Establishing Guilt:
- **The Presentation of Evidence: Rules on Outside Evidence (Past Crimes):**
  - Rule 401: “Relevant Evidence” means 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 evidence
  - Rule 402: All relevant evidence is admissible, except as otherwise provided…evidence which is not relevant is not admissible.
- **Privilege:** Privilege against self-incrimination provided by the 5th amendment
- **Prejudice:** Evidence must be excluded whenever it probative values is outweighed by its prejudicial effect.
- **Probative and Material Evidence:**
  - **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.
- **Kuhns: Why Past Criminal Activity Evidence Should Not Be Allowed:**
  - Focus should be on this case, not the type of person that D is or what he has done in the past.
  - Risk of Double Jeopard
  - Evidentiary Reasons: Jury may overestimates probative value and risk inefficiency
  - Puts pressure on the defendant not to testify, thereby burdening the 5th Amend
- **People v. Zackowitz (NY Ct of Appeal, 1930):**
  - **Facts:** Zackowitz claimed that evidence relating to his possession of other weapons at home should not have been admitted at his murder trial because its sole purpose was to give the impression he had a general criminal disposition
  - **Rule of Law:** Unless the defendant has made his general character an issue in criminal prosecution, evidence thereon is inadmissible (unless admissible for some other purpose).
  - **Dissent/Relevancy of Evidence:** The gun collection is relevant because it may indicate premeditation because D had to choose a weapon from among the collection.
- **Allocating the Burden of Proof: persuasion and production**
  - **Burden of Persuasion:** In criminal law, it is proof beyond a reasonable doubt; civil is a preponderance of the evidence
  - **Burden of Production:** Burden of production of evidence
- **Winship Rule:** A person’s liberty cannot be taken unless the court proves every element of that case beyond a reasonable doubt
- **Patterson v. New York (US, 1977):**
  - **Facts:** Patterson alleged as an affirmative defense that he was emotionally disturbed at the time of the killing
  - **Rule of Law:** So long as the state proves every element of the charge beyond a reasonable doubt, the defendant may be required to prove an affirmative defense.
  - **Kuhns:** As long as legislature prescribes it as such, it is constitutional to put the burden on the defendant to raise the affirmative defense.
- **The Role of the Jury**
- **Duncan v. Louisiana (S.Ct. 1968)**
  - **Facts:** Duncan (D), a black youth, was convicted on disputed evidence, without a jury of simple battery on a white youth.
Rule of Law: Because trial by jury in criminal cases is fundamental to the American scheme of justice, the 14th amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in federal court, could come within the 6th amendment’s guarantee.

Jury Nullification: Occurs when a jury nullifies a law by acquitting an obviously guilty defendant. Jury instructions usually tell jurors that they have to follow the law as put forth by the judge.

United States v. Dougherty (DC Circuit, 1972)
- Facts: Dougherty contends that the trial judge erred in refusing to instruct the jury of its right to acquit without regard to the law and the evidence
- Rule of Law: While the jury’s prerogative to disregard the court’s instruction even as to matters of law does exist and is approved of, the jury should not be formally informed of that power by the judge.

The Role of Counsel:

Nix v. Whiteside (US, 1986):
- Facts: Whiteside’s attorney refused to permit to commit perjury when testifying in his defense
- Rule of Law: A defendant is not denied the right to counsel when his attorney prevents him from committing perjury.
- Kuhns: Regarding Perjury: An attorney cannot be agnostic; he should discourage his client from committing perjury; he can and should tell his client the law.
- Monroe Position: Represent guilty clients as you would anyone else and allow the jury to sort out any perjury.

The Justification for Punishment

Background and Case Study

What objectives are there in punishment:
- Utilitarian: Justify punishment on grounds that punishment provides good consequences for society in the future.
  - General deterrent, specific deterrent, respect for law, moral impact.
  - Recidivism: “career criminals” who have a propensity for committing crimes, putting career criminals in prison is a sort of specific deterrence.
- Retributive: Justify punishments on grounds of offender’s past behavior

Regina v. Dudley and Stephens (QB, 1884)
- Facts: Dudley and Stephens killed a young boy with whom they were stranded on the high seas in a life boats, in order to survive off Parker’s remains after having run out of food and water
- Rule of Law: Homicide may not be excused when the person killed is an innocent and unoffending victim.
- Kuhns: This case serves neither the deterrence nor retribution purpose of punishment.

- Facts: D was a rabbi who operated several nursing homes, and was found to be conspiring to defraud the government with his nursing home scheme. He pled guilty and argued that no purpose would be served by sending him to jail. The court disagreed
- Holding: A jail sentence may be given as a general deterrent to others to prevent future commissions of criminal offenses (especially when he is a pillar of the community), in addition to the retributive purposes.

- Facts: Cheney, convicted of rape and robbery, was sentenced to one year in prison, a sentence that the prosecution considered to be too lenient.
- Holding: A criminal sentence should be sufficiently harsh so as to effectuate the societal purposes of incarceration—rehabilitation, isolation, deterrence of offender, deterrence for community and for the purpose of respecting the norms of society.

United States v. Jackson (7th Circuit, 1987)
Facts: Jackson committed a robbery 30 minutes after being released from prison. He had been in prison serving a sentence for two previous robbery convictions. He was sentenced to life in prison without parole.

Rule of law: Life in prison without parole is allowed where specific deterrence has failed, and the court is allowed to consider general deterrence and incapacitation in determining the new sentence.

United States v. Johnson (2nd Circuit, 1992)
Facts: In calculating Johnson’s sentence for stealing money from the government and bribery, the judge subtracted ten levels from federal sentencing guidelines because Johnson was solely responsible for the upbringing of four young children.
Rule of Law: Extraordinary family circumstances may constitute proper grounds for a downward departure from sentencing guidelines.

The Elements of Just Punishment:
- Three principles limit the distribution of punishment: culpability, proportionality, and legality.
- Culpability: safeguard conduct that is without fault from condemnation as a criminal
- Legality: give fair warning of the nature of the conduct declared to constitute an offense
- Proportionality: differentiate on reasonable grounds between serious and minor offense.

Actus Reus (Culpable Conduct)
- MPC §201.1: Person is not guilty of an offense unless his conduct is based on a voluntary act
- MPC §201.3: Liability for an omission only arises when duty to perform the omitted act is otherwise imposed by the law
- Requirement that the defendant have committed some voluntary act...this is distinguished from thoughts, words, states of possession, status, involuntary acts, and omissions.
- Criminal statutes are made up of elements (MPC 1.13(9)): 1) conduct; 2) circumstance; 3) result
- Martin v. State (Ala. Ct. of Appeals, 1944)
  Facts: Martin (D), was arrested and taken to a public highway by police officers, and he proceeded to exhibit drunken behavior on the highway.
  Rule of Law: Criminal liability must be based on conduct which includes a voluntary act or omission from committing an act which it was physically possible to have performed.
- People v. Newton (Cal. Ct. of Appeals, 1970)
  Facts: Newton was involved in an altercation with police and was shot. He alleged that he acted unconsciously in shooting the officer while in a state of shock resulting from his gunshot wound.
  Rule of Law: Where not self-induced, unconsciousness is a complete defense to a charge of homicide and should be included in jury instructions.
  EM: It is universally agreed that an act performed during a state of unconsciousness does not meet the actus reus requirement. Furthermore, the burden of proof lays on the prosecution to show that D was not in a state of unconsciousness, while D only needs to show some evidence of unconscious state in order to get a jury instruction.
- Omissions: A person who merely fails to act is usually not held to be criminally liable, particularly in cases of failing to attempt a rescue.
  There is liability for omissions in cases where a statute makes it criminal to fail to act; there are other factors giving rise to a distinct legal duty to act
  Statutory Requirement (EM): There are a number of statutes which impose a duty to take affirmative action in particular situations, such as the IRS makes it a crime to fail to file an income tax return
  Existence of a Legal Duty (EM): The courts have mentioned principle categories in which there is a special legal duty to act:
    - Special Relationship: Parent-Child, Spouse, etc.
Duty Based on Contract: Lifeguard who fails to rescue a drowning swimmer; baby sitters, etc.

Undertaking: Individual has a duty to act where he begins to give assistance

Statutory Duty: A statute may impose a duty to act whereby liability is imposed based on an omission
  - Ignorance of Facts: The prosecution must normally show that the defendant was aware of the facts that gave rise to the legal duty.
  - Strict Liability: In a few cases, a person may be strictly liable for a failure to act.
  - Ignorance of Law: Generally speaking, the fact that D did not know the law that imposed a legal duty will not constitute a defense, except where the duty and the law are so unusual that it was not reasonable for the D to know the law.

Pope v. State (Md. Ct of App, 1979)
  - Facts: Pope, who had let a woman and her child stay with her, did not intervene when the woman savagely attacked the child, or report it to the authorities.
  - Holding: According to the MD court, those who permit a parent and child to reside with them do not make one responsible for the child.
  - Rule: One is not criminally liable for failing to intervene when a person staying in one’s dwelling abuses her child.

Jones v. United States (DC Circuit, 1962)
  - Facts: Jones was found guilty of the involuntary manslaughter of Green, a 10-month old baby belonging to Shirley Green, who placed the baby in Jones care.
  - Rule of Law: Under some circumstances, the omission of a legal duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter.

Jones v. State (Indiana, 1942)
  - Facts: Defendant raped a child, who “distracted by pain and grief” fell or jumped into a creek where she drowned. Defendant failed to rescue her, even though he could have done so without risk to his own well-being.
  - Rule of Law: One, who by his own overpowering criminal act has put another in danger, has a duty to attempt to preserve her life.

