How guilt is established:

Evidence

- **People v. Zackowitz:** character is never an issue in crim prosecution unless D wants it to be.
  - Exceptions to the rule: if proof tends to establish (i) motive, (ii) intent, (iii) absence of mistake or accident, (iv) a common scheme of plan for the commission of the crimes, (v) identity of the criminal, (vi) sexual assault evidence under FR of Evidence.

- **Probative and material:** only relevant if it is both
  - Probative: tends to establish the proposition for which it is offered; if the proposition is more likely to be true given the evidence than it would be w/o the evidence
  - Material: the first prerequisite for determining the relevancy and hence the admissibility of evidence is a command of the substantive law of crimes

- **Rule 401:** “relevant evidence”
  - Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

- **Rule 402:** all relevant evidence is admissible, except as otherwise provided…. evidence which is not relevant is not admissible.

- **Rule 403:** although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
  - convince the judge that we are showing something other than a character trait then the evidence will be admissible subject to the balancing of its probative value against its prejudicial impact

- **Rule 404:** “other crimes rule”
  - Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

- **Rule 413(a):** sex offenses
  - If D is accused of a sexual assault, evidence of D’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
  - *Rehnquist’s view* on 413 (criticism): the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases; pose a danger of convicting criminal D for past behavior or being a bad person.

- Evidence more important in criminal or civil? CIVIL → in crim, we would rather let a guilty man go then hang an innocent man.

Proof beyond a reasonable doubt

- Two classes of **burden of proof:** persuasion and production

- Various standards for **burden of persuasion:**
  - Civil: preponderance of the evidence (50% +1)
  - Intermediate conflicts (commitment, wrongful death): clear and convincing
  - All criminal: beyond a reasonable doubt
  - Definition: what it takes to prove something to your standard (i.e. in criminal beyond a reasonable doubt)
• **Burden of production:**
  - If you do not meet the burden of production (of evidence) and you carry the burden, the case will usually be decided against you

• Directed verdicts: (civil)
  - The burden of persuasion line is 50% → if individual w/ burden (P) has provided enough evidence to cross the 50% line, we cannot direct

• **Winship:** the Due Process clause protects against any conviction except those proved beyond a reasonable doubt. State has to prove each and every element of the statutory definition of crime beyond a reasonable doubt.

• **Patterson v NY:** NY statute shifted the burden of proof to D; make D prove his aff.defense (extreme emotional disturbance) by a preponderance of the evidence → Ct says this is okay b/c it was not an *element* of the crime.
  - Easy for the state to get out of its requirement of proving all of elements in the statute by taking factors that relate to culpability or the amount of punishment and calling it an affirmative defense rather than an element of the crime?
  - Makes a mockery of the fundamental importance of Winship doctrine
  - **Dissent** test for whether the Prosecution Must Prove an Element Beyond a Reasonable Doubt:
    - (a) If presence or absence of element made a sig. difference in punishment and (b) whether historically, it’s been an important element of the crime.

• **Mullaney v. Wilbur:** ME wrote a statute that says unless otherwise rebutted by an aff defense, we presume that there was malice aforethought. SC struck this one but upheld NY
  - How do we square this and Patterson? An affirmative defense is not an element of the crime – therefore, not a mockery of Winship? (*Kuhns* disagrees)

### Role of the Jury

• **Duncan v. Louisiana:** D has a right to trial by jury based on 14th amend in criminal state cases and 6th amend for federal cases

• **Pros for jury trials**
  - Corrupt judges/prosecutors
  - Citizen participation in the justice system
  - Jury nullification
  - Difficult decisions made by citizens of community
  - Judge deniability

• **Cons (against jury trial)**
  - Less uniformity
  - Less understanding of complex legal issues
  - Complex exclusion of rules, instructions
  - Potential jury misconduct

• **Jury nullification:** jurors have a right to acquit even if they know he is guilty
  - Daugherty: did not inform jury of its right to nullify, that is okay

### Role of Counsel

• **Nix v. Whiteside:** no breach of any recognized professional duty if lawyer doesn’t help client perjure himself; no deprivation of right to counsel
To hold that there was ineffective counsel under the 6th amendment, look to (a) error = so serious that the attorney was not functioning as counsel; (b) prejudice = actions rendered the trial unfair.

- **Options** for lawyers to avoid ethical difficulties
  - Withdraw from the case
  - Move for leave to withdraw and, when that request is denied, proceed with the case, eliciting D’s testimony and arguing case to jury in normal fashion
  - Give D free narrative
  - Disclose to tribunal

- **Model Rules for Professional Conduct**
  - **Rule 1.6**: Confidentiality of Information
    - Can’t reveal info relating to representation of client
    - May reveal such info as necessary:
      - To prevent client from continuing criminal acts that lawyer believes is likely to result in imminent death/substantial bodily harm
      - Establish a claim or defense on behalf of himself in client controversy
  - **Rule 3.3**: Candor toward the tribunal
    - Lawyer shall not knowingly:
      - Make false statement to tribunal
      - Fail to disclose material fact
      - Offer evidence lawyer knows is false

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**Justification of Punishment**

- **Why do we punish?**
  - **Retribution**: you did something wrong, there justice requires punishment → broke societal norms, therefore deserve punishment
    - CONS: May not take into account extenuating circumstances
  - **Utilitarianism**: punishment is good for society, creates the greatest amount of happiness/security → achieves the greatest social goal
    - **Deterrence**
      - **General**: symbolic expression of society’s disapproval of crime; sends message to others not to commit this crime
      - **Specific**: deter this specific person from doing it again
    - **Rehabilitation**: we make you no longer want to commit crimes
    - **Incapacitation**: while you’re in jail, you cannot commit crimes

- Should punishment be proportional to the crime committed?
- Posner in US v Jackson: there are marginal returns for increased punishment
- **Johnson** on levels of punishment: Judge is at liberty to decrease punishment according to extraordinary extenuating circumstances.
- Regina v. Dudley and Stevens: strictly retributive to send them to jail – that is why ct gave them a short sentence
- US v. Bergman: A person who is a pillar of the community should be incarcerated for a marginal crime. Not for rehabilitation, and not for isolation or deterrence. Here, you put him in jail to show that we see the seriousness of the crime.

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**Elements of Just Punishment**
Voluntary acts and omission → Actus Rea

- **MPC 201.1**: person is not guilty of an offense unless his conduct is based on a voluntary act.
- **MPC 2.01(3)**: liability for an omission only when duty to perform the omitted act is otherwise imposed by the law.
- Statutes have three types of elements:
  - 1. conduct elements – these elements are the focus of actus rea – the requirement that there be an act (perhaps a voluntary act).
  - 2. circumstances elements.
  - 3. Results elements.
- **Martin v. State**: D taken against his will into a public place so they could charge him w/ public intoxication. Held: Requirement of overt and voluntary conduct: a voluntary act is required to be criminally liable; maintains foreseeability.
  - D must make a positive, voluntary action to be criminally liable. *Can’t be punished for thoughts alone.*
  - This is (1) an important limitation on the power of the state to punish that is (2) consistent with the justifications for imposing punishment.
  - **MPC**: A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable (omission is sufficient only when there is a duty or when the omission is defined as a violation of the criminal statute.
- **People v. Newton**: Newton claimed lack of conscious awareness of his actions.
  - *Unconsciousness*: where not self-induced (i.e. voluntary intoxication) unconsciousness is a complete defense to a charge of criminal homicide.
  - *Involuntary acts*: an act done by the muscles w/o any control of the mind.
  - *Voluntary acts*: (a) Habitual action done w/o though; (b) voluntary even though it was unintentional and its consequences could not be foreseen; (c) voluntary if it is a result of inability to control impulses.
- **Punishment for involuntary acts → responsibility**
  - Do not want to punish thoughts.
  - Cannot deter or promote involuntary action.
  - Inconsistent with retribution.
  - Important limit on power of state.
  - Reinforce notion of personal liability.
- **Pope v. State**: child abuse by omission. **Jones v. US**: failure to provide for a child in her care.
  - **Barber v. Superior Ct**: doctors pulled plug on a dying man.
  - *Omission* of an act: D cannot be convicted without having prior relationship established with decedent.
  - When is there a legal duty to preserve the life of another?
    - Statute imposes a duty of care.
    - Two people share a certain relationship.
    - One assumes a contractual duty.
    - One has voluntarily accepted the duty and has therefore secluded a helpless person from seeking help from others to render aid.
  - Omission with doctors: there is no duty to continue the use of life-sustaining treatment once doctor deems it futile; it is a crime to voluntarily end one’s life.
  - Cannot be an affirmative act; must be the direct cause of death.
Mens Rea

- The **mental state** required by the definition of the offense to accompany the act that produces or threatens the harm; must have a culpable mindset to be guilty of the act.
  - **Purpose** – doing something with the **intent** to have it occur
    - **Specific intent**: act done with a specific further purpose in mind
    - **General intent**: when it is sufficient to convict if D did an intentional action
    - So, the difference is whether the actor intended the result (specific) or just intended the act (general)
    - Act involves attendant circumstances and actor is aware of them or believes or hopes they exist.
  - **Knowledge** – Knowing or being pretty sure that the event will occur as a result of our acts or omissions; can be knowledge or just a high probability
  - **Recklessness** – Being *consciously aware* of a substantial and unjustifiable risk
    - Conscious disregard of a substantial and unjustified risk that the material element exists or will result from his conduct – failure of actor to perceive the risk, given the nature of his conduct, represents a gross deviation from standard of care that a reasonable person would observe in his situation.
    - Level of the MPC that is the norm for imposing criminal liability.
  - **Negligence** – When a reasonable person *should have been aware* of the substantial and unjustified risk.
    - How is negligence different in criminal law? → Though it is an objective standard, it is much greater; there must be a substantial and unjustified risk.
  - **Difference b/t negligence and reckless is awareness.** If you are reckless, you are actually aware of the risk. If you are negligent, you should have been aware of the risk.

