      ▪ Don’t want folks who can retroactively inject a legit purpose to get off.
      ▪ Defendant answer: we need a way to limit attempt liability.
   b. Anti prosecution stance: lantern shooter, most homicide statutes have a recklessness standard. if you hold him liable for gravely endangering another and knowing the risk, people who drive do this everyday. Legislature did not intend to make us all attempted murderers. So here up the ante of culpability requirement to purpose or knowledge and not recklessness.
      ▪ If not, then put us all in jail for driving.

3. Shouldn’t be able to get folks for attempt of reckless or negligent crimes.

How can you attempt to do something negligently?

D. Impossibility

   a. legal: had you completed the act, it would not be illegal. Jaffe case where on a sting he buys something that is not stolen (can’t be on the hook for buying stolen goods for something that was not stolen)
   b. factual: if completed, it would have been illegal. i.e. picking an empty pocket. If pick pocket finished what he attempted, it would have been illegal.
c. Generally, folks on the hook for factual impossibilities, but not legal one.
   - Rationale: Relates back to principle of legality, we don’t want to punish someone for something that is not in fact illegal, regardless of what they thought. Not going to punish mere thoughts.
   - Counter: isn’t Jaffe a danger to society regardless?
   - Pro-rule counter to that: we are setting a dangerous precedent for convicting based on what the criminal thought. Hey crazy’s could think they are committing crimes that they are not.

2. **MPC**: Prosecution prefers. eliminates legal/factual distinction. Judge based on how actor viewed the circumstances. If actor thinks the crime would have been so under the circumstances he believes, then convict whether or not those circumstances were so.
   a. Rationale: person has shown he is a danger to society, regardless if the conduct was actually impossible.

3. **reasonable man**: Middle ground. If from the viewpoint of a reasonable man, the desired criminal consequence could not be expected to result from the defendant’s acts, you are off the hook. (still need to prove intent and commission of an act to get him)
   a. rationale: does not endanger society to let this guy go.

4. Just need to argue one of these tests for pro defendant or pro prosecution.

E. **Abandonment**
   1. if required conduct and mens rea, voluntary abandonment can be an affirmative defense. Burden on def to show he did voluntary abandon the crime. Involuntary is not.
   2. **Prosecutor**: apply rule of completed criminal offense. If you have the requisite mens rea and conduct, you have already committed a crime and can not abandon. You abandon the crime of burglary not attempted burglary, can’t abandoned a real crime.
      a. Also argue this was not a voluntary renunciation of the crime
      b. We can’t trust folks to change their minds, need to get them before they commit the crime.
   - Defense: we are not allowing folks to change their minds.

3. **Defense**: defendant has shown that he does not have the requisite mens rea by abandoning the crime. If he intended to commit the crime, he would have. Strong argument of you don’t know what the defendants intent was. Abandonment casts doubt on a firm conviction to commit the act in question. Key defense though is voluntary!

F. **How to approach**
   1. Conduct: 6 tests, is conduct enough?
      a. Does this conduct look like something someone does on a normal day?
   2. Culpability: argue three approaches, general or specific intent
      a. Abandonment as showing lack of culpability
   3. Impossibility
II. **COMPLICITY**

A. **Defo:** someone who aides, abetted, encouraged, helped, or advised a second person in a commission of a crime.

1. **Rationale:** someone who helps a person commit a crime is just as dangerous to society as the criminal himself.
2. **Restrict:** not much action, no clear

B. Maybe more conduct here that conspiracy. Conspiracy is about the agreement only.

C. **Minimum conduct:** how much conduct must you engage in in order to be convicted as an accomplice?

1. issues same as attempt.
2. **failure to act:** is standing by and doing nothing in a criminal situation encouraging a crime?
   a. Defense: Limit criminal sanctions for failure to act where someone already has a duty to act imposed by law (i.e. the father). That might include the dad… but now we have another problem.
   b. Prosecution:

D. **Culpability:**

1. **Three standards – can apply to conspiracy as well**
   a. Prosecution: *knowing assistance to another’s criminal conduct, even if accomplice has no stake in the venture?* (prosecution)
      - But where do you stop, particularly with seller’s of goods.
        o Gun seller if he knows gun is going to be used for murder?
        o Shnucks clerk if she knows baking soda and vinegar can be used for bomb
        o You can maybe make a distinction of vendors of dangerous goods v. vendors of ordinary goods.
        o Anti: do we want every clerk to ask what you are going to with the goods.
        o Imposing a way to big a duty on the average joe, how do you know when to intervene, what if he was planning to p
   b. Defense: *Intent to promote commission of the offense*
      - Anti: you let a lot of nasty folks off with this but don’t over-deter
      - Pro: is person has vested interest going to see to it that it happens, shown a criminal mind.
      - Could say with misdemeanor need knowledge, with felony only need purpose.
   c. Compromise (MPC): *person liable if act with knowledge of crime and knowingly substantially facilitated its commission.* Word “substantially” strikes a balance between the above issue.
   d. Pinkerton rule: *Liability extends to the accomplice for natural and probable consequences of acts the accomplice meant to aid or encourage?*
• Usually occurs when principle commits come violent act that the accomplice did not expressly endorse. Decisive factor: did accomplice know principal was armed?
• Defense: end of the transaction is the end of your culpability for it. You are not permanently linked.

2. Be sure to apply these to conduct, circumstance and result elements of the crime. Worse the crime less cul
   a. Conduct: knowledge v. stake in venture
   b. Results: intent to promote v. knowing assistance
   c. Circumstances: knowledge v. culpability required of the principal

3. Third party liability
   a. Defense: Peoni court tells us it is not enough that the third man perpetrated the crime, you have to show that defendant wanted the third man to do it. Peoni court says you have to have purpose.
      • End of transaction end of culpability
      • Have to have true purpose
   b. Prosecution: if you have requirement of knowledge

4. Principal Guilt, 2 approaches
   a. Prosecution: Look to principal and see if actus reus exists. If it does, accomplice can be convicted according to his own mens rea, regardless of the primary actor’s mens rea or lack of it.
      • Rationale: someone with intent to commit a crime, even if principal not convicted, combined with the acts which amount to aiding and abetting are dangerous to society.
        o If principal not convicted how can the accomplice be liable, aren’t we punishing for state of mind
   b. Defense: even though the principal was not convicted, we need to show that the crime actually was committed, accomplice not guilty unless you prove the principal committed the crime.
      • Rationale: good balance, were we actually have a crime committed so we are getting the accomplice for some real danger to society
        o Aren’t we allowing someone to go free who has shown lots of danger

5. Limits
   a. Implied exemption: if you are the victim of the crime you can’t be an accomplice
      • Tyrrell: reasoning of legislature in passing the statute was to protect the girls, not to put them in jail!
   b. Abandoning or withdrawing: higher standard than that of attempt. Require you deprive your complicit acts of their effectiveness and give timely warning to authorities or other efforts to prevent commission of the crime
      • Rationale: if it attempt, it is just you abandoning the act, but in complicity when you abandon there is still at least one other person who may be carrying out the crime.
III. CONSPIRACY

A. Definition: agreement between two or more people with an intent to achieve a criminal objective

B. Minimum conduct:
   1. Prosecution: (and overwhelming majority) To protect ourselves, we reduce the minimum conduct requirements. Only need agreement and act in furtherance.
      a. not the same as substantial step, different function. This serves to distinguish locker room talk from nasty people.
      ▪ But act in furtherance should be something more than conduct we do every day (like buy nylons)
      b. stress on minimum conduct requirements because we only require act in furtherance. Why?
         ▪ Ordinary law abiding folks don’t agree to do nasty thing. If you do, you identify yourself as a menace
         ▪ People are more dangerous in groups, more likelihood the crime is carried out.
   2. Defense: need an overt act.

C. Agreement: How do you prove an agreement? Can be express or implied, but this is an area for argument.

D. Bilateral or unilateral agreement needed?
   1. Defense: (bilateral) yes, if everyone is not in on the crime then no dangerous group. Like a contract, can’t be an agreement unless both parties know what they are agreeing to.
      a. Rationale: we hold folks liable in conspiracy because people are more likely to commit a crime when two or more folks agree to it, function not served by unilateral view.
   2. Prosecution: party has conspired when he believes the other party was with him, even if that other party never intended to carry though with the conspiracy.
      a. Rationale: first persons intentions are dangerous and that is not decreased by second persons secret intention not to follow.