Barber v. Superior Court (California, 1983)
  - Facts: When Herbert, permanently comatose following surgery, was taken off life support, Barber, his physician was charged with murder.
  - Rule of Law: A physician who, at the request of the patient’s family, disconnects life-sustaining equipment is not criminally liable if the victim had virtually no chance of benefiting from the life-sustaining measures.

Mens Rea (Culpable Mental States)

- Mens Rea refers to the requirement that there be what might be called a “culpable state of mind.”
- For each element of the offense, there is an accompanying mental state:
  - Purposely: A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist. (Doing something with the intent to have it occur)
    - Specific Intent Crimes: Act done with a specific purpose in mind; a desire to have the result
    - General Intent Crimes: Act done simply with the intent of doing the act
  - Knowingly: A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his
conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

- **Recklessly**: A person acts recklessly with respect to a material element of an offense when he **consciously** disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation. Kuhns calls this conscious awareness of risk.

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

- **Strict Liability**: Crimes defined so as to require no mens rea at all. These are crimes for which no culpable mental state at all must be shown, it is enough that the defendant has performed the act in question, regardless of mental state. These typically include statutory rape and bigamy.

- **Kuhns**: Frequently, older statutes are not particularly clear as to the meaning of some of the more ambiguous terminology. MPC attempts to give some general guidelines for the interpretation of statutes. MPC says that when the statute is unclear, there must be at least some level of **recklessness** and the prosecution must prove recklessness as to every material element of the crime.

- **Regina v. Cunningham (QB, 1957)**
  - **Facts**: Cunningham intentionally stole a gas meter out of a house. A woman in the house was made ill by the escaping gas.
  - **Rule of Law**: “Malice” in a statutory crime means foresight of the consequences and requires either an actual intention (knowledge) to do the particular kind of harm that in fact was done or **recklessness** as to whether such harm could occur or not. Transferred intent only operates within the scope of the intended crime.

- **Regina v. Faulkner (1877)**
  - **Facts**: D lit a match in order to see better while he was in the process of stealing some rum from the bottom of a ship. The rum caught fire and caused a fire on the ship.
  - **Rule of Law**: The act must be done intentionally or willfully, although the intention and will may be shown in circumstances where the accused knew the injury was the probable result of the act, yet he did it anyway (recklessness).

- **Santillanes v. New Mexico (New Mexico, 1993)**
  - **Rule**: An act, to be **negligence**, must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such reasonable person, in the exercise of ordinary care, would not do.

**Mens Rea Applications:**

  - **Facts**: This was a case of alleged jury obstruction of justice.
  - **Holding**: Defendant only had to have knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice. Notice is provided by the reasonable foreseeability of the natural and probable consequences of one’s acts.
  - **Kuhns**: “Reasonable Foreseeability” indicates a standard of **negligence** because D does not even have to be aware of the fact.

- **Halloway v. US (US, 1999)**
  - **Rule of Law**: Carjacking “with the intent to cause death or serious bodily harm” requires the government merely to prove an intent to kill or harm if necessary to effect a carjacking.

Facts: Jewell entered the US driving a car in which marijuana had been concealed in a secret compartment. He claimed he did not have positive knowledge that the marijuana was present.

Rule of Law: Where a defendant is aware of facts indicating a high probability of illegality but purposefully fails to investigate because he desires to stay ignorant, he has knowledge of the illegality and positive knowledge is not required.

Kuhns: The mens rea culpability level here is somewhere between negligence and recklessness…MPC would hold that if D was aware that there is a high probability that the weed was in the car, D is guilty.

Mens Rea: Mistake of Fact

MPC 2.04 (1)-(2) Ignorance or Mistake

(1) Ignorance or mistake as to a matter of fact or law is a defense if:
- (a): the ignorance or mistake negatives the purpose, knowledge, belief, recklessness, or negligence required to establish a material element of the offense;
- (b): the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2): Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed.

Comment: Only a defense when it negatives 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 regarding defense

Regina v. Prince (Ct. of Crown, 1875)

Facts: Prince (D) who was under the reasonable belief that Annie Phillips was 18, was convicted of violating a law making it a misdemeanor for anyone to unlawfully take any unmarried girl under 16 out of the possession, and against the will of her father.

Holding: A reasonable but mistaken belief that the girl was 16 or older is not a defense against a charge that one violated the law which makes it a misdemeanor to unlawfully taken any unmarried girl under age 16 out of the possession and against the will of her father.

Kuhns: This is a strict liability offense

White v. State (Ohio, 1933)

Facts: D was convicted of violating a statute that imposed criminal liability on a husband who leaves his pregnant wife. The trial court was given an instruction that D was no less guilty because he did not know that his wife was pregnant.

Holding: the fact that she was pregnant makes this a strict liability offense

People v. Olsen (California, 1984)

Facts: Olsen was convicted of committing a lewd act on a child under 14 years of age whom he believed to be and who looked, older

Rule of Law: A reasonable mistake as to the victim’s age is not a defense to a charge of committing a lewd act on a child under 14 because a reasonable mistake of fact as to the girl’s age does not negate the mens rea regarding the crime.

Mens Rea: Strict Liability

Kuhns: A strict liability offense is typically identifiable by a low penalty; an offense where it is difficult to prove awareness; where there is a public welfare argument; where D has or can have more information to easily prevent the harm; where there is a risk of substantial harm. If a crime is a strict liability crime, the state does not have to prove a mens rea or intent

EM: If the statute is complex, easy to violate innocently, or if it imposes a stiff penalty, the court is likely to read into it a mens rea requirement.

Morrisette v. US (US, 1952)

Facts: Morissette converted spent air force shell casings, found on a military target range into scrap metal, which he then sold.
Holding: The statute in question was not a strict liability one, and required the prosecution to show an intent to steal. The statute was merely a codification of a common law crime of larceny; therefore, the fact that Congress failed to specify a requirement of intent to steal does not warrant the assumption that strict liability was intended, since intent to steal has always been an element of larceny.

Rule of Law: Crimes which are bad in themselves necessarily include the element of mens rea and no statutory strict liability version of them is permissible.

Staples v. US (US, 1994)

Facts: When Staples was convicted because he had not registered a rifle which had been modified to be capable of automatic fire, he claimed that he did not know of the rifle’s automatic firing capability.

Holding: Some indication of legislative intent, express or implied, is required to dispense of the mens rea requirement.

State v. Guminga (Minnesota, 1986)

Facts: Guminga (D), a tavern owner, was prosecuted under a statute providing vicarious criminal liability for the acts of one’s employees.

Rule of Law: A person may not be vicariously liable for the acts of his employees that he did not ratify.

Note: Vicarious liability is rarely used where a penalty would be incarceration

Mens Rea: Mistake of Law

People v. Marrero (NY, 1987)

Facts: Marrero (D), charged with illegal firearms possession, argued that he mistakenly believed himself to be exempt from the ambit of the statute proscribing possession.

Rule of Law: A good faith mistaken belief as to the meaning of a criminal statute is no defense to a violation of the statute.

Note: MPC §2.04(3): A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

- (a): the statute or other enactment defining the offense is not known to the actor and has not been published or otherwise reasonably made available prior to the conduct alleged; or
- (b): he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous.

Under MPC, D would be guilty: MPC mistake of law is a very narrow defense, the conditions of which rarely arise.

Kuhns: As a matter of first impression, there are two ways to look at Marrero:

- Standard Mens Rea Argument: We should interpret the statute as having a mens rea attached to this element and never have to consider mistake of law
  - Reasonable Belief, etc.
- Strict Liability Element: Mens Rea does not apply, so Marrero has to get to a mistake of law argument
- D can never get to a mistake of law argument until all mens rea arguments have been exhausted--???

Cheek v. US (US, 1991)

Facts: When Cheek was charged with willfully failing to file a federal income tax return, and willfully attempting to evade his income tax, he argued that because he sincerely believed that the tax laws were invalid, he had acted without the willfulness required for conviction.

Rule of Law: Any person who willfully attempts to evade or defeat the requirement that he pay a tax on his income shall be guilty of a felony where it can be shown that he knows and understands the law
Kuhns: The key difference between negligence and recklessness is subjective awareness is necessary in recklessness, this is not a mistake of law case, this is a mens rea case.

- **General notes on mistakes of law and fact:**
  - **Mistake** is a defense if it negates the requisite mens rea
  - **MPC:** Mistake is valid when it comes as a 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.
  - **Mistake of Fact:** This is an aspect of mens rea; a mistake of fact is a mistake of mens rea and requires reasonableness.
  - **Mistake of Law:** A limited, independent defense
  - **Propositions:**
    - Can never get to a “mistake of law” defense if the mistake relates to an element for which there is mens rea
    - What, if any, mens rea attaches to an element is a matter of statutory interpretation.

- **US v. Albertini (9th circuit, 1987)**
  - **Facts:** Albertini, relying on a later-reversed court of appeals opinion, violated an order not to enter certain federal property
  - **Rule of Law:** One may rely on a later-reversed declaration that his conduct is lawful.

- **Lambert v. California (US, 1957)**
  - **Facts:** Lambert was convicted for violating a statute which required all persons who had previously been convicted of a felony to register with the police.
  - **Rule of Law:** Failure to act may not be punishable under a criminal statute unless it is shown that the defendant knew or should have known of the duty established by the state and the penalty for failure to comply with the statute.

- **Consent:** In order to constitute a defense, the consent must be legally effect and negate an element of a crime that requires a lack of consent

- **Legality:** 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.