- **Regina v. Cunningham**: (gas meter) mens rea to steal the gas pipe is not enough to convict on the murder of the neighbor unless a reasonable person had *foreseen* such an injury
- **Regina v. Faulkner**: stole the rum and burned the ship → no mens rea found to justify the burning of the ship
- **Holloway v. US**: car-jacking statute requires intent to cause death or serious bodily harm → can intent be inferred?
- **MPC** on **Intent §2.06(6)**: when a particular purpose is an element of an offense, the element is established although such purpose is conditional unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.
- **US v. Jewell**: weed in the secret compartment of the car – *willful blindness*
  - Positive knowledge and deliberate ignorance are equally culpable. Therefore, to act “knowingly” is to act with actual knowledge or with an awareness of the high *probability* of the existence of the fact in question.
  - **MPC §2.02(7) High Probability**
  - “*high probability*” definition of *knowingly* only applies when the blindness is solely and entirely the result of a conscious purpose of avoiding the truth.
- **Mistake of fact**
  - **MPC §2.04 Comment**: only a defense when it negates the existence of a state of mind that is essential to the commission of an offense, or when it establishes a state of mind that constitutes a defense under a rule of law relating to defenses.
To say that a mistake of fact has to be reasonable, is to say that a person who is acting unreasonably is guilty

- **Knowing mistake:** guilty of offense if knowing suffices, not guilty if purpose is required
- **Reckless mistake:** guilty if recklessness suffices, not guilty of knowing or purposefulness is required
- **Negligent mistake:** guilty if negligence suffices, not guilty if recklessness, knowing or purposefulness is required.
- **Reasonable mistake:** guilty if strict liability, otherwise not guilty
- **Strict liability:** if no mental state is required and the act is morally wrong, then D is always liable

- **Regina v. Prince:** Unlawfully taking a 16 year old girl from her father
  - Ignorance or mistake of fact is a defense when it negatives the existence of a state of mind that is essential to the commission of the offense, or when it establishes a state of mind that serves as a defense.

- **People v. Olsen:** statutory rape w/ promiscuous 14 year old.
  - Reasonable mistake of fact as to the girl’s age held not to negate the mens rea required for the crime b/c the leg said that mistake of fact would only make D eligible for early parole. Essentially, leg made this a strict liability offense.
  - **Dissent** argues that making this a strict liability offense goes too far, past Constitutional guarantees against cruel and unusual punishment.
  - Mens rea is not required for some elements of a crime that have no bearing on the harm the offense seeks to prevent
    - Here, we want to make age strict liability to protect children, focus on the acts of D instead of victim, look at a wide-angle view of the offense (view the entire context)

- **Strict Liability:** Liability imposed w/o any demonstrated culpability, not even neg.
  - Distinction between public welfare crimes and malcontent → higher liability for public welfare but lower punishment
  - Look for strict liability when statutory offense, the crime does not infringe upon the rights of a person, the crime is part of a regulatory scheme, the crime imposes a light penalty, or requiring mens rea would impede giving effect to the legislative intent. → up to the legislature
  - **Penalty:** strict liability is generally high monetary penalty, low jail time
    - Idea is that we want people to have the requisite mens rea if they are to pay the price for their actions.
  - **Morisette v. US:** In criminal statutes forbidding certain conduct, including theft, the absence of a mens rea does not mean the leg intending strict liability.
    - Some acts can be strict liability, but some have always included an element of mens rea b/c of the severity of their stigma.
    - Due Process will not allow strict liability in situations when serious penalty or a history of CL mens rea for that offense.
  - **US v. Staples:** look to legislative intent (penalty and statements) to decide if the offense should be strict liability.
    - Ct tries not to find strict liability in situations that would make for criminalization of a broad range of activities.
- **State v. Guminga**: respondeat superior for waitress selling booze to minors
  - Strict liability for the acts of an employee overruled b/c of the invasion on personal liberty outweighs the benefit to the public interest.
  - **Vicarious liability**: it violates Due Process if you are found strictly liable for someone else’s actions and you have done nothing

- **Mistake of Law**
  - Mistake of law arises in two situations: (1) where D lacked the requisite mens rea b/c of his mistake of law and (2) where D had the requisite mens rea but believed that his conduct was no proscribed by law.
    - Mistake is a defense if it negates the requisite mens rea. It is not a defense if it does not negate the required mens rea. In other words, (a) whether the conduct is an offense and (b) the existence, meaning or application of the law determining the elements of the offense are strict liability unless the definition of the defense provides otherwise.
    - However, the mistake of law exemption only applies if you make a mistake about a law other than the one you’re charged with.
    - Another defense is that you’ve relied on an official statement of the law in making your mistake.
  - **MPC**: mistake is valid when it comes as the result of an affirmative statement by a qualified official, afterward determined to be invalid or erroneous.
  - **MPC on ignorance**: ignorance or mistake as to a matter of fact or law is a defense if it negatives the purposefulness, belief, recklessness or negligence required to establish a material element of the offense.
  - **People v. Marerro**: peace officer with a gun
    - Mistake of law does not relieve criminal liability unless the mistake negates some element of the mens rea for the crime.
    - Incorrect reading of the law is no defense to the crime, either.
  - **Mistaken Belief that Law Will Not Be Violated**
    - Generally, it is no defense that D was unaware that her acts were prohibited by law; however, sometimes D may base her defense on the fact that she made an affirmative decision that the act would not violate the law.
    - **Willful**: if the statute has a willful requirement, there must be a voluntary, intentional violation of a known legal duty, D has to **know of duty** (Cheek, pilot doesn’t pay taxes)
      - Means willfully committing an act, not willfully breaking the law. Held: Mens rea was knowledge. He had paid before, so knowledge was met. This was not, then, mistake of law.
      - In an extremely complex regulatory scheme, “willfully” could mean willfully breaking the law (Liparota, food stamps)
    - Belief must be (1) reasonable and (2) made under certain conditions that assure that the mistake was made and that it was objectively reasonable.
      - Reliance on statutes later held unconstitutional: **US v. Albertini** - Const’s Due Process requirements forbid the application of a SC decision reversing a lower court’s decision that D had reasonably relied on.
• Reliance on official interpretations of the law: Does not include relying on the advice of counsel or public officials not making an official statement of the law.

• D does not know that law and it has not been published, yet. See Lambert v. CA: requirement for all felons to register upon entering LA. D was unaware of law, so ct did not convict b/c of lack of notice (Likely b/c it was a crime of omission); Requirement of notice in situations where penalty or forfeiture might be suffered for mere failure to act. \( \rightarrow \) MPC would have convicted b/c it was published and could have been known.

  o Cultural diversity: there should be a fairly definite, precise and pre-existing notion of what the criminal law is

• Consent: To constitute a defense, the consent must be legally effective

  o Consent as Negating element of the crime – prevents liability for a crime requiring lack of consent.

  o Legal effectiveness of consent – consent must be (a) voluntary, (b) by a person w/ legal capacity to give consent, (c) consent must be free of fraud or mistake concerning the nature of the conduct at issue

  o Condoning is no defense – victim’s forgiveness after the commission of the crime is no defense unless authorized by the statute.

  o Contributory negligence is no defense – because a crime involves a wrong against the public.

• Legality

  o Criminal statute must be precise – due process requires precision so as to (1) give notice as to what conduct is criminal and (2) to discourage arbitrary enforcement by police and prosecutors.

  o Vagueness: Unconstitutionally vague if statute fails to define the offense with sufficient definiteness so that ordinary people can understand what is prohibited.