E. Mens Rea:
   1. intent to agree: usually covered by the actual agreement itself.
   2. intent to commit underlying substantive offense: break down into elements of the crime.
      a. Conduct: requires that you show the conspirator purpose the conduct. But if you can show agreement you can generally show this
      b. Result: requires actual purpose to cause a proscribed result.
         ▪ If you and your buddy steal cars and race them through town, and your buddy hits someone, if no one killed, you can’t be on the hook for conspiracy to commit homicide. No purpose to do that.
      c. Circumstances: split on authority here.
         ▪ Require conspirators to be aware of the attendant circumstances even when completed offense law does not require
· Same culpability requirements as underlying offense.
  o i.e. stolen watch scenario. You conspire to steal a watch you think is worth $500, but really worth $10,000. Conspire for grand theft or larceny?

F. Impossibility
  1. Defense: this is an excuse, can’t be convicted of conspiracy of an unlawful crime that does not exist, destroys function of criminal law. i.e. not a crime to rape a dead girl.
  2. Prosecution: no excuse. You carried out an overt act in furtherance of an agreement, and that is a danger to society regardless of actual possibility.
     a. i.e. you committed a conspiracy to commit rape, fact that she was dead unbeknownst to you is unimportant.

G. Withdrawal/Abandonment
  1. defense: you should be allowed renunciation in the same way you are allowed for complicity. (encourage folks to abandon)
  2. Prosecution: once you reach an agreement to commit a crime, you have committed conspiracy. The danger is the group mentality, if you already have that, not going to let you off.

HOMICIDE

I. MURDER
  A. Definition: intentional killings, killings in which the D intentionally inflicts serious bodily harm, killings resulting from outrageously reckless conduct (depraved indifference), felony murder.
  B. First degree v. second degree: on tests interpret distinctions functionally. first degree is premeditated and deliberated (what the heck does this mean?)
     1. deliberation: defendant acts in a cool state of mind.
        a. mere repetition may not indicate deliberation or premeditation
     2. Premeditation: design to kill. real problem lies in ascertaining how much before hand thought must have been formulated.

II. MANSLAUGHTER
  A. Definition: killing in the heat of passion, certain killings perpetrated in defense of one’s person (not subject to self defense), killings caused by recklessness or gross negligence, misdemeanor killings.
  B. Voluntary v. involuntary: Difference between voluntary ms and murder is provocation. Involuntary usually covers smaller time recklessness and gross negligence (hard line to draw here between homicide and a tort)

III. ISSUES:
  A. Law of provocation (see situational excuse)
  B. Murder v. voluntary manslaughter:
     1. Prosecution: no necessary correlation between premeditation and the need for a relatively sever penalty. Person who kills at the spur of the moment is just as dangerous to society.
     2. Defense:
        a. we have this distinction because one of the functions of crim law is to get the bad guys who would have gotten away. Folks who
premeditate are more likely to get away with it than those who fly off the handle
b. could argue that folks who are provoked have less probability to cause enormous harm… have not had time to plan it.
c. Unique situation, I am on inherently dangerous. In any other situation, I would not have done this. Not a danger to society. I am not more dangerous because I killed in heat of passion

C. Murder v. involuntary manslaughter v. tort
1. How do you know what amount of negligence counts for each? 
   a. Is the person doing the act a much bigger threat than other negligent killers? Farmer joe on his tractor v. wicked niece who lets her aunt rot upstairs.
   b. Ask the reasonable man test, how would they have assessed the risk? We are not going to bring criminal punishment on those that couldn’t assess the risk any better than a reasonable man
   c. Maybe for murder you create a culpability requirement of realizing the big risk you are creating.
   d. Or take into account the utility of someone’s conduct (killing in the course of driving a car v. game of Russian roulette)