- **Shaw v. Director of Public Prosecutions (House of Lords, 1962)**
  - **Facts:** Shaw was convicted of publishing a prostitute directory
  - **Holding/Rule of Law:** Where public policy demands the judicial fashioning of a particular offense to protect the public welfare, only the jury may determine whether the resultant offense is sufficiently free of uncertainty to be enforceable; judges cannot change the law in order to enforce against a moral wrong

- **Keeler v. Superior Ct. (California, 1970)**
  - **Facts:** The state contended Keeler was guilty of murder for killing a fetus which was ultimately stillborn.
  - **Rule of Law:** An unborn, viable fetus is not a human being for purposes of the murder statute and change the law such that it is would be a violation of the principles of legality

- **City of Chicago v. Morales (US, 1999)**
  - **Facts:** Morales challenged an anti-gang ordinance passed by the city on the basis of the wording of the statute defining loitering was so vague as to make the statute unconstitutional
  - **Rule of Law:** A statute providing penalties for criminal conduct is unconstitutionally vague if it fails to give sufficient notice regarding the type of conduct prohibited.

**RAPE**

- Rape is generally defined as unlawful sexual intercourse with a female without her consent.
- **MPC §213.1**
• **The Spousal Exception:** Common-law rape requires that victim be one other than the defendant’s wife, although this exception has begun to change.

• **Without Consent:** The intercourse must occur without the woman’s consent, and non-consent will be found only if the woman used words or acts that would make it clear to a reasonable person in the man’s position that the woman was not consenting. A woman who remains silent but subjectively fails to consent will normally not be found to have met the “lack of consent” requirement.
  o **Victim drunk or drugged:** Some courts find the requisite lack of consent where the victim is drunk, drugged, or unconscious; differing opinions over treatment of how the intoxication was induced.
  o **Fraud:** Consent obtained by fraud is typically viewed as consent nonetheless

• **Force:** The majority of rape statutes apply only where the intercourse is committed by force or forcible compulsion or in most cases, a threat of force. At least one jurisdiction has held that the force requirement can be satisfied by actual penetration.

• **Resistance:** No state requires resistance “to the utmost” anymore. Typically the woman must make merely “reasonable” resistance. Most states continue to insist that woman’s fear and her consequent failure to physically resist have been reasonable under the circumstance—if the woman becomes “unreasonably” scared, and submits without resistance, this is not rape in most state.
  o **Possible Examples of Acceptable Means of Signaling Non-Consent**
    ▪ Verbal resistance plus other behavior that makes unwillingness clear
    ▪ Verbal resistance alone (no means no)
    ▪ Verbal resistance or passivity, silence, or ambivalence (anything other than affirmative permission
    ▪ The absence of verbal permission (not saying yes)

• **Mistake as to Consent as a defense:**
  o Most courts do not recognize a mistake as to consent be a defense because the crime of rape is typically viewed as crime of general intent
    ▪ **Specific Intent:** crime done with a specific further purpose (result) in mind
    ▪ **General Intent:** When it is sufficient to convict if D did an intentional action.
    ▪ The difference is whether the actor intended the result (specific) or just intended the act (general).

**Force, Non-Consent, and Resistance**

• **State v. Rusk (Ct. of Appeals of MD, 1981)**
  o **Facts:** Rusk’s second degree rape conviction was reversed by the court of special appeals, which said it could not see in any of the victim’s testimony “any resistance on her part to the sex acts” and “no fear as would overcome her attempt to resist or escape.”
  o **Rule of Law:** The lack of consent element essential to a rape conviction can be established by proof of resistance or by proof that the victim failed to resist because of a genuine, reasonably grounded fear.
  o **Kuhns:** Rusk represents the tradition view of the act requirement. There has to be force and resistance (non-verbal) OR a threat of force and fear. There also has to be non-consent.
  o **Dissent:** Concerned that a standard such as this makes it possible that D does not know that he is doing something wrong and the woman is not consenting because she is not resisting.

• **In the Interest of MTS (NJ, 1992)**
  o **Facts:** MTS, a seventeen year old boy engaged in sexual penetration of a fifteen year old girl to which she did not consent, but there was no evidence of unusual or extra force or threats to accomplish the act of penetration
  o **Rule of Law:** The element of “physical force” in the crime of sexual assault is met simply by an act of nonconsensual penetration involving no more force than necessary to accomplish the result.
  o **Kuhns:** NJ law holds that the defendant has to be at least negligent as to the consent issue; this effectively takes away any force requirement.
Note: In states that have eliminated the force requirement, intercourse without consent is criminal.

Mens Rea

- **Commonwealth v. Sherry (Mass, 1982)**
  - **Facts:** Sherry, charged with rape, argued that he believed that the victim had consented to the rape.
  - **Rule of Law:** A subjective belief that the victim has consented is no defense to a charge of rape.
  - **Kuhns:** Do we know what the mens rea for consent is? D wanted a jury instruction that actual knowledge should be the minimum.

- **Commonwealth v. Fischer (PA, 1998)**
  - **Facts:** Fischer, a college student, engaged in intimate contact in a dorm room, after which Fischer was charged with and convicted of sexual assault, a decision which he later appealed on the basis that he should not be convicted if he believed the victim had given her consent.
  - **Rule of Law:** A defendant’s subjective belief that a victim consented to sexual contact is not a defense to the crime of rape. The binding precedent set forth in the Williams decision holds that the subjective belief of a defendant that consent has been given is not an adequate defense.
  - **Kuhns:** Recklessness is usually the mens rea required for rape.

Statutory Rape: A strict liability crime

- **CL:** Most jurisdictions hold that even a reasonable belief by the defendant that the girl was over the age of consent is not a defense, making this a strict liability offense.
- **MPC:** Allows the reasonable mistake as to age defense though only for less serious forms of statutory rape.

HOMICIDE

- Any unlawful taking of the life of another falls within the generic class “homicide.” The two principle kinds of homicide are murder and manslaughter.
  - **Degrees of Murder:** Murder is in turn divided into first-degree and second-degree murder. First degree is limited to murders committed with “premeditation and deliberation,” and to killings committed during the course of certain felonies.
  - **Two Kinds of Manslaughter:** Similarly, manslaughter is in nearly all jurisdiction divided into voluntary manslaughter (a killing occurring in the heat of passion) and involuntary manslaughter (an unintentional killing committed recklessly, grossly negligently, or during the commission of an unlawful act.)

Intentional Killings:

- **First-Degree Murder:** The most common statutory requirement for first-degree murder is the killing had to be “premeditated and deliberate.” Most courts require a reasonable period of time to have elapsed during which deliberation or premeditation occurs.
- **Second-Degree Murder:** Murders in which there is no premeditation; where there was intent to seriously injure, but not to kill; where there was reckless indifference to the value of human life; felony murders are typically here included also.
- **EM: Manslaughter, Generally:** the common feature of all types of manslaughter is that they are deemed not sufficiently heinous to be treated as murder, but still too blameworthy to go completely unpunished. Manslaughter falls into two general categories 1) voluntary: there is generally an intent to kill; 2) involuntary: the death is accidental.
- **MPC §210.2: Murder:**
  - 1) Except as provided in §210.3(1)(b), criminal homicide constitutes murder when:
    - a) it is committed *purposely* or *knowingly*; or
    - b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after
committing or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, or felonious escape

- **2) Murder is a felony in the first degree**

**MPC §210.3: Manslaughter:**
- **1) Criminal homicide constitutes manslaughter when:**
  - a) it is committed **recklessly**; or
  - b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.

- **2) Manslaughter is a felony in the second degree.**

**Commonwealth v. Carroll (PA, 1963):**
- **Facts:** Carroll shot his wife in the back of the head following a violent argument. Carroll argued that the crime only amounted to second-degree murder.
- **Rule of Law:** The specific intent to kill, which is necessary to prove first-degree murder, may be found from a defendant’s words or conduct or from attendant circumstances together with all reasonable inferences therefrom, and from the intentional use of a deadly weapon on a vital part of the body of another human being. Here, the evidence clearly supports a finding of first-degree murder.
- **Note:** Whether the intent to kill and the killing were within a brief space of time or a long space of time is immaterial if the killing was in fact intentional, willful, deliberate, and premeditated.

**State v. Guthrie (W.Va. 1995):**
- **Facts:** Guthrie stabbed a co-worker who poked fun at him.
- **Rule of Law:** There must be some evidence that the defendant considered and weighed his decision to kill in order for the state to establish premeditation and deliberation under the West Virginia first-degree murder statute.
- **Note:** This is the modern view that the court requires a reasonable period of time during which deliberation exists.
- **Kuhns:** Given the facts of Carroll, it is likely that the decision would still come out the same, Carroll would still be convicted of first-degree murder.

**Provocation**
- **Kuhns:** Appropriate provocation reduces murder to manslaughter
- **EM:** In order to reduce a charge from murder to manslaughter through the use of a provocation defense, the defendant’s act must be in response to a provocation sufficiently strong that a reasonable person would have been caused to lose her self-control. The reasonable person is really never provoked to kill. All the defendant has to establish is that a provocation would have been enough to make a reasonable person lose her temper.

**Acceptable Categories of Provocation:**
- Battery not initiated by the defendant
  - Some courts will recognize assault
- Mutual combat
- Adultery
  - Catching a spouse “in the act” OR hearing about it second-hand
  - Reasonable mistake: if D
- Words alone traditionally **NOT SUFICIENT**; but words carrying information, could constitute reasonable provocation.
- **Note:** The current trend is to treat adequate provocation as an issue of fact that would be determined by a jury. This would allow a jury to decide on a case-by-case basis what provocation would be sufficient to cause the ordinary person to act rashly
• **Girouard v. State (1991):**
  - **Facts:** Girouard was convicted of second-degree murder after killing his wife during an argument in which only words were exchanged.
  - **Rule of Law:** Words alone do not constitute adequate provocation to mitigate murder to manslaughter.

• **Maher v. People (1862):**
  - **Facts:** The court rejected evidence offered by Maher which tended to show that shortly before the assault, Hunt, the victim, had intercourse with Maher’s wife.
  - **Rule of Law:** If a killing, though intentional, is committed in the heat of passion produced by a reasonable provocation before a reasonable time has lapsed for the passion to cool and is the result of temporary excitement rather than one’s personal depravity, it is manslaughter rather than murder.