    ▪ Curing vagueness by scienter: a statute that would otherwise be unconstitutionally vague may be upheld if it requires that the offense be committed with intent or scienter.

  o Statute cannot be made/enforced ex post facto.

  o Cts not allowed to create the criminal law: Shaw v. Director of Public Prosecutions: Judge cannot take it upon himself to use moral wrongs to create a crime from; (magazine selling prostitute info)

    ▪ Must put people on notice crime exists

    ▪ Leave it to the legislation

    ▪ Separation of powers (leg passes one law, courts another)

    ▪ No consistency, uniformity in decision-making b/t judges

    ▪ Arbitrary police, prosecutorial, judicial action

  o Keeler v. Superior Ct: man killed fetus when he kicked ex-wife in stomach, ct held not murder

    ▪ CL definition of human being – one who was born – applied to the statutes in the state. To redefine that standard would have been a due process violation. Would have been creating a CL criminal offense, which would violate the principles of legality.
Dissent argues that the law would not chance, and that the Penal Code says to define words in such a way as to carry out justice. So, the ct could redefine human being to meet with new conceptions of science if it needed to in order to do justice.

- **Vagueness**: if a statute encompasses a broad range of activity that was not particularly dangerous and that people may not anticipate then it is unconstitutional (Chicago v. Morales, loitering gangs) → Held: unconstitutional b/c it would make criminal something legal. Could get around it by changing to “improper reason.”

- **MPC §250.6**: narrowly designed to reach only alarming loitering. Gives occasion for police inquiry. Failure to explain why they’re there could lead to an offense.

### Rape: unlawful sexual intercourse w/o consent of victim

- **Statutory rape**: always a strict liability
- **Voluntary intoxication**: not a defense for rape
  - Unless D is so drunk that he himself didn’t intend to have sex
- **resistance** requirement:
  - (OLD) used to be full physical resistance to the utmost
  - (NOW, CL) resistance is probative to consent → proves probability or lack thereof
  - does it have to be **objectively reasonable**? → must give **notice**
  - threats that may prevent resistance → rape
- **Force** requirement: in the absence of force, nonconsensual intercourse traditionally was criminal only under special circumstances, i.e. unconscious, mentally incompet.  
  - “Forcible compulsion”: compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied.
  - Victim is not required to use physical force to resist; it is enough when her force demonstrates lack of consent is “honest and real.” (Sherry case, nurse)
    - Case may have turned other way if D had requested a “reasonable mistake” instruction!
- **Consent required?**
  - Any act of sexual penetration where victim did not affirmatively and freely give her permission constitutes a sexual assault (M.T.S. case)
  - Possible conceptions of nonconsent:
    - Verbal resistance (saying “no”) plus other behavior that makes unwillingness clear
    - Verbal resistance alone
    - Verbal resistance or passivity, silence or ambivalence (anything other than affirmative permission)
    - Verbal permission only (must say yes)
  - **New Rule**: possibilities where D might non-recklessly or even reasonably, but wrongly, believe that his words and conduct do not constitute force or the threat of force and that a non-consenting female is consenting (Penn Code statute) (Fisher, Lafayette student – still convicted for rape)
    - Counsel cannot be ineffective for failing to provide assistance on a rule that was not in existence at the time.
  - Honest and reasonable belief is not a defense to rape in Massachusetts
MPC §213.1: fresh approach

Mens Rea
- Not clearly defined – unclear if D must have actual knowledge of the lack of consent (recklessness) or whether it is enough to reasonably believe there is consent (negligence). Still others make it strict liability.
- CL approach: Commonwealth v. Sherry (3 docs and nurse, see above) Held: mistake of fact does not negate requisite mens rea for rape (D asking for mens rea of knowledge) \(\rightarrow\) ct finds that the mens rea is negligence
- Special problems: corroboration (some jurisdictions will not base conviction on victim’s testimony alone); victim’s resistance (see above for requirements on how much victim must do to resist); victim’s promiscuity (sometimes victim’s sexual past is admitted for issue of consent)

Actus Rea
- Elements of the crime: Force; Lack of Consent \(\rightarrow\) Proven by (a) proof of reasonable resistance or (b) proof that victim failed to resist b/c of fear (fear must be reasonable and genuine – fear of death or serious bodily harm)
- Different approaches in CL
  - Force only - Berkowitz
  - Force and lack of consent (manifested by reasonable resistance) - Rusk
  - Lack of consent – M.T.S.

Homicide
- MPC Scheme – murder and manslaughter and homicide graded by mens rea requirements
  - Murder: a killing committed purposefully, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.
  - Manslaughter: killing committed recklessly or under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.
  - Negligent Homicide: killing committed negligently. Possible that some jurisdiction’s vehicular homicide fits here.

Murder
- CL murder is the unlawful killing of another human being with malice aforethought or killing during the commission of a felonious act.
- Malice aforethought: state of mind preceding/co-existing with act/omission
  - Intention to cause the death of or harm to such person, w/o provocation although there is no premeditation
  - Knowledge that act which causes death will probably cause death or harm and knowledge is accompanied by indifference
  - One person is killed by act intended to kill another
  - Person is killed by act intended to kill no one in particular
  - Death results from act only intended to cause grievous bodily harm
  - Express malice: deliberate intention to kill
  - Implied malice: no provocation or criminally reckless killing with an extreme disregard for human life.
    - Commonwealth v. Malone: implied malice defined by gross recklessness
• US v. Fleming: Allowed the finding of malice by the gross negligence definition even though D had no subjective awareness of the substantial and unreasonable risk to life. Said he was estopped from denying this b/c of voluntary drunkenness.
  ▪ MPC on Malice Aforethought: an act of gross negligence for which D must reasonably anticipate that death of another is likely to result or an act of gross negligence w/ extreme disregard for human life.
    • Distinguishing factors: likelihood of death, lack of justification
      o Premeditation: required for first-degree murder charge
      ▪ Evidence of premeditation: time lapse, planning, motive (i.e. prior relationship), manner of killing
    o Degrees of Murder
      ▪ MPC approach: division of murder into degrees – confine the death penalty to homicides that are particularly heinous.
      ▪ First Degree: requires premeditation. Cts generally require at least some time to reflect before they find premediation; others allow for instantaneous premeditation.
        • Commonwealth v. Carroll: D shoots wife in back of head
          o Ct convicted of first degree murder b/c it found that premeditation can be formed in the time it takes to squeeze the trigger.
        • People v. Anderson: littler girl killed by drunk step-father
          o Requires pre-existing reflection to find premed
          o Three factors help determine if there was premeditation: planning activity, relationship = motive, manner of killing (particular, planned)
      ▪ Second degree: When murder statutes are divided into two, typically everything that is malice aforethought but not premeditated is a second degree murder.
        • Guthrie tries to draw substantive differences b/t “intent to kill” (second degree) and “premeditated murder” (first degree)
          o If the act is done intentionally, in reckless and wanton disregard of probable consequences, it is murder. (Malone, Russian Roulette, 60% chance)
            ▪ Specific intent is not necessary to prove murder, must prove depraved indifference to human life
          o MPC level of negligence required (wanton) 208.2: when recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.
          o Trier of fact determines whether actor’s conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life.
            ▪ If conduct is so reckless, a jury is warranted in inferring that D was aware of a serious risk of death or serious bodily harm
          o MPC on liability for inadvertent murder (210.2): murder requires proof that D acted recklessly under the circumstances manifesting extreme indifference to value of human life. Inadvertent risk creation cannot be punished as murder.
Intent to inflict great bodily harm that results in unintended killing = murder

Voluntary manslaughter
- A killing that would otherwise be murder, but was committed in response to adequate provocation, it is voluntary manslaughter.
  - Provocation: extreme emotional disturbance
- Elements of Provocation sufficient to mitigate a murder charge
  - Provocation would have provoked a reasonable person
  - D was actually provoked
  - Absence of a cooling off period (but can be rekindled by some occurrences, according to some courts)
  - Victim is the provoker (although a mistake about identity is okay)

Reasonable provocation:
- Standard is reasonableness → you have to have actually suffered the emotional disturbance and then it must be reasonable.
  - Director of Public Prosecutions v. Camplin: buggered teenage killer
    - Ct allows the objective test for whether the provocation would have provoked a reasonable person of the same sex and age. Recognizes that words affect different people differently, as do actions.
    - Usually, words alone are not sufficient provocation but the minority view holds that words alone are enough. CL says that the only time words alone are enough is when one is being told of one’s wife’s infidelity.
  - Girouard v. State: Husband stabbed wife after she ridiculed her husband’s sexual abilities
    - Ct held that words alone do not equal sufficient provocation
    - Traditional categories of provocation:
      - Extreme sexual assault on D or a close relative
      - Mutual combat
      - D’s illegal arrest
      - Sudden discovery of spousal adultery
      - Also, violent and painful blows, aggravated assault, and witnessing spousal adultery
  - Maher v. People: Departs from the categorical approach
    - Leaves to the jury (1) whether the provocation was such that it would lead an ordinary man to the state of mind where he would kill and (2) whether there was sufficient cooling time to negate the provocation.