D. Causation
   (need to go through hypos, anorexic, drunk driver)
1. is the manner of death sufficiently related to D’s conduct that the death can be fairly attributed to him. For the defendant, trick is to make negligence look like a causation issues.
   a. Must show “but for cause” but not sufficient
      ▪ Suppose you shoot at someone, miss and then running from you he is killed by a bus. You are but for cause, but should you be on the hook?
   b. Is it justifiable to hold this D liable for the death?
      ▪ Prosecution: when D intend to cause death should be on the hook unless a clear break in chain of causation. They have a wicked mind and have acted upon it.
         ▪ Anorexic: must have higher standards for parenting. Can’t just say the kid didn’t want to eat, kids don’t want to do lots of things. His negligence was the but for cause.
      ▪ Defendant: argue independent intervening causes. Volitional acts on part of victim should not get me. Policy arguments?
         ▪ My conduct did not cause the death. So what are you punishing me for? Can’t punish for mind alone.
         ▪ Don’t punish me for others careless acts, not what crim law about.
         ▪ D like to frame negligent deaths as no causation.
      ▪ Neutral: (unintended) Foreseeability (particularly in unintentional deaths)
         ▪ Because function of criminal law is to punish and not compensate, don’t want to hold a defendant liable for a
death that is unintended and no foreseeable. What are you punishing?

E. Felony Murder
1. Somehow in the course of a felony, someone dies. Prosecutor charges D for felony and the murder is tacked on if D is found guilty of felony. Relieves the prosecutor of showing any culpability about death, (i.e strict liability crime). So need lots of limits
2. Generally applied when: (1) defendant commits a dangerous felonies that the defendant intended to commit.
   a. If no limits it obliterates all distinctions above. Legislature did not go through process of creating distinctions to wipe them out.
3. **Approaches:**
   a. Use felony murder to deter folks from committing felonies.
      Deterrent function won’t have effect on felonies where death is not likely, so require felony to be inherently dangerous.
      - Define inherently dangerous as which felony would the doctrine deter.
      - You tell someone about to commit tax evasion that he could be on the hook for murder if someone dies in course of evasion. He won’t be deterred from evading taxes.
      - Only those felons that have the potential for death should qualify.
   b. Use felony murder to make felons more careful when committing the felony.
      - If this is function, suggest we ought to look into the circumstances in which he did the bad stuff, could he have done it more careful?
   c. Device for economizing prosecutorial resources.
      - Prosecution must show that felony is of the nature that the chances are overwhelming that the felon at least was aware of substantial risk of death.
      - we save a lot of time and money but just saying if the someone commits an armed robbery and sticks a gun in someone’s face, that alone tells us that the robber has all the culpability about death we ought to require for a murder conviction.
4. **Merger doctrine:** D wants this. If not, scheme of degrees of murder is ruined. I.e. in assault and battery, elements to prove this merge into the elements to prove homicide.
   a. If not, then every murder is felony murder. Never have to show murder, always show lesser offense of assault, or armed robbery. All murder involves some felony.

**JUSTIFICATION**

Defendant is saying, I was pursuing the greater good. We don’t look to the D to tell us what the greater good is, it is a legislative function, but rarely have a legislative directive. Usually falls on the judge to determine.
involves the judge (and us) to weigh the scales of justice – saving a fetus about to be aborted versus destruction of property, etc…

Alleged greater harm must be imminent, if you have options, must take them: we do this because we don’t want judges making value judgments.

I. MISTAKE
   A. What if you make a mistake about what the law will say is the greater good?
   B. What if you make a mistake about a fact in the situation?
      1. Defendant: justification is about what you were trying to accomplish, not what you did. No culpability.
      2. Prosecution: you committed a crime that pursued the greater harm.

II. SELF DEFENSE
    A. Requirements: Harm imminent, response proportional
       1. subjective, objective, or reasonable man in his shoes standard?? Generally if you are unreasonably sensitive, not going to work, use a broad reasonable man standard
          a. but allow some characteristics in, just which ones?
       B. Require to retreat – but never have to retreat if in your home, victim of rape or robbery or a police officer
       C. Anti-self defense: not pursuing greater good, still one dead body.
       D. Pro-self defense if you recognize self defense as an excuse, attackers be more careful? If you don’t recognize, not really going to deter folks. They act on impulse in self defense. Going to protect your life no matter what.
          a. I am not inherently dangerous, but was in this situation and protected by life.
    E. Mistake: same old issues
    F. Expert testimony: what do you let in and what not about psychology (i.e. BWS, insanity) Where do you stop? What is scientific? Etc…