• **People v. Casassa (1980):**
  - **Facts:** Casassa, charged with murder, contended that whether he was under extreme disturbance so as to lessen murder to manslaughter should be analyzed subjectively.
  - **Rule of Law:** Whether a defendant was so emotionally disturbed as to lessen murder to manslaughter involves both an objective and subjective analysis. It is subjective as to whether or not the defendant was under such a disturbance and it is objective as to whether the disturbance was reasonable.

• **Kuhns:**
  - **Really Bad Murder:** Premeditation and previous calculated design
  - **Ordinary Murder:** Purposeful murder
  - **Voluntary Manslaughter:** Provocation
  - **Involuntary manslaughter:** Recklessness or criminal negligence
  - **Vehicular Homicide:** Ordinary Negligence

### Involuntary Manslaughter

- This type of offense is based on criminal negligence.
- **Criminal Negligence:** The vast majority of jurisdictions hold that something more than ordinary tort negligence must be shown before the defendant can be liable for involuntary manslaughter. Usually, it is termed *gross* negligence.
- **MPC:** The MPC requires that the D acts recklessly and be aware (conscious disregard) of the risk. If he is not aware of the risk, he is guilty of a lesser crime.
- **A good example of involuntary manslaughter would be a man racing his pregnant wife to the hospital at top speed, hitting and killing someone with his car.**

• **Commonwealth v. Welansky (Mass, 1944):**
  - **Facts:** Welansky, owner of a nightclub, had failed to alleviate serious fire hazards that existed prior to a deadly blaze that erupted one night.
  - **Rule of Law:** A manslaughter conviction may be based on omissions as well as affirmative acts.
  - **Kuhns:** As an evidentiary matter, there may not be a difference between negligence and recklessness.

• **State v. Williams (Wash, 1971):**
  - **Facts:** Mr. and Mrs. Williams failed to obtain medical aid for their 17 month old child and as a result, he died.
  - **Rule of Law:** Where the failure of a person to act while under the duty to do so is the proximate cause of the death of another, that person may be convicted of involuntary manslaughter, even though his conduct was no more than ordinary negligence.

• **Intoxication:** voluntary intoxication can be found to negate “malice aforethought,” thus reducing murder to manslaughter.

### Murder
• If defendant knows that death is “substantially certain” to result from his conduct, most jurisdictions will treat him as having intended that result.
• But, if Defendant realizes merely that there is a “very high” risk of death.
  o Most jurisdictions are still willing to hold defendant liable for murder in this situation as well—depraved heart
  o MPC: the defendant has acted recklessly under circumstances manifesting extreme indifference to the value of human life, and he is therefore guilty of murder.

**Commonwealth v. Malone (PA, 1946)**
  o **Facts:** D, a 17 year old boy, plays a game of Russian roulette with V, age 13. D places one bullet in a 5 chamber pistol, spins the chamber and pulls the trigger three times while the gun is pointed at V. It goes off the third time, killing V.
  o **Held,** D is guilty of murder based on his wicked disposition even though he may not have intended to kill V.
  o **Rule of Law:** When an individual commits an act of gross recklessness for which he must reasonably anticipate that death of another is likely to result, he exhibits that wickedness of disposition, hardness of heart, and cruelty which proves that he possessed malice.

  o **Facts:** Fleming was convicted of second-degree murder subsequent to a vehicular homicide without evidence of an intent to kill.
  o **Holding/Rule of Law:** Second-degree murder does not require an intent to kill. Here, D’s conduct went beyond merely driving under the influence, the driving was so reckless that a serious accident was highly probable, thereby constituting malice aforethought.
  o **Kuhns:** If the reason for the absence of conscious awareness in voluntary intoxication, it does not serve as a defense.

The Felony-Murder Rule:
• Doctrine under which the intent to commit a felony (unrelated to homicide) is sufficient to meet the mens rea requirement for murder.
• **Broader Form:** If the defendant, while he is in the process of committing a felony, kills another (even accidentally), the killing is murder.
• **Limited to Dangerous Felonies:** All courts and legislatures now restrict application of the felony-murder doctrine to certain felonies that fall under these related schemes:
  o 1) Those felonies which are inherently dangerous to life or health
  o 2) Those felonies which were felonies at common law (rape, sodomy, robbery, burglary, arson)
• **Causation Limitation:** If the death is only remotely connected to the felony, then the defendant cannot be guilty under the felony murder rule

**Regina v. Serne (Britain, 1887)**
  o **Facts:** it was alleged that D set a house on fire and caused his son to burn to death.
  o **Rule of Law:** Any act known to be dangerous to life and likely, in itself, to cause death, done for the purpose of committing a felony, and which causes death, is murder.

The “Inherently-Dangerous” Felony Limitation:
• **ONE APPROACH: INHERENT DANGEROUSNESS IN THE ABSTRACT:**
  o **People v. Phillips (1966):**
    o **Facts:** Phillips, a chiropractor, persuaded a child’s parents not to have her submit to an operation for cancer, but to have her treated by him. She died as a result.
    o **Rule of Law:** Only felonies which are inherently dangerous to human life can support the application of the felony murder rule.
    o **Kuhns:** The Res Ipsa Relationship (A comment on the Evidence): The judge can comment on the circumstances, such that he tells the jury that they may find a certain charge, not that the charge is certain
- **Kuhns thinks:** *Non-binding judicial notice should not be imposed on the jury.*
  - **EM:** Judge in the Abstract: The courts that have tested the felony in the abstract have apparently done so principally out of their dislike of the felony-murder rule, and their reluctance to expand its application.

**OPPOSITE: EXAMINE THE PARTICULAR FACTS:**

**People v. Stewart (RI, 1995)**
- **Facts:** Stewart, mother of an infant under two months of age, went on a crack binge during which she neither fed nor cared for the infant, who died. She urged that inherent dangerousness of child neglect should be viewed in the abstract, and that because child neglect does not always endanger human life, it should not be considered an inherently dangerous felony for felony-murder purposes.
- **Rule of Law:** The trier of fact must consider the facts and circumstances of the particular case to determine if such felony was inherently dangerous in the manner and the circumstances in which it was committed.
- **EM:** Examine the Particular Facts: Other courts are willing to take the facts of the particular case into account in determining the dangerousness of the felony. If what is in the abstract not necessarily a dangerous felony is performed in an obviously dangerous manner, these courts would apply the felony murder rule.

**The Merger Doctrine**
- Occurs when the felony cannot be separated from the felony such that felony murder does not apply...in other words, the felony is merged with the murder.
- Merger Limitation: An ordinary assault cannot be a basis for saying that death resulting from assault is felony murder.

**People v. Smith (California, 1984)**
- **Facts:** Smith was convicted under the felony murder rule when the underlying felony was child abuse.
- **Rule of Law:** Felony-murder may not be applied when the underlying felony is child abuse because the child abuse is an integral part of the crime of homicide.
- **Kuhns:** There will be some underlying assault in any killing of a child, and the assaultive act will be included in the crime, cannot be separated, so felony murder does not apply.

**Killings Not in Furtherance of The Felony**

**State v. Canola (NJ, 1977)**
- **Facts:** Canola was convicted of a felony murder because one of his cohorts in the commission of an armed robbery was killed by a bullet fired by the owner of the store being robbed.
- **Rule of Law:** The felony-murder rule does not extend to render a felon liable for the death of a co-felon effected by one resisting the felony.
- **Kuhns:** There is a distinction between the courts and the legislature here, but generally the murder must committed at the hands of the felon in order to find him guilty under felony-murder.

**Taylor v. Superior Court (California, 1970)**
- **Facts:** Taylor was charged with the murder of his accomplice in a robbery attempt.
- **Rule of Law:** Where a felon or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and a victims kills in reasonable response to such act, the felon will be guilty of murder.
- **Kuhns:** This is not a felony-murder case because CA is an agency felony murder state. Therefore, Taylor can only be guilty of felony murder if one of the co-felons did the killing. Although felony-murder cannot be used in this case, we can say that Daniels was creating a substantial and unjustifiable risk that manifested extreme indifference to human life and Taylor can be convicted as an aider and abettor to the reckless homicide.

**Wrap-Up of Homicide:**
Really Bad Murder:
- Some felony murders and premeditated murders.
- There is really no difference between this and the ordinary murder

Ordinary Murder:
- Felony murder that is not really bad murder
- Purposeful or intentional killing but not necessarily with premeditation
- Knowing killing (MPC) or an intent to inflict serious bodily harm.
- Conscious awareness and really bad conduct

Not all jurisdictions have a requirement for conscious awareness (MPC does)

Voluntary Manslaughter:
- Intentional killing that satisfies provocation or extreme emotional distress requirement
- The person has to actually be provoked or under extreme emotional distress, with good reason for the distress
- The extent to which subjective factors come into play
- Imperfect defenses can reduce a murder charge to voluntary manslaughter

Involuntary Manslaughter
- Bad risk-taking—more than civil negligence
- MPC requires recklessness or conscious awareness
- Unlawful act doctrine

Lesser Homicide
- MPC: Negligent homicide
- Limited ordinary civil negligent homicide, like vehicular homicide

THE SIGNIFICANCE OF THE RESULTING HARM

Causation

Kuhns 4 major Points:
- Foreseeability rhetoric
- Take your victim as you find your victim (thin-skull rule)
- Medical malpractice does not break the causal chain
- “Transferred Intent” does apply

People v. Acosta (1991)
- Facts: Due to Acosta’s fleeing from police, a high-speed chase ensued which resulted in the collision of two helicopters and the deaths of three occupants of one of the helicopters.
- Rule of Law: Unless an act is an actual cause of an injury, it will not be considered a proximate cause of a result for which an actor will be held responsible.
- EA: At common law, and under MPC, if the result that comprises the criminal offense would not have occurred but for the defendant’s voluntary act or omission, then “actual cause” exists. This analysis determines who the potential candidates are for causal responsibility for a certain result. The analysis for “proximate causation” is to determine who among these candidates should be held causally accountable for the harm.
- Cause in fact: the act must be the but-for antecedent of the result. By this meant that if the result would have happened anyway, even had the act not occurred, the act is not a cause in fact of that result.
- Proximate Cause: Is the connection between the act and the harm so attenuated that it is unfair to hold the defendant liable for that harm?
  - MPC on Proximate Cause: At least where the actual result involves the same “kind of injury or harm” as that intended by the defendant, the act is the proximate cause of the harmful result if it is “not too remote or accidental in its occurrence to have a just bearing on the actor’s liability or on the gravity of his offense.”