MPC approach → Murder is reduced to manslaughter when there is proof of EED for which there is reasonable explanation or excuse. Similar to adequate provocation, but it send more cases to the jury to be decided.
- Maher: get rid of all of the categories of provocation, let the judge/jury decide and the whole thing turns on whether the provocation was reasonable.
- People v. Casassa: Stalker who kills his ex b/c she broke up with him. Claims EED as a defense. Held: objective/subjective test: view the subjective, internal situation in which D found himself and the external factors as he perceived them at the time, no matter how wrong he is, and assess from that standpoint whether his use of EED is objectively reasonable.
  - D has to be under EED.
• EED must be reasonable
• EED can simmer for a long time before it bubbles over, so it does not involve the cooling off period of CL provocation.

  **Objective factors:** age and gender may account for EED

  • Other characteristics: unusual characteristics may not be adequate for provocation
    - **Cooling time:** too long a lapse of time b/t the provocation and the act of killing will render the provocation inadequate as a matter of law → deprives D of right to instruction on voluntary manslaughter
    - **Battered women:** courts hold that evidence of battery is irrelevant on the question of whether victim’s conduct was adequately provocative b/c inquiry requires application of the reasonable person test.

• **Involuntary Manslaughter**
  - An unintended killing is involuntary manslaughter is it is the result of criminal negligence or caused during the commission of an unlawful, nonfelonious act.
  - **Killing by criminal negligence:** an unintentional killing caused by the commission of any act in a criminally negligent manner
    - **Criminal negligence:** a greater degree of unreasonableness required for criminal negligence than would otherwise suffice for imposition of civil liability
      - **Commonwealth v. Welansky:** nightclub fire case
        - Allowed for a criminal conviction for involuntary manslaughter for something more than regular negligence → negligence-plus
        - **MPC Approach:** homicide is manslaughter when it is committed recklessly → conscious disregard for a substantial and unjustifiable risk that his conduct will cause that result. **Negligent homicide:** if you’re negligent in the mistake, it is negligent homicide rather than manslaughter b/c there is no recklessness.
      - **State v. Williams:** toothache baby, Native-Am couple
        - Negligence-plus required for criminal negligence
        - If the conduct of D, regardless of his ignorance, good intentions or good faith, fails to measure up to the conduct required of a man of reasonable prudence, D is guilty of ordinary negligence
          - Negligence of the accused must be “culpable,” “gross” or “reckless” → conduct must be such a departure from what would be the conduct of an ordinary prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or conduct amounting to an indifference to consequences.
          - Contributory negligence not a defense to manslaughter; may affect whether D’s conduct was a proximate cause of death
        - **Justification of the risk:** identify (1) magnitude of risk to which other persons are exposed and (2) importance of the object to be attained by the dangerous form of the activity.
Criminal Law Outline – Kuhns

- **Objective standard:**
  - **Glanville Williams** criticisms: we don’t want to punish people so much (i.e. prison) for a negligent mistake
  - **Negligence = objective standard** b/c liability turns on whether the action of D created a risk of a kind and degree that a reasonable person would not have taken.

- **MPC on individualization:** rejects a fully individualized standard; still accounts for it on some level by requiring perspective from “the actor’s situation.”
  - Courts are split on how to treat ind characteristics like IQ

**Felony Murder**

- Felony murder can be charged when murder is caused by intent to commit a felony or the killing is done in an act that is likely to kill someone.-felons are liable when one of them caused the death, although this changes if the killer is not one of the felons or if the killing was not in furtherance of their common felonious purpose.
  - Felony murder not limited to foreseeable death in some jurisdictions, but more require **foreseeability**
  - **Causation:** felony must be both the but-for and the proximate cause of the death
  - **MPC:** allows the commission of a felony to serve as a rebuttable presumption that the death was an act committed recklessly with extreme indifference to human life.
  - **Statutory reform of Felony-Murder Rule** can lead to the application of the felony murder rule only once murder is established. To bump it to first degree murder.

- **Misdemeanor-manslaughter:** unintentional killing caused during the commission of an unlawful, nonfelonious act are involuntary manslaughter.

- **Felony murder doctrines**
  - Causation (see proximate cause)
  - Only designated felonies
  - Killing otherwise culpable
  - Inherently dangerous
  - Merger
  - Furtherance of the crime

- **Limitations to the Felony-Murder Rule**
  - **Inherently Dangerous Rule**
    - **Regina v. Serne:** arsonist kills his son
      - First suggestion that the felony-murder rules should apply to inherently dangerous activities.
    - **People v. Philips:** chiropractor defrauding eye-cancer child
      - Only such felonies that are inherently dangerous may serve to activate rule. Must look at the felony in the abstract rather than looking at the specific acts at hand.
    - **Stewart:** crack mom did not take care of her baby
      - Determine if it is inherently dangerous based on the circumstances of the case.

  - **Merger**
- **People v. Smith**: child abuse was merged
  - If a felony is an integral part of the homicide, then the felony-murder rule does not apply.
    - **Ireland** rule: look to the definition of the felony to determine whether merger occurs.
    - **Burton** rule: asks if the homicide resulted from “conduct for an independent felonious purpose” or from a “single course of conduct with a single purpose.”
      Looks to the facts of the felony
- **Bootstrap notion**: if any assault that happens to result in death could be felony murder, you have directly and immediately wiped out your homicide rating system
- **Killings Not “In Furtherance” of a Felony**
  - **State v. Canola**: felon and owner killed during a robbery
    - Court uses **agency** theory → who does the killing is essential.
      If a third party kills a co-felon, another co-felon cannot be liable b/c the act was not in furtherance of a common felonious design.
    - Under the **common felonious design** standard, a co-felon cannot be culpable for a killing even by his co-felon if the killing was not part of the common plan.
      - Also **proximate cause theory**: was the killing a **foreseeable risk** of the felonious behavior?
- **Alternative to Felony-Murder Rule**: Vicarious liability
  - **Taylor v. Superior Ct**: victim shot co-felon. Ct wanted to get the driver of the get-away car for death of co-felon. Instead of using F-M, which might have been shut off in this case b/c of agency theory, they used vicarious liability.
    - **Vicarious Liability** → provocative action → manifestation of recklessness w/ conscious disregard for human life that provoked the killing → malice → murder charge (2nd degree)
    - Then, the ct could use the felony-murder-as-first-degree murder component to bump this up to murder one.

**Significance of resulting harm**

**Causation** → when a crime requires proof as a result, D’s conduct must be shown to be the cause of that result

- **Factual causation**: (“but for” causation) if not for D’s actions, the result would not have occurred.
  - **Speeding up result**: Where D has accelerated the inevitable, cts find factual causation
  - **Concurrent Sufficient Cause**: Where two factors concurrently cause a result and either factor alone would have been sufficient to cause that result, both factors caused the result.
- **Proximate causation**: In addition, the result must be the proximate cause of that action. This usually means that the result is the natural and probable consequence of D’s action;
however, the means to this end vary. Criminal proximate cause is likely to be narrower than tort proximate cause; however, in some ways it is broader b/c criminal law does not recognize contributory negligence in assumption of the risk.

- An act is the proximate cause if it is **foreseeable**
  - difference between providing the means and actually pulling the trigger (Kevorkian); suicide is not a separate crime in most jurs
    - **§210.5(1) MPC**: permits convicting a person of criminal homicide for causing another to take his life but only if he purposefully causes such suicide by force, duress or deception.
      - Felony to purposefully aid or solicit another to commit suicide
    - **People v. Acosta**: helicopter crash during a police chase. Ct noted that highly extraordinary results are not foreseeable; however, the helicopters’ crashing was not highly extraordinary. It is a foreseeable probability that pursuers in a chase will act negligently and injure themselves.
      - **Dissent** employs **zone of danger** test to determine foreseeability; must be within the zone of danger to be foreseeable.
    - **People v. Arzon**: D set fire to 5th floor apt, called fire dpmt and fire-fighters got trapped by another blaze in the building.
      - An individual is liable if his conduct results in some ultimate harm that should have reasonably been foreseen as something reasonably related to the actions of the accused.
      - Here, D’s act put the victim in a position where he was particularly vulnerable to a separate and independent force.
    - **People v. Warner-Lambert Co.**: Company knew dangerous chemicals were loose in its plant and it knew of the risk of explosion. Ct, however, said that the company had to be aware of the specific event that sparked the explosion to have caused the fire.

- **Voluntary Intervening Human Actions** cut off Original Actor’s Liability
  - **People v. Campbell**: D suggested the man commit suicide and left a gun with him. Man committed suicide. B/c the man intervened in the chain of causation to pick up the gun and shoot himself, no prox cause.
    - When another voluntary, mentally responsible human act (in full knowledge and w/o constraint) intervenes in the chain of causation, it cuts off causal responsibility.
  - **Stephenson v. State**: abducted woman, raped her and she killed herself. D was guilty of her murder, even though it was suicide.
    - If both physical and mental injuries are inflicted, the natural and probable result of which would render the deceased mentally irresponsible, and suicide followed, D is guilty of murder.