III. DEFENSE OF OTHERS
    A. Pro: should predicate justification on actor’s belief
       1. encourage good Samaritans
       2. crim law concerned with acts against society… this was not one.
       3. police not always around to help, want to encourage folks to intervene.
    B. Con:
       1. rights of person protecting stranger no greater than the rights of the person you are protecting.
       2. interfering with someone/meddling
       3. easy excuse to give: I was pursuing the greater good, need real strict limits on it.
       4. promotes chaos, and vigilantly justice
       5. Protecting police officers more compelling than protecting the innocent bystander who attacks at a whim

IV. PUBLIC AUTHORITY:
    A. Pro:
       1. encourage folks to follow public authority
2. if you reasonably believe that it is legit, should get off.

B. **Con:**
   1. Can’t blindly follow orders and commit a criminal offense.
   2. responsibility to research, raise red flags, etc…. You are willingly committing a crime and needs some responsibility.

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**SITUATIONAL EXCUSE**

I did the greater harm, but I was really in a bind. Why do we offer excuses? The defendant as evidenced a situation in which the purpose of the criminal law system would not be served by conviction of the defendant.

I. **Provocation and murder**
   A. **Issue:** which provocations out to suffice to reduce murder to manslaughter?
      1. we say something sufficient to excite the passions of a reasonable man
         a. but this tells us nothing more than there is some limit on which provocations suffice and which don’t.
         b. but how do you apply a reasonable man standard, reasonable men don’t kill.
      2. MPC gets rid of provocation standard to broaden the defense and says murder can be reduced to ms when killing is done in result of an extreme emotional disturbance for which there is a reasonable basis.
         a. Captures both and objective and subjective test.
         b. Anti: sky is the limit, huh? Where do you stop?
   B. **characteristics:** what circumstances personal to the defendant are permitted to the jury?
      1. **Totally objective:** we are all sensitive in some way and confronted by stressful situations. Society has a strong interests in deterring violent conduct by not allowing allows individuals to use this excuse - defeats deterrent effect of a homicide statute. No subjective characteristics
         a. Subjective and MPC approach are too permissive and don’t protect human life
      2. **Subjective approach:** criminal law is about measuring moral blameworthiness and punishing proportionally. We should measure each individuals moral blameworthiness, not hold him to a standard he can not attain.
         a. If we are in a situation where the actor would never kill except this unique situation, and then don’t normally have a propensity to kill, it id es not make sense to use the same draconian punishment as another intentional killing, it is not worth the cost
            ▪ Only upside to criminal law is deterrence, and not possibility of deterrence here. .
         b. con: If you allow a totally subjective approach you suddenly means only what a defense attorney says a reasonable defendant means.
            ▪ Response: put some limits, so every day occurrences don’t count as provocation.
   C. **Cooling time:**
1. **pro**: still extreme emotional disturbance, would not have killed otherwise
2. **con**: as a society if folks have time to cool off we want them to seek out other options.

II. **DURESS**
   A. **Anti**: at the moment when the temptation to crime is strongest we want the law to speak most clearly that you are not permitted to do it. If we allow duress we open the door to collusion and encouragement of criminal activity.
      1. no doubt less moral blameworthiness, so allow this at the sentencing phase
      2. folks will do lots of nasty things with little duress (Milgram) so want to limit this excuse.
      3. to limit we could say must be imminent threat of death or serious bodily harm
   B. **Pro**: crimes are about folks choosing to commit a crime. If there are external constraints governing that choice want to take them into consideration.
      1. folks don’t always have the capacity to choose even when not under duress (Milgram) cut them some slack
   C. **Notes**
      1. we allow third party duress (duressor threatening someone else and you do the crime)
      2. if you participate in a crime or put yourself in a shady situation, prob not going to allow.
      3. murder: courts say no duress in murder (why is your life any more valuable) but others say maybe as an accomplice.
      4. possible test: what would a reasonable man do under the circumstances

III. **NECESSITY**
   A. We may allow when you are not evaluating the value of one life over the other.
   B. Same reason as self defense, only under these circumstances would they have killed.