People v. Arzon (NY, 1978)
Facts: A fireman died from injuries sustained when he attempted to evacuate from a building under the hazardous conditions created by the fire Arzon set plus smoke from another fire.

Rule of Law: A defendant’s conduct can support a charge of homicide only if it was a sufficiently direct cause of the death and the ultimate harm was something which should have been foreseen as being reasonably related to his acts. Motion to dismiss is denied.

Kuhns: What is the limit to this doctrine? As long as the death is fire-related, the case will go to the jury.

Note: The doctrine of transferred intent still applies.

Subsequent Human Actions

- Subsequent Actions Intended to Produce Result
- People v. Campbell (Michigan, 1983)

Facts: Campbell sold Basnaw a gun after Basnaw expressed a desire to commit suicide. After Basnaw committed suicide with the gun sold to him by Campbell, Campbell was charged with murder.

Rule of Law: Juries can convict of murder only when they are convinced beyond a reasonable doubt the defendant intended to kill. While Campbell’s conduct was morally reprehensible, it is not criminal under the present state of the law.

Kuhns: Campbell is creating the risk, but the intervening cause of the victim killing himself is the actual cause of the murder.

- People v. Kevorkian (Michigan, 1994)

Facts: Kevorkian, convicted of assisting in a suicide, contended that a person had a due process right to commit suicide; therefore, the state statute under which he was prosecuted was unconstitutional.

Rule of Law: There is no due process right to suicide.

Kuhns: Defense counsel in an assisted suicide case would want to show: a good or helpful motive, the independent free will of the victim, that D merely provided the means—if close, the question should go to the jury.

- Stephenson v. State (1932)

Facts: As a result of Stephenson’s act, the woman who he had beaten and raped took a drug to commit suicide. She became sick and Stephenson offered to take her to the hospital, but she refused. When she got sicker, she screamed for a doctor and Stephenson drove her home.

Rule of Law: If an accused committed a felony such as rape or attempted rape and inflicted on the victim both mental and physical injuries as a result of which the victim was rendered mentally irresponsible and suicide followed, the accused would be guilty of murder.

- Kuhns Foreseeability Jargon:
  - Thin Skull Rule (take your victim as you find him)→ liability
  - Medical Malpractice→ liability
  - Transferred Intent→ Liability
  - Intentional act of the victim→ likely non-liability
  - ?D comes close→ liability
  - Force, fraud, duress, intoxication or other incapacity of the victim→ liability
  - ?Defendant’s culpability→ Liability
  - Unexpected or delayed result→ non-liability
  - ?Intentional Acts of 3rd Persons
  - ?Negligent or reckless acts of 3rd persons

- Subsequent Actions that recklessly risk the result:
- Commonwealth v. Root (PA, 1961)

Facts: Root was engaged in a drag race in which the other driver was killed when he ran into a truck.
Rule of Law: For a charge of criminal homicide, it must be found that the defendant’s act was the direct cause of the death and not just the proximate as defined in tort law

Note (EM): This case stands for the idea that in drag racing, when the victim was a voluntary participant in the drag race, his own act is superseding and proximate cause should be read more narrowly than in tort cases.

State v. McFadden (Iowa, 1982)

Facts: McFadden was convicted of two counts of involuntary manslaughter following a drag race that McFadden participated in, in which his competitor collided with another car, resulting in the competitor’s death and the death of a passenger in the other car.

Rule of Law: 1) The acts and omissions of two or more persons may work concurrently as the efficient cause of an injury. 2) The tort concept of proximate cause is applicable in criminal cases. McFadden’s conviction is affirmed.

Kuhns: Theories of Liability from Root & McFadden:

1) Defendant was an aider and abettor, therefore he is guilty of involuntary manslaughter also; no causation problem
2) Joint participation in an illegal act; defendant was engaged in a commission of a crime, so the defendant is liable under misdemeanor manslaughter rule; no causation problem.
3) D’s own reckless conduct, in choosing to engage in the drag race is liable for death

Commonwealth v. Atencio (Massachusetts, 1963)

Facts: Atencio and Marshall played Russian Roulette with the deceased, who was killed when the gun discharged.

Rule of Law: Direct causation may be established by wanton and reckless conduct found in a joint enterprise. Each pulling of the trigger was not an intervening act act superseding the original agreement to play the game

Attempt

As a general rule, for a defendant to be convicted of attempting a particular substantive crime, he must have had an intent to do acts which, if they had been carried out, would have resulted in the commission of that crime.

Under this approach one can attempt to kill another person only if one intends to kill that person, and not if a danger of death to the other person arises from some other mental state (recklessness).

An intent may be proved by circumstantial evidence

Smallwood v. State (MD, 1996)

Facts: D, who knows that he is HIV positive, has been warned by a social worker to wear a condom before having sex. D then rapes three victims without wearing a condom. He is charged with three counts of attempted murder (in addition to rape). He is convicted and appeals, on the grounds that the state produced no evidence that D ever intended to kill his rape victims. The state responds that the trier of fact was permitted to infer such an intent from the fact that D engaged in behavior the he knew posed a serious danger of inflicting death on his victims.

Rule of Law: Before an intent to kill may be inferred based solely on the defendant’s exposure of a victim to a risk of death, it must be shown that the victim’s death would have been a natural and probable result of the defendant’s conduct.

Kuhns: Murder is recklessness with extreme indifference to human life, but for attempt, there must be knowledge or purposefulness. Attempt requires a higher degree of mens rea than there is for the substantive crime.

Kuhns: In circumstance situations, it is sufficient if the defendant has the mens rea normally required for the crime.

Kuhns: With respect to attempt crimes, you must have the purpose or knowledge that something is going to happen as a result.

The Act—Attempt vs. “Mere Preparation”
At what point in the process of a preparation of an attempted crime is there enough to convict of attempt?

There are three tests to consider

- **MPC:** Requires a substantial step in the process to show attempt.
- **Extremes:** The last possible act before committing the crime *as opposed to,* any act in the process.
- **EM: The Proximity Approach:** How close the defendant comes to completing the offense
  - “Last Act Test”
  - “Dangerous Proximity to Success”
- **EM: The Equivocality Test:** Requires that the defendant’s conduct unequivocally manifest his criminal intent. If the conduct could be indicative either of a non-criminal intent or of a criminal one, it is not sufficient. But if it does unequivocally manifest criminality of intent, it suffices even though completion of the plan is many steps away.

- **People v. Rizzo (NY, 1927)**
  - **Facts:** Rizzo and three others were arrested while they were driving around Manhattan looking for a payroll messenger that they intended to rob.
  - **Rule of Law:** An attempt is committed when an act is performed which is so physically close to the contemplated victim or scene of the crime that completion of the offense is very likely but for timely interference. Here, Rizzo did not come close enough to completion of the crime.

- **McQuirter v. State (Ala, 1953)**
  - **Facts:** McQuirter, a black man, followed a white woman down the street and back up the street
  - **Rule of Law:** Since assault is, by definition, the attempt (intent plus some act in furtherance) to commit battery, attempted assault must be attempted battery by an act in furtherance of assault, which does not qualify as being in furtherance of battery.
  - **Kuhns:** This case may fail on all of the tests which indicates that the should not have even gone to the jury.

  - **Facts:** Jackson claimed that, as a matter of law, the conduct he and his partners engaged in never crossed the line from mere preparation to an attempted robbery
  - **Rule of Law:** An attempt requires that the defendant have acted with criminal purpose and that he engaged in conduct constituting a substantial step toward commission of the target crime.

- **State v. Davis (Missouri, 1928)**
  - **Facts:** Davis paid an undercover police officer to kill the husband of his lover
  - **Rule of Law:** Mere solicitation, unaccompanied by an act moving directly toward the commission of the intended crime, is not an overt act constituting an element of attempt.
  - **Kuhns:** The action in this crime was too far away from the actual commission of the crime. Mere solicitation of another party to aid in the crime does not constitute attempt.
    - *D would likely be guilty of whatever crime the person he solicited commits, unless there is a solicitation statute in the jurisdiction*

**Attempt: Impossibility**

**Types of Impossibility:**

- **Factual Impossibility:** Arises out of the defendant’s mistake concerning an issue of fact, such that had the defendant not been mistaken, he would have known that his attempt had no possibility of success.
  - This defense is *almost never successful:* Impossibility is no defense where, had the facts been as the defendant believed them to be, there would have been a crime.

- **True Legal Impossibility:** Arises where it is not only the case that what the defendant has done could not possibly be a crime, but also that even had the facts been as the defendant supposed them to be, no crime would have been committed. This situation arises when the defendant
engages in conduct which he believes is proscribed by a statute, but he has misconstrued the meaning of the statute.

- In the case of “true legal impossibility,” courts will always acquit.

  - **Mistake of Fact governing legal relationship:** Arises when the defendant understands what the statute prohibits, but mistakenly believes that the facts bring his situation within that statute.
    - In these cases, most courts would convict, as they would in a case where an undercover agent sold someone a substance they purported to be heroin. This is Jaffe.