- **Reckless Intervening Act**
  - **Commonwealth v. Root**: D challenged decedent to a road race. Speeding, decedent swerved into oncoming traffic and died in an accident.
    - Ct held that decedent’s act was a voluntary-intervening cause, and that D’s actions had not proximately caused the accident.
  - **State v. McFadden**: D challenged decedent to a drag race. Decedent slid into traffic and killed himself and a little girl.
Criminal Law Outline – Kuhns

- D’s subsequent action that negligently risked the result did not cut off causation for D b/c the D and the decedent were engaged in the same unlawful act and not in separate actions. Thus, D’s act proximately caused the deaths of the girl and the decedent.
  - Commonwealth v. Atencio: Guys sitting around drinking playing Russian Roulette. One guy actually shot himself, killed himself.
  - The subsequent negligent act of the decedent did not cut off causation for the others b/t they were acting together in a collective enterprise, not as individual acts. In both Atencio and McFadden, the decedent did not act completely independently, making the causation not cut off.

- MPC §2.03: causal relationship between conduct and result
- §2.03 MPC: requires but-for causation and that the harm be what D intended or risked and not too tenuous as to be unjust.

**Attempt**

- MPC treats attempts, in punishment, the same as if the crime were actually committed. Most jurisdictions treat it as a less severe crime.

- **Mens rea**
  - Smallwood: HIV carrier rapes women and is not found to have attempt
    - There must be specific intent and actus reus for there to be attempt, even if recklessness or a lesser mens rea would suffice to convict for actual crime
  - Why do we require more in the attempt situation under Smallwood’s rule?
    - Culpability
    - Maybe it’s just semantics
    - Not always sure a person w/o a purpose will pose a real threat → give him the opportunity to abandon
    - Extend liability too far → further than we want to
    - Don’t want police arresting for no reason
    - We care about prevention and intervention
  - Hypothetical: at various stages in the formation of the crime (i.e. forming intent to kill, buying a gun, searching for victim, locating the victim, walking toward the victim, aims the gun at the victim, fires but misses the victim, fires again and wounds), we do not want police to get involved too earlier.
  - People v. Morano: allowed knowledge to satisfy the purpose requirement for an attempt. Consistent with the MPC, which allows attempt when you act with purpose or knowledge for the requisite criminal act to come about.
  - Thacker v. Commonwealth: drunk man fires shot at a tent
    - Because he was reckless (assumed b/c of his drunkenness under the MPC), if he would have hit the woman, he would likely have been guilty of murder under the recklessness with extreme disregard for human life.
    - But, b/c he had not intent to kill, it’s not attempt.

- **Actus Rea**: where do we draw the line b/t attempt (liability accrues) and acts of preparation (no liability)?
  - Last Act Requirement: D must commit the last act before the criminal act to be guilty of attempt.
Criminal Law Outline – Kuhns

- **Proximity Theory**: Preparation must come very near (proximate) to the completed act to become attempt. Must be a very dangerous proximity to suffice.
  - *People v. Rizzo*: People hunting for a particular victim and not finding that person not guilty of attempt b/c not close enough in proximity to the commission of the crime. Preparatory acts must come very close to the accomplishment of the intended crime in order to be attempt.
- **Substantial Step Requirement**: (MPC Approach) D must (a) act with the culpability otherwise required for the crime and (b) take a substantial step toward the commission of the crime that strongly corroborates the criminal purpose.
  - *US v. Jackson*: Bank robbers too late to rob the bank but had all the gear to do so.
  - Their substantial step strongly corroborated their criminal purpose.
  - SEE MPC §5.01: Substantial step test
- **Unequivocality Test**: unequivocally guilty over acts sufficient in themselves to manifest the criminal intent behind them equal attempt.
- **Acts Falling Short of Attempt**
  - *McQuirter v. State*: man found guilty of an assault with intent to rape. So, it’s a statutory crime of preparation, even though it would not have been attempted rape b/c probably no act sufficiently proximate to the commission of the rape.
- **Solicitation as Attempt**
  - *US v. Church*: Hired a hit man to kill his wife. Gave the hit man a schedule of his wife’s movements and provided the means. Also asked for confirmation of the murder.
  - Because of the substantial involvement of the wife, ct saw this as an overt action sufficient to constitute a substantial step toward the commission of the murder.
  - *State v. Davis*: Davis hired an undercover cop to kill his lover’s husband.
  - Mere solicitation, unaccompanied by an overt physical act moving toward the commission of the crime, is not an act equaling attempt.
- **Defenses to Attempt**
  - **Abandonment**: Abandonment must occur under circumstances manifesting a voluntary and complete renunciation of the criminal purpose.
  - **Impossibility**:
    - **Factual Impossibility**: occurs when extraneous circumstances unknown to the actor or beyond his control prevent consummation of the intended crime. (not a defense)
    - **Legal Impossibility**: Occurs where intended acts, even if completed, would not amount to a crime. (sometimes a defense)
    - *US v. Jaffe*: D bought cloth she thought was stolen. If it were stolen, she would have been in violation of the statute. But the cloth was not actually stolen.
      - She intended to buy cloth and completed the purchase. But the purchase was not actually a crime, so no crime. Not even attempt.
      - We would be punishing thoughts if we punished her for this.
• We would also not have any manifestation to be sure of her mens rea in her action.
  - **People v. Dlugash:** Shot what could have been or might not have been an already dead man.
    • Whether the man was already dead was a factual issue that prevented the consummation of the intended crime. Factual impossibility is no defense, so D is guilty of attempted murder.
  - Most situations were a mix of factual and legal impossibility, so the MPC turned to mens rea to eliminate the impossibility defense. If you have the requisite mens rea, you can be guilty of attempt if the commission of the crime would have occurred if things had gone the way you intended or expected. → done away with distinction

**Group Accountability**

**Complicity**

• **Introduction**
  - **Principal:** (first degree) the absolute perpetrator of the crime; (second degree) one who present, aiding and abetting the act to done
  - **Doctrine of conspiracy:** a criminal conspiracy is an agreement or combination by two or more persons to commit a crime; substantive crime in itself. Makes each of the coconspirators committed in furtherance of the planned criminal enterprise, whether or not those particular criminal acts were planned, so long as they are foreseeable
  - **Doctrine of complicity:** requires an act that provides aid, assistance or encouragement.
  - **Accessory:** (1) Before the fact – absent from the scene of the crime, but procures, counsels or commands the actor. (2) after the fact – knowing the crime has been committed, relieves and assists the felon.

• **Mens Rea**
  - Level one: mens rea required for accomplice (helper or encourager)
  - Level two: mens rea required for principal (actual perpetrator)
  - As to actions of Principals – Purpose, Knowledge, or Reasonable Foreseeability Approach
    - **Hicks** (one Indian shoots a white man, second Indian brought in based on words he had spoken) Held: ct must find direct evidence of agreement, more than just words of encouragement.
      • If there is a conspiracy to aid and abet, but it happens that the aid is not needed, D is still guilty of aiding and abetting.
    - **Gladstone** (D told ind whom he could buy pot from)
      • D not liable for A&A b/c he did not have intention of aiding seller → rule: No A&A unless one associates himself with the venture, that he does so by choice, and that they seek to accomplish the same criminal end.
    - **Knowledge** that the Act will aid a criminal act might suffice for the mens rea of A&A (Alt MPC element that was voted down)
  - ***MPC Approach to Accomplice Liability §2.06
    • purpose is a requirement for accomplice liability
**Reasonable Foreseeability Approach**

- **People v. Luparello** (D enlisted help of friends to get info about former lover and, w/o D, they killed the victim)
  - Ct found D guilty of A&A if he intended to facilitate one criminal offense but another offense that was *reasonably foreseeable* occurred instead.
  - Seems to lower mens rea from purpose to negligence, although you have to have purpose to A&A one crime before you can get to the point where negligence is sufficient.

- As to **Attendant Circumstances** – *Knowledge*
  - Not guilty of A&A unless you *know* the essential elements of the crime and you then purposefully aid and abet the crime.
  - **US v. Xavier**: (D is told to stand by while his brother shoots their common enemy – D claims govt has to prove D’s knowledge of brother’s conviction as an essential element to D’s crime of aiding and abetting an ex-felon) Ct finds no criminal liability for A&A w/o knowledge or cause to believe possessor’s status as ex-felon.

- Mens Rea as to Result – Mens Rea sufficient for the offense (MPC)
  - **State v. McVay**: (boss was negligent in convincing the engineer and the captain to push the steamboat beyond what it could do, causing deaths of three)
    - D A&A a grossly negligent act, which is more than mere negligence. Thus, he had the mens rea of the offense.
    - Argument: How can you A&A a negligent offense, as it wasn’t meant to be committed? This is gross negligence, which is a bit more.
  - **People v. Russell**: (one of three possible D accidentally shot decedent while engaged in a gun battle)
    - Each D was guilty of depraved indifference, therefore each had the mental culpability required for the commission of the crime. Depraved indifference → each D recklessly engaged in conduct creating grave risk of death to another person.
  - **People v. Abbott**: (drag race where one driver lost control and killed himself and two innocents)
    - D *intentionally* engaged in drag race, which aided in creating the negligence of the principal actor.