**INSANITY (as an excuse)**

**Intro**: That is really different from saying you didn’t have the requisite culpability for the outcome.
   - i.e. someone who kills another person does so on purpose, but they are acquitted on the grounds of insanity.
   - Strange idea, not same as culpability.

**Criminal Function**: No getting around function of criminal law in our society if you are going to discuss insanity.
   - Goal: achieve goldilocks amount of optimal deterrence (not too little not too much). Do this through draconian punishment. Reflects fundamental assumption that human beings choose to do what they do. If you grant that, then it makes sense to use this system for determent. If it is false, you wonder what are we doing here
If deterrence is a goal, then punishing her if she didn’t know what was she was doing or choose it, there will be no deterrent effect

- Why don’t we assume the opposite, that choice is not a factor?
  - then every occasion when an outcome occurs that is bad, that becomes an occasion for intervention for the state
  - If otherwise, only time you use the system is when people choose to do something bad.

- Might there be people that are so different from the rest of us that we are confident that they are not so choosing? If we could identify them with only a tolerable number of errors, perhaps we should treat them differently than those folks how are choosing.
  - Yes, assign criminal responsibility and use lack of choice at disposition stage
  - Yes, we should relieve them of criminal responsibility (what we do today)

**Issue 1:** how do we distinguish those that should be held responsible and those not?
- Medical folks have testified that they can identify those folks to us. And linguistically that is an appealing notion. Not responsible defense as the insanity defense. And sanity happens to be a label familiar to mental health professionals.
- As lawyers though, need to recognize that we use insanity different from mental health professionals. Not all medically insane people qualify for the not responsible ruling. Somehow we have to develop mechanisms for identifying which forms of insanity ought to qualify for this not responsible defense (extremely difficult task).

**Issue 2:** Must the defendant show anything more than that they are insane?
- Traditional answer is, yes you sure do. The additional stuff corresponds to the argument for having a insanity defense in the first place.
- Test:
  - M’Nagten (right/wrong test): Defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong
    - M’Naghten test: Want to know if they are nutty enough that they don’t know what they are doing, or they know what they are doing they don’t know it is wrong (not choosing to do wrong).
    - At least this verbal formulation has something to do with the insanity defense.
  - MPC: Not responsible if at the time of the conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate (read affective knowledge) the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law (read control test)
    - Broadens M’Naghten.
  - Control: Insane impulse so strong as to dethrone reason and thereby deprive the offender of the capacity to know right from wrong
- Practicle difference between these is not great.
- **Definition of words**
  - Wrong: allows for mistake of law! Wrong just means that something is against the law. Traditionally means stuff legislature decided ahead of time is stuff you should not be doing. Note though that traditional we don’t allow for mistake of law, but we do for the nutty defense.
  - Know: what does it mean to know the nature and quality of your act or that it is wrong.
    - Legally knowing it is wrong? Know against the law.
    - Affective knowledge? Appreciate what you are doing is wrong.
      - Only evidence that you had the affective knowledge is often the act itself. No affective knowledge because shot her loving aunt. Evidence of affective knowledge is: they did the thing they did
        - But with this understanding MN test looks a lot like the control test.
  - Volitional v. cerebral tests: Disturbing implication of reading know as affective knowledge, in practice becomes a whole lot like the volitional test. What does it tell us that you did the deed you were not supposed to do?
    - Maybe it tells us you lacked affective knowledge (cerebral)
    - Perhaps all it means is that you had impulse you could not resist (volition)

**Issue 3: psycho dynamics interpretation.**
- When you read about pyromaniac, jilted lover, gambler: explanation offered by mental health professionals all focus on psycho-dynamics. We are talking about a deterministic view of conduct (pre-determined action).
  - Problem with this model is that it is not helpful in distinguishing the few people who should not be held responsible from the rest of us that should not be.
  - Mental health professionals could offer the same deterministic explanation for what we (not able to get off on insanity) do. Doesn’t help us figure out who is so different that they should not be held responsible. Turns function on its head.
- Bottom line, law does not like this.