  - **MPC §5.01(1)(a):** makes it an attempt to purposely engage in conduct which would constitute the crime if the attendant circumstances were as the defendant believes them to be.

- **People v. Jaffe (NY, 1906)**
  - **Facts:** Jaffe offered to buy goods that he thought were stolen; but the goods in fact had been previously returned to their rightful owner so that they were no longer stolen property.
  - **Rule of Law:** A defendant cannot be convicted of an attempt to receive stolen goods knowing it to be stolen if the goods he sought to be were not stolen property. *Is this still good law?*
  - **Kuhns:** Under MPC, he would be guilty because he would be guilty of the crime if the circumstances were as he believed them to be. The MPC and the majority of states reject any further parsing of the impossibility notion and take the position that regardless of how you label impossibility, if the activity would be a crime, then that person would be guilty of the attempt to commit the crime.

- **People v. Dlugash (NY, 1977)**
  - **Facts:** Dlugash claimed that Geller was already dead when he shot him
  - **Rule of Law:** While a defendant may not be convicted of murdering someone already dead, he can be convicted of murder if he believed the person to be alive when he shot him.

GROUP ACCOUNTABILITY

Complicity:

- The fundamental principle of accomplice liability is that one who aids, abets, encourages, or assists another to perform a crime, will himself be liable for that crime
  - Words that encourage or approve of the crime are usually sufficient to constitute the requisite link between accomplice and principal.
  - Mere presence is not enough to render a person an accomplice, it must also be shown that the defendant was at the crime scene for the purpose of approving and encouraging commission of the offense.

- **Mens Rea**
- **Actions of the Principal**

- **Hicks v. United States (1893)**
  - **Facts:** Hicks was convicted of verbally encouraging Rowe to kill the deceased.
  - **Rule of Law:** Before a person can be convicted of verbally aiding and encouraging another person in the commission of a crime, it must be shown that the words were intended to encourage and aid the perpetrator of the crime
  - **Note:** Hicks could have been convicted if it could be shown that it was within Hicks’ power to prevent the crime, unless he could have shown that he really was trying to stop Rowe.
  - **EM:** His presence, plus a showing that he had previously agreed with the friend that the latter should commit the killing, would have been enough
  - **Kuhns:** If he encourages Rowe and has intent, Hicks is guilty

- **State v. Gladstone (Washington, 1980)**
  - **Facts:** When approached by Thompson, Gladstone told him he did not have enough marijuana to sell him any but gave him the address of another who eventually did sell some to Thompson
Rule of Law: Mere communications to the effect that another might or probably would commit a criminal offense does not amount to aiding and abetting of the offense should it ultimately be committed.

Under MPC: Gladstone would not be guilty because he does not have the purpose of commissioning the sale of marijuana.

**People v. Luparello (California, 1987)**

- **Facts:** Luparello asked his friends to elicit information from Martin. They ended up killing him instead, resulting in a murder conviction for Luarello based on aiding and abetting liability
- **Rule of Law:** A defendant may be found guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.
- **Notes:** This is the majority view, but the MPC has rejected the doctrine in favor of a liability standard that requires that the aider and abettor encourage the identical crime. In MPC, there is a requirement for purpose, perhaps knowledge

- **Kuhns:** As long as the murder was foreseeable results of the defendant’s behavior, the defendant can be found guilty of murder. Similar to felony-murder rule, the defendant’s mens rea does not apply to this situation…defendant may have no mens rea or may just be negligent.

**Actus Reus—Attendant Circumstances**

Courts have refused to impose accomplice liability where the defendant’s conduct has the effect of encouraging or aiding another to commit a strict-liability offense.

This can arise in a situation where D encourages Accomplice to commit an act that is criminal only if certain attendant circumstances exist.

**US v. Xavier (1993):**

- **Facts:** Clement (D) was convicted of aiding and abetting his brother Franklin, an ex-felon in obtaining a firearm, which is a crime under federal law.
- **Rule of Law:** Proof of knowledge, or reasonable cause to believe, of an ex-felon’s status is required for conviction of an aider and abettor under §922.
- **Kuhns:** Strict liability crimes: If the substantive law policy is that an individual will be guilty, then it reasonable to treat the aider the same way as you would treat the person who actually engages in the conduct. MPC has no definitive rule as to mens rea for accomplice liability.

**Actus Reus—Results**

**State v. McVay (1926):**

- **Facts:** After Kelley hired McVay to captain his steamer, the ship’s boiler exploded, resulting in the loss of many lives
- **Rule of Law:** A defendant may be indicted and convicted of being an accessory before the fact to the crime of manslaughter arising through criminal negligence.

**People v. Russell (1998):**

- **Facts:** Three defendants engaged in a gun battle were charged with second-degree murder for the killing of a bystander during the shoot-out
- **Rule of Law:** A depraved heart indifference murder conviction requires proof that the defendant, under circumstances evidencing a depraved indifference to human life, recklessly engaged in conduct creating a grave risk of death to another person and thereby caused the death of another person.

**Actus Reus**

**Wilcox v. Jeffrey (1951)**

- **Facts:** Wilcox bought a ticket and attended a concert by an American who was not legally permitted to perform in England.
- **Rule of Law:** If a person is present at the commission of an illegal act, the fact that he was present may be used as evidence of aiding and abetting that crime, as long as the person intended to be there and was not there accidentally.

- Aid not critical: it will sometimes be the case that the defendant gives assistance in furtherance of a crime, but that the assistance turns out not to have been unnecessary. However, this is not a defense.

- **State v. Tally (1894)**
  - **Facts:** X has seduced the sister-in-law of D (a judge). Her brothers, A and B, pursue X to the nearby town of Stevenson, in order to kill him. One of X’s relatives sends X a telegram warning him of the danger. D, learning of this, sends his own telegram to Stevenson telegram operator telling him not to deliver the warning telegram. The warning telegram is not delivered, A and B catch up with X, and kill him. D is charged with being an accomplice in the killing.
  - **Holding:** It is irrelevant that A and B might have caught up with X and killed him even if the warning telegram had been delivered.

- **Actus Reus—Liability of the Parties:**
  - The Principal is normally required to be guilty of the crime that the accomplice is being charged with.
  - It is generally held that the accomplice cannot be convicted unless the principal is shown to have had the required mental state for the crime in question.

- **State v. Hayes (1891)**
  - **Facts:** Hayes was convicted of burglary even though he did not actually enter the building.
  - **Rule of Law:** When some act essential to the crime charged is done by a party who does not have the same felonious intent as the other parties, the act cannot be imputed to the other parties.
  - **Kuhns:** Hayes cannot be guilty because Hill did not have the requisite mens rea to commit the crime.
  - **Kuhns:** If Hayes were forcing Hill to commit the crime, Hayes would be guilty of the completed crime, even if Hill did not intend to commit the crime.

  - **Facts:** An undercover agent posed as a hunter in order to catch Vaden in the act of promoting illegal hunting practices by his customers. The agent shot several animals and Vaden was convicted as an accomplice.
  - **Holding:** Supreme Court affirmed the conviction even though Snell had been acting within his role of law enforcement. They also rejected a defense of entrapment.
  - **Kuhns:** Think about the possibility of an entrapment defense and why agents are not deterred by the possibility of this defense.

- **MPC Attempt Theory:** MPC §5.01(3) makes a person who engages in conduct designed to aid another to commit a crime which would establish his complicity under §2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime.

- **Taylor v. Commonwealth (1999)**
  - **Facts:** Taylor appealed form her conviction of second-degree abduction on the basis that the person who she aided in committing the crime was the natural father of the child abducted.
  - **Rule of Law:** The concept of legal excuse is personal to the actor and is non-delegable, and thus unavailable to an accomplice.
  - **Kuhns:** Compare the possible defenses: Justification circumstances where what the person did was not wrongful in light of the circumstances, OR BY CONTRAST, the partial provocation defense that the act is still wrongful but this will be used as an excuse.
  - **Kuhns:** The important general principle is that there has to be an underlying crime that the defendant committed in order for the person to be guilty of the crime. However, there are ways around this:
    - If there is a specific statute governing the behavior of the aider
    - Have a statute like the attempt statute in MPC§ 5.01(3)
- Irresponsible of innocent agent doctrine
- Defense is regarded as being personal to the actor (TAYLOR)
- Both the principal and the aider are prosecuted and the principal is acquitted, the aider can still be found guilty.