**Actus Reus**

- MPC Approach: A person acting w/ the requisite mens rea is an accomplice whether the person aids or attempts to aid the principal actor (Attempt to aid = attempt liability)
  - Can also be complicity by omission – if you have a legal duty to prevent the offense and fail to do so with the purpose to promote the crime, you are guilty of A&A.
- **Wilcox v. Jeffery**: (jazz journalist aware that illegal jazz concert is taking place – HE PROBABLY EVEN ENJOYED IT!}

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**Note:** This text appears to be a legal outline covering various aspects of criminal law, particularly focusing on the concept of reasonable foreseeability and attendant circumstances. The examples provided illustrate how these legal principles are applied in specific cases.
Criminal Law Outline – Kuhns

- Ct found him guilty of A&A b/c he was present at a criminal act, knew of the attendant circumstances, and cheered Hawkins w/o trying to keep him from performing. → That was enough of an act to constitute A&A liability.
  - State v. Tally: (Southern Judge intervenes in an effort to have a man killed for sleeping with his sister)
    - A&A only needs to commit act that makes it easier for the principal to commit the crime, even if it’s going to happen w/o their help.
  - Re causation: No need for but-for causation (contrast to Causation where but-for is required)

**Feigned Accomplices (Relationship b/t liability of parties)**
  - State v. Hayes: D asked Hill to help him rob a store and Hill was related to store owners so Hill agreed in order to catch D in the act; Hill climbed in and handed goods to D outside the store.
    - *Overt* act of the principal must be criminal before the accomplice can be held liable.
  - Vaden v. State: local guide helps people hunt illegally and a Game Warden working undercover to catch the guide shot deer illegally.
    - Ct rejects the “mutuality of purpose” argument (D claims he did not commit the overt act) to find D guilty, b/c regardless of Game Warden’s acts, D’s acts were still not justified.
  - Taylor v. Commonwealth: fiancé of natural father helps him abduct his children and father is justified in trying to take the children but she is not.
    - Father’s defense is personal to him and does not carry over to fiancé; she is a principal in the second degree for A&A, and intends her words, gestures, signals, etc to encourage, advise, help person committing the crime.

Four Ways to get Accomplice Liability w/o a Crime by the Principal
  - 1. MPC §5.01 (3): Attempt Statute – if the accomplice tries to aid and abet, it is attempt liability.
  - *Innocent Agent Doctrine*: if actor is innocent or irresponsible agent, and someone duped him into it by acting with the requisite culpability, duper is the principal actor.
    - Does not work when:
      - Only the designated person can be guilty of the offense
      - Crime committed only b/c of the innocent agent’s relation to the proscribed act.
  - *Defenses are personal to the individual committing the crime* – principal has a defense b/c he is a law enforcement officer, etc.
  - *Principal’s acquittal is irrelevant to A&A* – this is just a by-product of the criminal system with juries.

**Conspiracy**
- Conspiracy – two or more people agree (actually or constructively) to commit some criminal act (Am Cts under the Powell Doctrine, require criminal act, not just an act against public morals).
  - Duration of Conspiracy – the conspiracy ends when:
    - Commission of the final criminal act is complete
• Abandonment - Cts require an affirmative act inconsistent with the conspiracy and communicated in a manner to reach con-conspirators and let them know of the intent to abandon.

• Conspiracy hearsay
  o Krulewitch v. US: Conspiracy to take a woman to Fla for prostitution. Statement of D’s involvement in the conspiracy by one of the co-conspirators.
    ▪ Statement must be made pursuant to and in furtherance of the objectives of the conspiracy charged.
      • Because the conspiracy charged was completed, the conspiracy hearsay exception does not apply.
      • Thus, it is not a conspiracy to cover up a crime already committed unless specific evidence of said conspiracy.
  o Reasons why not to allow hearsay
    ▪ Persons out of court are not under oath
    ▪ Jury cannot observe witness testimony
    ▪ Cross-examination is not available
  o Dangers of hearsay
    ▪ Ambiguous or unclear meaning of the words testified to
    ▪ Sincerity problems (unclear from testimony as to whether the speaker was sincere)
    ▪ Perception problems – did the witness perceive the statement correctly
    ▪ Memory problem – failure to remember correctly
  o Exceptions: b/c the co-conspirator has been charged to act on behalf of the principal, he also speaks on his behalf, so no hearsay.
    ▪ Co-conspirator hearsay becomes admissible under FedRules of Evidence whenever judge determines by a preponderance of the evidence that D was a member of the conspiracy (SC rule)
    ▪ Situations in which the statement may be deemed to be trustworthy: excited utterance, dying declaration, admission against Penal interests
  o Three requirements for co-conspirator exception
    ▪ The person offering the testimony has to be a co-conspirator
    ▪ The statement being offered has to have been made during conspiracy
    ▪ The statement must be in furtherance of the conspiracy

• Conspiracy as a form of accessorial Liability – can hold a co-conspirator liable for the acts of another co-conspirator if the act is (a) reasonably foreseeable as a result of or (b) in furtherance of the conspiracy. (Both of these mirror Luparello’s view of accessorial liability)
  o Pinkerton v. UIS: Brothers conspired to run moonshine, one bro did it while the other was in jail.
    ▪ As long as the substantive crime is committed in furtherance of the conspiracy, then D has requisite mens rea to be charged with the crime. Idea is that the co-conspirator is acting on behalf of the other conspirator; evidence of conspiracy suffices to convict.
    ▪ Point, generally: we don’t care about the mens rea of the crime so long as it is in furtherance…
  o State v. Bridges: (D got into argument and left to get friends, returned with friends and one of the friends shot decedent while D was there)
- Conspirator may be held liable for criminal acts not within the scope of the conspiracy, so long as that criminal act is reasonably foreseeable as a result or natural consequence of the conspiracy.
  - Alvarez: Dealers shot federal agents during a cocaine buy
    - Limits the accessorial liability for conspirators to big players in the conspiracy → application of Pinkerton is improper.
  - See MPC → most jurisdictions currently hold, by statute or common law, that conspirators are liable for substantive crimes of their co-conspirators only when the strict conditions for accomplice liability are met. (specific intent and actus reus)

- **Actus Reus** of conspiracy – an express or constructive agreement to commit the crime
  - Knowledge of all elements of the conspiracy is not required. Need only knowledge of its essential nature and that his participation is essential to the success of the crime.
  - Interstate Circuit v. US: Movie house sent a letter to each of eight distributors proposing a price-fixing plan. Each distributor knew of the seven other’s receiving the letter, and they all knew that all would have to agree for the plan to work. → tacit agreement
    - When there is no express agreement, test:
      - Knowledge that the concerted action was contemplated and invited?
      - Knowledge that the criminal act could not work w/o agreement?
    - Re tacit agreement → the Coleridge instruction: it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means and so to carry it into execution. – must only have pursued the same object.
  - US v. Alvarez (2): co-conspirator indicates his agreement by smiling and nodding his head for transportation of marijuana.
    - En banc AC finds evidence sufficient for conviction, holding that D knew criminal activity was going on and made himself someone the other conspirators could rely on in the commission of the crime; D intended to be at off-loading site

- **Mens rea of Conspiracy**
  - Requires knowledge of the illegal use of legal goods or services and
  - Requires purpose to further that illegal use.
  - Some alternatives means to the “purpose to further illegal use”:
    - People v. Lauria: telephone message service operator knows prostitutes use his service to do “business” but he lets it continue (ct found him not guilty, based on reasoning below)
    - Court infer purpose when:
      - Knowledge, and the purveyor of legal goods or services for illegal purposes has acquired a stake in the venture
      - Knowledge, when no legit use of the goods exists
      - Knowledge, where the volume of the sales is disproportionate to legit demand
      - When the crime is a felony
Cts accept *knowledge* as the mens rea for conspiracy sometimes when the crime the provider of the legal goods knows about is sufficiently serious.

- MPC requires purpose for both conspiracy and accomplice liability §2.06(3)(a) and §5.03(1)
- Mens rea as to Circumstance Elements – mens rea required for the defense.
- Mens rea for the Results Elements – *purpose*
  - When causing a result is an element of the offense, had to have purpose to cause that result.

**Scope of the agreement – single or multiple conspiracies**

- MPC Approach – considers the scope of the conspiracy from the perspective of each conspirator. Ask what that person could have known and sets the scope of conspiracy as individual to that person.
  - Exception for when the D knows a conspiracy to the same crime is being made b/t his conspirator and a third party. Sort of a Chain Theory exception.
- CL approach sets the scope of the conspiracy as to all members at once.
- Spoke Theory – It takes more knowledge than knowing that a central figure is doing illegal things.
  - *Kotteakos v. US*: fraudulent loans being made through a central figure. Individuals knew central figure was doing this in multiple cases, but the success of any one fraud did not depend on the success of the others.
    - Because the individuals had no interest in the success of the other spokes, no conspiracy.
  - *Chain Theory* – Knowledge of place in a larger and more general conspiracy, and knowing that success of the whole depends on the success of the parts, makes you part of a conspiracy.
    - *Blumenthal v. US*: liquor sales set at above maximum price – salesmen knew of the plan and benefited from its general scheme.
    - *Anderson v. Superior Court*: woman referred patients to an illegal abortionist
      - B/c she knew the doc did this as an all-inclusive business, she knew others must be referring people to him. Unles they all referred people to the doctor, the deal would fail. So the ct said she was a conspirator on all counts. Serious Pinkerton liability.
    - *US v. Bruno*: middlemen part of major drug operation
      - Success of the part in which he was immediately concerned depended on success of the whole so ct finds conspiracy for the sum. (one conspiracy)
- MPC – take perspectives of individual defendants (§5.03)

**Parties to the conspiracy**

- *Gebardi v. US*: Mann Act – transporting hookers across state lines
  - A person cannot be convicted of conspiracy when there is a recognized rule of policy exempting that person from the substantive crime
- *Wharton* rule: where it is impossible under any circumstances to commit the substantive offense w/o cooperative action, the preliminary agreement b/t the same parties to commit the offense is not a conspiracy.
- Modified by SC to give only a presumption in favor of no conspiracy unless leg intends to separate punishments for conspiracy and the substantive crime.
  - See MPC §5.04
  - Garcia v. State: D tried to get her husband killed but the man she hired was a detective so there was no real crime for him. Application of bilateral/unilateral
    - Bilateral: 2 or more persons agree to commit crime, each w/ intent to do so.
    - Unilateral: it is immaterial to the guilt of a conspirator whose culpability has been established that all of the persons could or could not be convicted.
  - Ct applies new MPC approach – this is a unilateral crime and she is guilty (§5.03)

- Punishment
  - Treat conspiracy as a generic offense and make punishment range unrelated to those authorized for the object crimes.
  - USC §371 provides for a maximum punishment for conspiracy crimes for up to 5 years, except when crime is a misdemeanor and then you cannot be punished for more than the maximum requirement of the misdemeanor.

**Exculpation**

- **Self-Defense**
  - Must have a reasonable belief as to necessity – subjective then objective
  - **Complete Self-defense**
    - Perceived (subjective) threat
    - Objectively reasonable belief that you are in danger of death or serious bodily harm.
    - Unlawful and immediate threat
    - Use of responsive force must be objectively reasonable under the circumstances
  - Incomplete self-defense
    - Honest but unreasonable belief that you are in danger of death or serious bodily harm.
    - Results in voluntary manslaughter charges.
  - MPC §3.04: Use of force in self-protection
    - Partial individualizing of objective standard for a reasonable person
    - Immediacy requirement
    - Limited to where danger is death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat.
  - **Protection of Life and Person**
    - US v. Peterson: law of self-defense is law of necessity → must be honest and objectively reasonable in light of surrounding circumstances
    - People v. Goetz: let white man off for shooting black boys on subway when he thought they were going to rob him. Held: jury found his belief reasonable and his actions necessary in light of circumstances – CRAZINESS!!!
    - State v. Kelly: Battered Women’s Syndrome defense for woman who stabs her husband w/ scissors after years of abuse. Held: admission of evidence of BWS is relevant in showing a reasonable person’s honest belief of being in imminent danger of death (ct remanded).
• BWS evidence explains to jury why she did not leave
  ▪ Making BWS more objective: Jury must consider D’s situation and knowledge, which makes evidence of BWS relevant, but the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm. (People v. Humphrey)
  ▪ Juries should instead assume the physical and psychological properties peculiar to the accused…and then decide whether or not the particular circumstances … were sufficient to create a reasonable belief that the use of force was necessary.” (State v. Leidholm)

• Problems with BWS defenses:
  ▪ Eroding the moral force of the criminal law (giving everyone a way – makes it hard to punish people)
  ▪ Allowing govt to intervene when person becomes dangerous (i.e. if we use knowledge of BWS to try and prevent crimes before they happen by intervening w/ every possible future criminal before they commit a criminal act)
  ▪ State v. Norman: abused woman (husband forced her to prostitute herself, eat dog food, etc) tried to shoot husband, failed and then shot him again. Held: BWS evidence is not allowable b/c she has not met the immediacy requirement → does not have a reasonable fear of imminent harm.

• Burden of proof: most jurisdictions place burden on the prosecution to disprove the self-defense beyond a reasonable doubt, once the issue is raised by the evidence.
  ▪ Ohio requires D to prove his self-defense b a preponderance of the evidence
  ▪ SC has upheld constitutionality of that practice – finds that absence of self-defense is not among elements of crime charged in Ohio statute

  o Duty to Retreat
  ▪ State v. Abbott: D killed family members using hatchet they brought out to fight against him with. Held: If D resorts to deadly force in self-defense, he must take the opportunity to retreat if (a) he knows he can avoid the force (b) with complete safety. Otherwise, he cannot avail himself of the self-defense exculpation.
    ▪ Duty to retreat does not arise until the threat is so imminent that retreat would manifest intention not to fight.
  ▪ MPC §3.04(2)(b)(ii): issue of retreat arises only if D resorted to a deadly force.
  ▪ “castle exception”: Typically no duty to retreat in one’s home.

  o Self-defense by original aggressor
  ▪ US v. Peterson: D threatens to kill, decedent grabs a lug wrench and walks toward D and then D kills him.
    ▪ Common law: self-defense not available to original aggressor unless the original aggressor indicates intent to withdraw and does attempt to withdraw, at which point he regains his right to assert a self-defense defense.
Criminal Law Outline – Kuhns

- **MPC**: If the original aggressor’s victim goes beyond a proportional response to the aggression, the original aggressor has the right to self-defense against the disproportionate force.

- **Protection of Property**
  - **People v. Ceballos**: D had tools stolen and set up a spring gun in his home to attack robbers; decedent was killed when he opened garage door and spring gun went off.
    - **Held**: There can be no use of deadly force when there is not a reasonable belief/fear of great bodily harm. Here, the asserted burglary did not threaten death or serious bodily harm though if D had been present he would have been justified in deadly force if he perceived great bodily harm.
    - **MPC Approach**: §3.06(3)(d)(ii)(2) – same as in Ceballos, strictly limits the use of deadly force against an intruder in the home.
  - Statutory measures to increase presumption of legitimacy in homeowner’s protection of property by use of deadly force
    - Colorado “Make my Day” statute
    - California Homeowner’s Bill of Rights: presumed to have that fear → people no longer need to prove perception of deadly force

- **Law Enforcement**
  - **Durham v. State**: D officer was attempting to arrest victim for illegal fishing and victim tried to escape, D shot him in the arm. Ct held D’s conduct was okay based on the following rule:
    - (a) an officer for w/ a right to arrest a **misdemeanant** may use all force reasonably necessary to accomplish arrest, except
    - (b) he may not, just for the sake of the arrest, inflict great bodily harm, endangering life of a **fleeing** (but not resisting) victim
    - if victim **resists**, officer does not have to retreat but can move ahead and use all force, short of taking life, necessary to make the arrest and if, in order to do that, the officer has to seriously wound/kill in order to protect himself, the officer is justified.
  - **Tennessee v. Garner**: Office shoots/kills a boy as he is trying to escape over a wall. Ct found that D was unjustified.
    - Transition from old law (can always shoot any fleeing felon) to new rule: suspect has to threaten the officer w/ a weapon or the officer has to have probable cause to believe that victim has committed a felony that inflicted serious physical harm
  - **MPC, §3.07(2)(b)**: Use of Force in Law Enforcement

- **Necessity**
  - **Choice of the Lesser Evil**: Principle of Justification
    - **People v. Unger**: D escapes from prison b/c he feared for his life in prison; wanted to get help and return to prison. Ct finds D is entitled to submit defense of necessity to the jury.
    - Defense of necessity is justified b/c D was forced to choose b/t two admitted evils – escaping versus fear of threatened assaults and reprisal. RULE: If accused was w/o blame in occasioning or developing the situation and reasonable believed such conduct was
necessary to avoid a public or private injury greater than the injury which might result from his own conduct.

- **Lovercamp rules**: Defense of necessity can be submitted to jury when five conditions have been met:
  - (1) Prisoner is faced w/ a *specific threat* of death, sexual attack or substantial bodily injury in the immediate future
  - (2) no time to complain to authorities or a history of futile complaints;
  - (3) no time to resort to cts;
  - (4) D doesn’t use violence toward any innocent others (i.e. prisoners, guards) in his escape;
  - (5) prisoner immediately reports to the proper authorities once he is safe

- Ct finds that all five rules need not necessarily be met – but the rules, if met, lend credibility to D’s case.

- **Borough of Southwark v. William**: homeless take shelter in empty building. Ct finds necessity cannot be an excuse for everything or it would open too many doors (keep property sacred)

- **Commonwealth v. Leno**: D passed out hypodermic needles in violation of law restricting distribution. Ct found that public policy furthered by intent of statute(to control distribution of needles for use with illicit drugs) is entitled to deference by cts. Therefore no necessity.