**Conspiracy:**
- The common law crime of conspiracy is defined as an agreement between two or more persons to do either an unlawful act or a lawful act by unlawful means. At common law, the prosecution is required to show the following elements: 1) Agreement; 2) An objective; 3) Mens rea.
- **Hearsay Exception:**
  - In a conspiracy case, the rule is that any previous incriminating statement by any member of the conspiracy, if made in furtherance of the conspiracy, may be introduced into evidence against all of the conspirators.
  - 3 things that need to be proved in order to use the exception; only have to be proved by a preponderance of the evidence:
    - All parties must be involved in the conspiracy
    - Must be made during the course of the conspiracy
    - Must be made in furtherance of the conspiracy.
  - Prosecution cannot rely exclusively on the hearsay exception
- **Krulewitch v. US (1949)**
  - **Facts:** A statement made by a conspirator to the complaining witness after the three of them had been arrested plainly implied Krulewtich’s guilt. It was admitted as evidence.
  - **Rule of Law:** A conspirator’s statements against a coconspirator are admissible as exceptions to the hearsay rule only if they were made in furtherance of the conspiracy
- **Pinkerton v. US (1946)**
  - **Facts:** Walter and Daniel Pinkerton, brothers who live a short distance apart, were convicted of various substantive violations of the Internal Revenue Code and conspiracy to violate the same.
  - **Rule of Law:** As long as a conspiracy continues, the overt act of one partner may be the act of all without any new agreement specially directed to that act.
  - **EM:** Since the requirement of an overt act can be met as to all defendants by the showing of an overt act of one, the Court saw no reason why liability for substantive crimes committed in furtherance of a conspiracy should not all be imputed to all defendants. (Element of reasonable Foreseeability).
  - **EM:** Most modern courts reject the Pinkerton model of mere membership sufficient for liability.
  - **State v. Bridges:** Widens the Foreseeability notion of Pinkerton
- **General:**
  - **Alvarez:** Liability is only going to come into play for the major actors, but also takes the broad view of liability
  - **MPC:** All defendants must have purpose
  - **Luparello view:** There is really no difference between the liability for aiding and abetting and that for conspiracy
  - **Kuhns:** There is only a difference between aiding/abetting and conspiracy when one takes a narrow view of aiding/abetting.
    - **Aiding/Abetting liability:** The basis for holding an individual liable for the substantive crime committed by the defendant
    - **Conspiracy liability:** Provides an alternative basis for liability for other substantive crimes—D may be guilty of other crimes committed in furtherance of the conspiracy
  - **Pinkerton/co-conspirator theory:** Finds guilt for anything done in furtherance of the conspiracy
- **MPC Accomplice Liability**: Must have the purpose of assisting the other person in the commission of the crime. Must aid/agree/attempt to aid and joining the conspiracy is enough to fulfill the requisite aid. However, there must also be the mens rea of purpose.

- **Luparello**: If you aid in the commission of one crime, you are responsible for other crimes that are foreseeable as a result of the conspiracy.

- **Bridges**: Supports the element of Foreseeability.

- **Alvarez**: The notion of Foreseeability is broader than the notion of furtherance.

- **The Actus Reus of Conspiracy**
  - The act requirement is normally satisfied by the presence of the agreement, which is normally inferred from the circumstances.

- **Interstate circuit v. US (1939)**
  - **Facts**: Interstate entered into contractual agreements with distributors specifying the conditions under which their movies could be played.
  - **Rule of Law**: An unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators.
  - **Kuhns**: Conspiracy means knowing, concerted action, and acquiescence. Federal law indicates that something substantially less than proof beyond a reasonable doubt of an agreement may be sufficient to sustain a conspiracy charge.

  - **Facts**: Alvarez contended that he was not a conspirator but only a menial who intended to lend his pickup truck and his strong back to unload contraband imported by others.
  - **Rule of Law**: To obtain a conspiracy conviction, the government is not required to prove that a defendant had knowledge of all the details of the conspiracy, but need only establish his knowledge of its essentials.

- **The Mens Rea of Conspiracy**

- **Intent Requirement**: Each conspirator must have an intent to agree as well as a further unlawful criminal intent.

- **People v. Lauria (1967)**
  - **Facts**: Lauria knew that some of his answering service customers were prostitutes who used his service business purposes.
  - **Rule of Law**: The intent of a supplier (who knows of the criminal uses to which his goods are put) to participate in the criminal activity may be inferred from circumstances showing that he has a stake in the criminal venture by the aggravated nature of the crime itself.
  - **Kuhns**: The prosecution must prove knowledge and intent.
  - **Kuhns**: A prosecutor must argue one of the following in order to suggest that the person had the purpose of promoting the activity (in addition to the knowledge) in order jury:
    - A stake in the venture
    - No legitimate alternative purpose for the business.
    - An inference from a very serious crime

- **General Mens Rea**: 
  - **Conviction Rules**: 1) Normally there is a requirement for purpose, but if the crime is serious enough, 2) knowledge is sufficient

- **MPC**: Requirement for purpose

- **Feola**: Ignorance to the fact that they were shooting at federal agents is not a defense because there is mens rea for the offense.

- **Result Elements**: There is no way to conspired to commit a reckless homicide
  - However, it is possible to be guilty of conspiracy to commit reckless conduct such as an agreement to drive as fast possible.

- **Scope of the Agreement**: Single or Multiple Conspiracies
• **Wheel Conspiracy:** The type of arrangement in which a ringleader participates with each of the conspirators, but these conspirators deal only with the ringleader, and not with each other.

• **Chain Conspiracy:** There is a sequence of distribution of a commodity (usually drugs) from an importer to wholesaler to retail to consumer. It will often be the case that not all participants are aware of each other.

• The court often applies a community of interest test where it is shown that all of the parties know about each other and the conspiracy.

• **Kotteakos v. US (1946)**
  - **Facts:** Brown made fraudulent applications for loans under the housing act for Kotteakos and several other persons, who had no connection with each other.
  - **Rule of Law:** Where no one person is dealing with two or more persons who have no connection with each other, although each deals individually with the same person, they cannot all necessarily be convicted of a single conspiracy.

• **Blumenthal v. U.S. (1947)**
  - **Facts:** X, the owner of two carloads of whiskey, arranges for its resale by a wholesaler run by D1 and D2. D1 and D2 arrange for D3 and D4 to sell and deliver the whiskey at an illegally high price. All Ds are charged with conspiring with X to violate the price laws.
  - **Rule of Law:** There was one conspiracy despite the fact that all of the Ds did not know about X, this case is differentiated from Kotteakos because that case was made up of several independent transactions.

• **Gebardi v. US (1932)**
  - **Facts:** Gebardi, not then married, transported a woman across state lines and engaged in illicit sexual relations with her.
  - **Rule of Law:** When a woman acquiesces to being transported across state lines for the purpose of engaging in illicit sexual relations, thus not being herself in violation of the Mann Act, she and the man involved may be convicted of a conspiracy to violate the Mann Act; cannot conspire with a victim.
  - **Kuhns:** this is a matter of legislative intent, legislature did not intend to prosecute a woman in this case because a woman is a victim and the court should not punish victims.
  - **Wharton Rule:** Where it is impossible under any circumstances to commit the substantive offenses without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy.
  - **Kuhns:** Wharton’s Rule reflects legislative judgment, but is different from the Gabardi rule—HOW??

• **Gebardi Rule:** Generally accepted; One may submit with some confidence that a person cannot be convicted of conspiracy when there is a recognized rule of justice or policy exempting him from prosecution of the substantive crime; cannot conspire with a victim.

• **Wharton Rule:** Where it is impossible under any circumstance to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy.

• **Garcia v. State (1979)**
  - **Facts:** The only party with whom Garcia conspired in her effort to have her husband murdered was a police informant who only feigned his acquiescence in the scheme.
  - **Rule:** Under a penal code which adopts a “unilateral” concept of conspiracy, as opposed to the common law’s traditional “bilateral” concept, a person can be convicted of conspiracy even if the only party with whom he “conspired” feigned acquiescence in the plan.

**EXCULPATION**
Self-Defense: There is a general right to defend oneself against the use of unlawful force. For the use of self-defense, it must be shown that the defendant had reasonably perceived an imminent threat of death or serious bodily injury.

- **Qualifications:** 1) Defendant must not have been the aggressor 2) Defendant has a general duty to retreat unless the attack takes place in his dwelling

- **Kuhns:** Defendant does not have to be right about his perception of the situation, he just has to be reasonable in his belief.

- **MPC:** Deals with mistakes and misjudgments about reasonableness as it does with mistake of fact.

- **People v. Goetz (1986)**
  - **Facts:** Goetz contended that he was justified in shooting his assailants if he alone reasonably believed he was in danger, and not if a reasonable man believed so.
  - **Rule of Law:** A person is justified in the use of deadly force if, objectively, a reasonable man would, in his position, believe he was in danger of life or physical being.

- **State v. Kelly (1984)**
  - **Facts:** Kelly appealed from a decision affirming her conviction of reckless manslaughter, contending that the trial court erred in ruling that expert testimony concerning the “battered women’s syndrome” was inadmissible on the issue of self-defense.
  - **Rule of Law:** BWS is an appropriate subject for expert testimony, and such testimony is admissible on the issue of self-defense

- **General Treatment of BWS evidence:**
  - Evidence can show that D’s fear was reasonable
  - May make D’s version of the events more plausible
  - Because she has been beaten before, she is a good judge of the risk he poses
  - Neg: Could possibly be an indicator of unfair prejudice against the evidence.
  - Court treatment: Court will weigh the probative value of the evidence against the prejudice and decide if the evidence is admissible (usually is admissible)

- **If the evidence is admissible, what role does BWS play?**
  - Both D’s story and the credibility of D are bolstered by the evidence
  - Risk of a slippery slope…there is a syndrome for everything
  - KUHNS’ ALTERNATIVE: Have a standard jury instruction that outlines what BWS is; Counsel can argue for a general education and instruction for the jury about what BWS is.
  - BWS is not a defense to homicide, but can serve as evidence to the credibility of a self-defense argument

- **State v. Norman (1989)**
  - **Facts:** Norman, who had killed her sleeping husband, raised his long-standing abuse of her as a basis for self-defense.
  - **Rule of Law:** Absent imminent peril, a history of spousal abuse will not a constitute a defense in a homicide prosecution.
  - **Kuhns:** This case hinges on the meaning of “imminence” and the instruction was not allowed because there was no imminence in the situation.
  - **Kuhns:** Most statutes regarding self-defense are not clear.

- **US v. Peterson (1973)**
  - **Facts:** Peterson shot and killed Keitt while Keitt was attempting to steal windshield wipers from Peterson’s car.
  - **Rule of Law:** One cannot support a self-defense claim by a self-generated necessity to kill.

**Defense of Property (MPC §3.06)**

One has a limited right to use force to defend one’s property against a wrongful taking, however only non-deadly force may be used and the degree of force used must not be more than that which is reasonably necessary to prevent the taking.