- **Commonwealth v. Hutchins**: D uses marijuana for health purposes. Ct balances potential harm to public if D’s conduct were not punishable and finds therefore no necessity.

- **MPC, §3.02  Justification Generally: Choice of Evils**
  - Must be necessary to avoid an evil
  - Must arise from a desire to avoid a greater harm (evil) than the harm sought to be avoided by defining the law
  - Not subjective – balancing of the evils subject to determination at trial.

- **US v. Schoon**: civil disobedience, Ds protest IRS for US involvement in El Salvador. Ct finds that there was no necessity b/c they were not challenging in a direct manner the harms they were opposing (throwing blood at IRS office was irrelevant, sort of).

  - **To invoke necessity defense**, Ds must show (1) they were faced w/ a choice of evils and chose the lesser evil; (2) they acted prevent imminent harm; (3) they reasonably anticipated a direct causal relationship b/t their conduct and the harm to be averted; and (4) they had no legal alternative to violating the law.

- **Regina v. Dudley and Stephens**: analyze Regina (boys who ate weak victim to save themselves) in light of necessity doctrine
  - Consider element of *certainty*: i.e. if you know there’s not going to be another, better option for you, you may proceed → very difficult standard to apply!

- **Note on Rights and Lives**:
  - Killing one person deemed a lesser evil than death of more than one
- MPC, §3.11(1): allows you to take an innocent life if it means more lives will be saved.
  - Committee Against Torture v. State of Israel: Interrogators believe that gravely physical attacks to get information from suspects. Ct rules that as a general matter, torture is not justified but in individual cases, interrogator may raise necessity defense – think, ticking time bomb.
    - Consider: if we’re going to allow it at all, don’t we want to regulate it?
  - Euthanasia
    - Cruzan v. Director, MO Dpmt of Health: Victim was in vegetative state and family wanted her off life support. SC required convincing evidence of informed consent as to victim’s wishes in order to allow her to be removed (previously telling roommate not enough)
    - Washington v. Glucksberg: terminally ill patients challenge state’s ban on assistant suicide. Ct finds that right to assisted suicide is not a liberty protected by (substantive) due process under the Constitution.

- Principles of Excuse
  - Three categories of excusable disabilities
    - (1) involuntary actions – no control over bodily movements;
    - (2) disabilities that produce deficient but reasonable actions – power to choose in literal sense but choice is constrained so that ordinary law-abiding citizen could not be expected to choose otherwise;
    - (3) disabilities that render all actions irresponsible: infancy and legal insanity
  - Duress
    - State v. Toscano: D helped aid fraudulent insurance claim b/c he feared threats to himself and his wife. Ct finds that duress is a defense to a crime if D engaged in the conduct b/c he was coerced to do so by use of, or threatened use of, unlawful force against his person…force that a reasonable man in his situation would not have been able to resist. Ct allows defense of excused behavior.
    - MPC, §2.09 Duress
      - Opposed to making duress a subjective standard → D must meet standard of “reasonable firmness”
    - Necessity and Duress compared
      - MPC separates them: necessity is a justification → choice of evils; duress is an excuse → it was not right to violate the law but b/c circumstances were so compelling that an otherwise law-abiding person would have done the same.
      - Some overlap (see LaFave and some jurisdictions): law of duress requires not only that D be threatened by another w/ imminent serious unlawful
    - US v. Fleming: D POW in Korea was threatened with dangerous walk or being sent to cave to die unless he helped promote propaganda. Ct says no defense b/c there was no immediate threat of death.
    - US v. Contento-Pachon: driver was forced to carry drugs or the lives of his family would be threatened. Ct found defense of duress allowable b/c he had no opportunity to escape.
- **Regina v. Ruzic**: Yugoslav woman travels with drugs b/c she fears reprisal from man and does not trust authorities. Ct found that she was left no realistic choice, even though the threat was not immediate and the threatener was not present when she committed the offense. Found that it was in the best interests of justice to allow defense.

- **Duress as a defense to murder**
  - Not under Common Law but it is allowable under MPC

- **Nature of the Threat**:
  - Under both: a person; under common law – death or serious bodily injury whereas MPC requires only unlawful force.

- **Gang Membership**: where D voluntarily, and with knowledge of its nature, joined a criminal organization or gang which he knew would put the pressure on him to commit an offense cannot later claim duress

- **Mistaken Threat**:
  - Common law: valid only if well-grounded
  - Under MPC: §2.09(1): unclear

- **Intoxication**
  - **Regina v. Kingston**: D may have pedophiliac desires but other man gets him drunk and then he acts on those desires. Ct found that D cannot be held responsible for condition surreptitiously brought on by another person – although D’s acts were intentional, D himself bears no blame.

- **As an affirmative defense**:
  - Involuntary intoxication is a defense.
  - Voluntary intoxication: defense only when it produces a permanent condition sufficient to meet the test for insanity

- **Roberts v. People**: man gets drunk and shoots someone. Ct finds that jury must determine whether or not D had the intent sans alcohol.
  - Both voluntary and involuntary intoxication negative mens rea

- **People v. Hood**: man gets drunk and shoots officer. Ct finds that jury should not be instructed on voluntary intoxication b/c only general intent was necessary in this case (inferred from statutory interp)

- **State v. Stasio**: In a specific intent crime, ct finds evidence of voluntary intoxication inadmissible b/c only general intent was differentiating b/t specific and general intent indicates that intoxication is a defense for some crimes but not others, which ct disagrees with.

- **Intoxication negatives mens rea**
  - Roberts rule: evidence of intoxication is admissible whenever it is factually relevant
  - Hood and Stasio rule: evidence of intoxication sometimes is inadmissible even when it is logically relevant.
    - Contemporary application: evidence is admissible to determine if D has developed the mens rea for specific intent crimes.

- **General intent vs Specific Intent** (from People v. Hood)
  - General: when the definition of the crime consists of only description of an act, w/o reference to intent to do a further act or achieve a further consequence – determine only if D intended to do the proscribed act.
- Specific: When the definition of the crim refers to D’s intent to do some further act or achieve some additional consequence.
  - MPC, §2.08 Intoxication
- Insanity
  - Purpose: if he can show he was INSANE at the time of the crime, he may be able to prove that he is not guilty by reason of insanity.
  - No constitutional requirement: most states recognize it but it is not constitutionally required.
  - Limits on the use of mental disease: there is a rule that no evidence relating to mental disease or defect may be introduced except as part of an insanity defense.
- Tests for insanity
  - M’Naghten “right from wrong” rule: D must show:
    - (1) Mental disease or defect – he suffered a mental disease causing a defect in his reasoning powers.
    - (2) Result: as a result, he either (1) did not understand the “nature and quality” of his act; or (2) he did not know that his act was wrong.
  - Irresistible impulse test: Many states follow a second standard by which D can establish his insanity: that D was unable to control his conduct. (= irresistible impulse)
  - Model Penal Code Standard (§4.02(1)): allows D to be acquitted if “as a result of a mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.”
    - D wins if he can show either that he (a) didn’t know his conduct was wrong or (b) couldn’t control his conduct.
    - Essentially, D wins under MPC if he shows either the M’Naghten test or the irresistible impulse test.
  - Federal Standard: very stringent standard for fedl prosecutions. D wins only if “as a result of a severe mental disease or defect, he was unable to appreciate the nature and quality or the wrongfulness of his acts…” (essentially the M’Naghten standard)
    - The fact that D was unable to conform his conduct to the requirements of the law is irrelevant – in other words, in federal suits, there is no “irresistible impulse” defense.
- Raising and establishing the defense
  - Affirmative defense – D must come forward with the evidence showing that he is insane.
  - Burden of persuasion: Courts are split about who bears this burden.
    - (1) prosecution must prove beyond a reasonable doubt that D is not insane; or (2) D bears the burden of proving his insanity, but only by a “preponderance of the evidence.”
    - In the federal system, D must prove insanity by “clear and convincing evidence.”
• Psychiatric Evaluation: If D has demonstrated that his sanity will be a significant factor in his defense, he has a constitutional right to have assistance from a psychiatrist at the state’s expense.
  o Ct can also appoint impartial expert for an independent exam
• Up to jury: jury can decide whether or not it believes the evidence.
  ▪ **Mandatory commitment**: if he succeeds with this defense, he’ll still be involuntarily committed to a mental institution.
  ▪ **Release**: release depends on whether (1) continues to be insane and (2) whether D continues to be dangerous.
  ▪ **Constitutional requirements**: though state can involuntarily commit D, state must give him the opportunity to be released if he bears the burden of proving that he is either no longer insane or no longer dangerous.
  ▪ **Fitness to stand trial**: D is fit to stand trial if he (1) understands the proceedings against him and (2) can assist counsel in defense
  ▪ **Burden of proof**: on D to prove that he is not competent to stand trial.