- **People v. Ceballos (1974)**
Facts: Ceballos was convicted of assault with a deadly weapon when a trap gun he set up in his garage fired into the face of a teenage boy who broke open the garage door.

Rule of Law: A person may be held criminally or civilly liable if he sets upon his premises a deadly mechanical device and that device kills or injures another.

Note: This case turns on the fact that D was not there and could possibly have realized that deadly force was not necessary.

- Defense of Law Enforcement and Affecting Arrest

Durham v. State (1927)
- Facts: Durham, a game warden, arrested Long for illegal fishing. While Long was beating him with an oar, Durham shot him
- Rule of Law: While a police officer is not justified in killing or inflicting great bodily harm in attempting to arrest one accused of a misdemeanor, where the accused resists arrest the officer may repel such resistance with such force as is necessary, short of taking a life, and may seriously wound or kill the accused if necessary to prevent the accused from seriously wounding or killing him

- Facts: Garner’s decedent, an unarmed suspect, was shot and killed while fleeing from arrest
- Rule of Law: A police officer may not use deadly force to prevent the escape of an unarmed suspect unless it is necessary to prevent the escape and the officer has probable cause to believe the suspect poses a significant threat to others.
- EM: Supreme court says that where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so. Court is equating the use of deadly force to apprehend a non-dangerous fleeing suspect to an unreasonable seizure under the fourth amendment.
- EM: Generally, an officer is not allowed to use deadly force in affecting an arrest

MPC §3.07: Deadly force may be used only if the officer believes that the force to be used creates no substantial risk of injury to innocent persons and believes either that. 1) the suspect used or threatened the use of deadly force; or 2) that there is substantial risk that the suspect will “cause death or serious bodily harm if he is not immediately apprehended.”

Necessity (Choice of the Lesser Evil):
- This defense may be raised when the defendant has been compelled to commit a criminal act, not by coercion from another human being but by non-human events.
- MPC § 3.02: Explicitly recognizes that the balancing of evils is the basis of the defense. The code defense is called that of justification and is available where “the harm or evil sought to be avoided…is greater than that sought to be prevented by the law defining the offense charged.”
  - The test for this is objective, not subjective

People v. Unger (1977)
- Facts: Unger escaped from a minimum security honor farm allegedly to avoid homosexual assaults and threats of death.
- Rule of Law: The defenses of necessity and compulsion are available in escape cases, and the jury should be so instructed where evidence adduced at trial is sufficient to raise the defense.
- Kuhns: In denying the right to the instruction to the jury, you are in effect directing a verdict against the defendant.

Necessity Jury Instruction:
- Who should bear the burden of proof?
  - Kuhns: The court says that the defendant has to produce enough evidence to support a finding. If the defendant meets the burden, the prosecution has to disprove the evidence beyond a reasonable doubt
o **Indirect Actions:** Violating the law on a basis of necessity of some separate and independent purpose. Kuhns seems to think that protesting against a greater wrong may be entitled to a necessity defense.

o **Jury Nullification:** Likely to occur if evidence is let in but the instruction is not given

o If there is a statutory provision the defense of necessity is available only where it is not in conflict with the legislative purpose.

  o **Facts:** A group of individuals who had entered and vandalized an IRS office to protest US involvement in El Salvador claimed the necessity defense when criminally charged for these acts
  o **Rule of Law:** The necessity defense is unavailable as a matter of law to one committing indirect civil disobedience.

- **Public Committee Against Torture v. State of Israel (1999)**
  o **Facts:** Petitioners sought an order prohibiting the General Security Service from utilizing certain physical means against individuals suspected of committing crimes against Israel’s security during interrogations
  o **Rule of Law:** Neither the government nor heads of security services possess the authority to authorize the use of liberty infringing physical means during interrogation of suspects.

- **Euthanasia**
- **Act or omission?**
- **Cruzan v. Missouri (1989)**
  o **Facts:** Missouri officials refused to terminate life support on a comatose patient because they contended that state law requiring clear and convincing evidence that such action would comport with the parents’ wishes had not been satisfied.
  o **Rule of Law:** A state may require that a person not be denied life support unless a desire for such denial can be shown by clear and convincing evidence.

  o **Facts:** Washington’s statute banning assisted suicide was held unconstitutional on due process grounds.
  o **Rule of Law:** The asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the due process clause.

- **Kuhns:** Both of these cases seem to comport with long-standing judicial practice (right to refuse medical treatment; state prohibition of assisted suicide.)

- **Duress**
- **Kuhns:**
  o **Common Law Duress Defense is Fairly Limited:**
    - Must be imminent
    - Must be threat of death or harm
    - Cannot kill an innocent person
  o **MPC (§2.09) is More Flexible:**
    - No imminence requirement
    - It is okay to kill under duress
    - Person of reasonable firmness would do the same thing
  o Most jurisdictions and the MPC limit the use of the duress defense to situations where a human force is the source of the duress.
    - **There is a two-fold concern:**
      - Undermining the purpose of the law
      - Too easy for individuals to falsely claim that they were acting under duress in a particular situation

- **State v. Toscano (1977)**
Facts: The trial judge decided that Toscano’s claims that he engaged in certain illegal acts because of fear that another party would harm himself or his wife in the future were, even if true, insufficient to constitute a defense of duress—and he so instructed the jury.

Rule of Law: Duress is a defense to a crime (other than murder) if the defendant engaged in conduct because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

Intoxication
- Should be considered as both a defense and a fact that negates the mens rea of a necessary element of a crime.

As a Defense...
- Involuntary Intoxication: Is a defense (beyond its possible evidentiary role in negating mens rea elements of the offense) only if it creates in the defendant at the time of the crime a condition (temporary or permanent) that meets the test of legal insanity, that is, a substantial incapacity either to appreciate the criminality of the actor’s conduct or to conform to the law.
- Voluntary Intoxication: Only serves as a defense where it produces a permanent condition sufficient to meet the test for legal insanity.

As Evidence Negating Mens Rea...
- Drunkenness will be a defense to the extent that it negates a specific intent or knowledge of a fact required for the crime charged.
- MPC: When the mens rea for the crime is knowledge or purpose, take intoxication into account; when mens rea is recklessness or less, do not take intoxication into account (getting drunk is a form of recklessness)
- General Intent crimes (lesser crimes): Do not consider intoxication
- Specific Intent crimes (more serious crimes…”Assault with intent to…”): Okay to consider intoxication.
  - Kuhns does not like the general/specific delineation

- Facts: Kingston contended that his involuntary intoxication negated the mens rea necessary for him to be criminally liable
- Rule of Law: Involuntary intoxication does not negate the mens rea necessary for criminal liability

Roberts v. People (1870)
- Facts: Roberts was convicted for assault with intent to murder and argued that at the time of the act he was too drunk to have had the required intent to murder.
- Rule of Law: If a crime requires a specific intent, voluntary intoxication, which makes the defendant incapable of entertaining the specific intent, is a valid defense.

People v. Hood (1969)
- Facts: While intoxicated, Hood resisted arrest by grabbing the officer’s gun and shooting him in the legs
- Rule of Law: In crimes of general intent, evidence of the accused intoxication shall not be considered in determining guilt or innocence

Stasio: At times, it is not at all appropriate to allow evidence of intoxication, even when it seems logically relevant.

Insanity
- MPC §4.04: The generally accepted test of insanity for purposes of determining whether an accused may be tried and sentenced: No person who as a result of mental disease or defect lack capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.
• **Execution:** Supreme Court will not allow an incompetent individual to stand trial; most common test is if the person knows of the impending execution and understands it.

• **M’Naghten’s Rule:** At least half of the states abide by this rule:
  - The defendant should be presumed to be sane unless he proves that, at the time he acted, he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.
  - **Reformulation:** 1) D must show that he suffered a mental disease causing a defect in his reasoning powers; and 2) as a result, either a) he did not understand the nature and quality of his act or b) he did not know that his act was wrong.
  - **Irresistible Impulse:** One of the principal objections to this rule is that it does not accommodate the possibility that D understands the difference between right and wrong, but was unable to control his conduct. Almost half of the states that use the M’Naghten rule now accommodate for the irresistible impulse.

• **MPC §4.01:** Broaden M’Naghten Rule; A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of the conduct or to conform his conduct to the requirements of the law.

• **Burden of Proof:** Legal sanity is presumed
  - **However,** Two points of conflict arise
    - If the prosecution has the burden of persuasion beyond a reasonable doubt, D only has to raise a doubt
    - If the defense has the burden of persuasion, D has to produce enough evidence to give the jury an opportunity to decide in his favor.

• **Mens Rea and insanity defense:** If you have a defendant who does not realize that he is taking the life of a human being, he should not be guilty because the individual did not have the requisite mens rea.

• **US v. Lyons (1984)**
  - **Facts:** Lyons was convicted of narcotics possession, over his defense that his addiction prevented him from conforming his conduct to the law
  - **Rule of Law:** The insanity defense only applies where a defendant is unable to understand the wrongfulness of his conduct.
  - **Kuhns:** Some courts have begun to eliminate the insanity defense because they cannot determine an inability to control conduct with precision, courts should not have the option at all.
  - Scope of insanity defense is not a scientific question, rather it is a legal question

• **Things to know about the Insanity Defense:**
  - There is a cognitive and sometime behavioral component to the defense
  - Incapacity must result from a mental disease or defect
    - This is a legal question
    - 4.01(2): This does not include abnormality manifested only by repeated criminal or otherwise anti-social conduct
  - Mens Rea: Sometimes independent; sometimes important
  - **MPC:** the liberal version of the defense
  - The requirements since Hinckley have been significantly narrowed
  - Insanity Defense tells us:
    - By acknowledging that some people are so insane that they are not responsible, shows that most people are responsible for their behavior
    - The insanity defense has a very limited scope→shouldn’t really have a sophisticated analysis.